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Obama and the State of Progressivism, 2011

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Playing to the people's prejudices while disparaging their preferences

On November 2nd, a majority of American voters repudiated the ambition of President Barack Obama, and of the congressional Democrats whom he leads, to transform the American political system by enacting a sweeping progressive agenda.

No doubt a variety of factors were in play. During campaign 2008, and despite just four years of experience in the legislative branch of the federal government (two of which he devoted to campaigning for president) and no experience holding executive office, Senator Obama inflated hopes to levels no mortal could satisfy and evoked changes of proportions that even a master statesman could not achieve. Moreover, President Obama began his term in hard times: His fledgling administration confronted a global economic crisis that endangered the very operation of the American financial system; two wars halfway around the globe; and an unabated threat to the homeland from transnational Islamic terrorism. By the time the 2010 midterm elections rolled around nearly double-digit unemployment had persisted for more than fifteen months, inflicting pain not only on workers but also on their families, friends, and communities. The ramifying effects of joblessness contributed to a generally sour attitude toward the president and his programs as well as toward Senate Majority Leader Harry Reid and soon-to-be former House Speaker Nancy Pelosi.

But it was Obama's decision — against the advice of several of his closest advisers — to seek comprehensive health care reform in the face of an historic economic crisis and to resolutely pursue it month after month despite vocal majority opposition instead of concentrating on reviving the economy and creating jobs that sent a loud and clear message that the president placed progressive political transformation ahead of the will of the people.

The seeds, however, for voter indignation and anger that culminated in the electorate's decisive shift in November 2010 toward the Republicans — and not only on the national level but also in races for governor and state legislative chambers — were sown by Obama's 2008 election strategy. It has been frequently remarked that he put forward two quite different faces on the campaign trail. He was the progressive candidate of hope and change. But he was also the pragmatic and post-partisan candidate. He ran a relentlessly anti-Bush and anti-Republican campaign. But he also proclaimed his determination to heal wounds and bring the country, red and blue, together. He repeatedly declared himself dedicated to a new kind of politics, and he repeatedly styled himself a new kind of politician. But his inside men — David Axelrod, Rahm Emanuel, David Plouffe — were old school, rough and tough, bare-knuckles Chicago-style political operatives. Nearly two years in office have gone a long way toward showing that Obama's vaunted moderation, pragmatism, and post-partisanship were, if not elements of a pose to conceal the hardball-playing partisan progressive, then qualities that stood for something other than the

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devotion to balance, accommodation, and conciliation that the terms in their ordinary, everyday sense suggest.

Not that the president has been unrelievedly partisan. National security and law is a case in point. But even here, where Obama has shown a salutary moderation, his conduct in office presents a striking departure from the acrimonious tone and uncompromising positions on the issues that he adopted as a candidate.

To take the example of moderation concealed by partisanship first, candidate Obama ran as a fierce foe of Bush administration national security law policy. From detention, interrogation, and prosecution of enemy combatants to warrantless electronic surveillance and “state secrets” doctrine, Obama declared Bush policies contrary to enduring American values and sided with those who accused the Bush administration of systematically shredding the Constitution. Upon entering office, President Obama sought to dramatize his break with the Bush era by promptly and to great fanfare rejecting a variety of enhanced interrogation techniques and announcing his intention to close the detention facility at Guantánamo Bay within a year. Yet the president has quietly embraced much of the substance of Bush administration national security law policy.¹ And despite his unequivocal and high profile promise, the detention facility at Guantánamo Bay remains open — to be sure for good reasons that were as evident before he became president as after — nearly a year after his own deadline, with no prospects in sight for closing it. And the president has significantly increased targeted killings in Afghanistan and Pakistan by means of Predator drone strikes, even as the unremitting accusations of lawlessness that he and his allies leveled at the Bush administration have, as conservatives warned, exposed his administration’s lawyers to legal jeopardy.

But for the most part it was the other way around. The appearance of moderation masked partisan intentions. For example, candidate Obama decried the \$440 billion Bush deficit as indefensible and unsustainable. Yet a month after taking office, he presented a budget that would more than quadruple the Bush deficit. And not as a temporary, stop-gap measure to deal with an historic economic crisis. According to the Congressional Budget Office, Obama’s budget, which involved huge new spending on long-term social and economic programs — cap and trade, health care, and education — set the country on course for a decade of deficits substantially greater than the Bush budget deficit candidate Obama harshly condemned.

Concern over this long-term deficit projection should not be confused with debate over the massive \$787 billion fiscal stimulus package that the president signed into law in February 2009. That was ostensibly to deal with the immediate economic crisis that threatened to overwhelm the economy as a whole. Yet a substantial portion of the package, including one-time tax cuts and aid to states to support public sector jobs and pensions, was not well-calculated to stimulate the economy because the spending it authorized did not meet the criteria — “timely,” “targeted,” and “temporary” — that Obama economic advisor Lawrence Summers had identified as critical to any effective stimulus. One reason for the popular confusion between the enormous budget and the massive stimulus is that Obama misleadingly sought to sell the budget as necessary to deal with the immediate challenges posed by the economic crisis, and he used the stimulus to prop up and expand public sector jobs and entitlement programs that imposed a drag on economic growth.

And there’s more to call into question the quality of Obama’s commitment to moderation, pragmatism, and post-partisanship. Candidate Obama promised that his health care plan would not increase costs for the federal government or raise taxes on families making under \$250,000 a year. Common sense counseled that the government could not create a new entitlement, revamp the entire system, and build new bureaucracies to elaborate the complex new rules and regulations called for in 2,500 pages of health care legislation without incurring higher costs and imposing new taxes also on those earning less than \$250,000 a year. Since March 2010 when the president signed the legislation into law, the White House itself has acknowledged that the new health care legislation will substantially increase health care expenditures. And the Congressional Budget Office has

¹ Jack Goldsmith, “The Cheney Fallacy,” *New Republic* (May 18, 2009), available at <http://www.tnr.com/article/politics/the-cheney-fallacy?id=1e733cac-c273-48e5-9140-80443ed1f5e2>

confirmed that, contrary to the president's repeated promises and even on the basis of the rosy assumptions it was obliged by law to work with, Obama's health care reform will bend the cost curve up. To meet these rising costs, taxes will have to be raised, including on those making under \$250,000 a year.

Candidate Obama ran for president not only as an intransigent opponent of the war in Iraq, which he denounced as a war of choice, but as resolute advocate of the war in Afghanistan, which he supported as a necessary and just war. Yet when President Obama's hand-picked Afghanistan commander, General Stanley McChrystal, requested in September 2009 60,000 troops for maximum effectiveness and 20,000 troops to avoid almost certain defeat, Obama balked. And he did so, according to Bob Woodward's *Obama at War*, in crucial part for political reasons, for fear of losing Democratic Party support. In November 2009 at West Point, President Obama announced the decision to send 30,000 troops to Afghanistan while at the same time setting a militarily arbitrary date of July 2011 to begin troop withdrawals. More than a year later, he continues to project ambivalence and irresolution on a war whose successful prosecution he made a crucial part of his campaign.

Finally, candidate Obama promised to bring a new tone to Washington. But since taking up residence in the White House he and his administration have vilified Rush Limbaugh, sought to delegitimize Fox News, dismissed opponents of his health care reform legislation as mean-spirited and obstructionist, darkly insinuated that the Tea Party movement promulgates hate and is funded by sinister forces, demonized House Minority Leader (and the next Speaker of the House) John Boehner, groundlessly cast aspersions on the legality of funds collected by the U.S. Chamber of Commerce, charged those intending to vote against him in the midterm elections with turning their backs on reason, and exhorted Latino voters to punish their common enemies.

The discrepancy between candidate Obama's rhetoric and President Obama's words and deeds is not explainable only in terms of the inevitable exaggerations and omissions that characterize electoral politics and the concessions compelled by the harsh realities of governing. Candidate Obama did not merely obscure the policy implications of his principles. He obscured his principles as well.

In 2006, the new senator observed in his bestselling *The Audacity of Hope*, "I serve as a blank screen on which people of vastly different political stripes project their own views." But Obama takes too little credit. For a politician constantly in the bright glare of public life performing daily on the national stage, to appear all things to all people requires a calculated and concerted effort. This is particularly true when one's transformative ambitions are as great as his first two years in office have revealed Obama's to be. By running for president as both the candidate of hope and change and the candidate of sobriety and good judgment, somehow simultaneously a progressive and a moderate, a man of big ideas and a pragmatist concerned with real-world consequences, an unabashedly partisan left-liberal Democrat and a proudly post-partisan leader, Obama cultivated ambiguity about his principles and his policies.

Consequently, in casting their 2008 presidential ballot for Senator Obama, many voters who certainly hoped for a change from President Bush were uncertain about exactly what change they were hoping for from a President Obama.

The simple explanation for the cultivated ambiguity is that Obama feared that if he clarified his intentions he would lose the election. The steady slide in the president's approval rating culminating with the November 2010 rout suffered by his party bears out the fear and lends support to the explanation. The simple explanation, however, needs to be supplemented by an understanding of the ambiguity of progressivism's opinions about democracy and reform.

In the annals of American progressivism, Obama's predicament is hardly unique. Indeed, the mismatch between leaders who put forward partisan ambitions in the name of the people and majority sentiment reflects an enduring paradox with deep roots in the progressive tradition. Like Obama's new progressivism, the old or original progressivism championed a vision of democracy that sometimes conflicted with ordinary people's opinions and preferences. The old progressives

often realized it and said as much, clearly and with a clear conscience. One of the distinguishing marks of the new progressivism at whose head Obama stands is the determination to conceal the gap between what majorities want and what progressive leaders want to enact in their name while insisting proudly on the purity of their democratic credentials.

The new progressivism is well represented in the academy, where the generally unacknowledged struggle to overcome the paradox of progressivism drives dominant schools of political and legal theory. For going on two generations, leading scholars have sought to develop a rhetoric of reform that explains how progressive political goals are, notwithstanding majority views, not merely just but also democratic. From the perspective of the professors' theories, the glaring gap between the president's promises to govern in a balanced and moderate fashion and his transformative progressive agenda is no gap at all, once democracy is rightly, which is to say progressively, understood. The ultimate incoherence of the professors' theories and their illiberal and antidemocratic tendencies underscore the need to reform progressives' rhetoric of reform².

The old progressivism

The original progressivism arose in the 1880s and 1890s and flourished during the first two decades of the 20th century. It is associated with, among others, Presidents Theodore Roosevelt and Woodrow Wilson, scholars Fredrick Jackson Turner and Charles Beard, reformer Jane Addams, theologian Walter Rauschenbusch, Supreme Court Justice Louis Brandeis, philosopher and educator John Dewey, and journalist and New Republic founder Herbert Croly.

At their best, the original progressives responded to dramatic social and economic upheavals generated by the industrial revolution, opposed real Gilded Age abuses, and promoted salutary social and political reforms. They took the side of the exploited, the weak, and the wronged. They fought political corruption and sought to make political institutions more responsive to the will of the people. And they advanced programs and policies that, in a changing world, brought liberal democracy in America more in line with the Declaration of Independence's and the Constitution's original promise of freedom and equality for all.

But progressivism went astray owing to a defect in its basic orientation. It rejected the sound principles of government embodied in the Constitution, because of a critical difference of opinion about human nature. Progressives believed that great improvements in the moral character of humanity and in the scientific understanding of society had rendered the Constitution's scheme of checks and balances — or better its separation, balancing, and blending of power — unnecessary to prevent majority tyranny and the abuse of power by officeholders. Whereas the makers of the American Constitution believed that the imperfections of human nature and the tendency of people to develop competing interests and aims were permanent features of moral and political life, progressives insisted that progress allowed human beings, or at least the most talented and best educated human beings, to rise above these limitations and converge in their understanding of what was true and right. Indeed, according to the progressives the Constitution's obsolete and cumbersome institutional design was a primary hindrance to democratic reforms to which all reasonable people could agree and which upright and impartial administrators would implement. It is a short step from the original progressives' belief that developments in morals and science had

² This is a revised and updated version of a Bradley Lecture delivered at the American Enterprise Institute in November 2009. It draws upon arguments developed in "Pragmatism Obama Style," Weekly Standard (May 4, 2009), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/425yustu.asp> (this and subsequent weblinks accessed November 4, 2010); "Obama's Empathy Test," Weekly Standard (online exclusive) (July 13, 2009), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/729yuyeg.asp>; "He's No Ronald Reagan," Weekly Standard (August 10, 2009), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/797jfduh.asp>; "The New Progressivism: Same as the Old Progressivism?" Pajamas Media (January 21, 2010), available at <http://pajamasmedia.com/blog/the-new-progressivism-same-as-the-old-progressivism/>; and Peter Berkowitz, "The New Dogma of Fairness," in Adam Bellow, ed., *New Threats to Freedom* (Templeton Foundation Press, 2010), available at <http://www.peterberkowitz.com/thenewdogmaoffairness.pdf>.

obviated reasonable disagreements about law and public policy and dissolved concerns about the impartiality of administrators to the new progressives' belief that in domestic affairs disagreement is indefensible and intolerable.

The paradox of American progressivism, old and new, is rooted in the gap between its professed devotion to democracy, or the idea that the people legitimately rule, and its belief that democracy consists in a set of policies independent of what the people want. The paradox may not inhere in every single progressive utterance or program, but it typifies progressivism as a whole. It certainly receives expression in the disjunction between official progressive aims. On the one hand, progressives proclaim their intention to democratize American politics by making it more responsive to the will of the people and giving the people greater say in government. On the other hand, progressives favor the steady enlargement of the national government's responsibilities, which increases the distance between the people and government, while supporting the expansion of an educated administrative elite, which reduces government's accountability to the people.

One of the virtues of the old progressivism was its clarity. Indeed, New Republic founder Herbert Croly could hardly have been more forthright. In 1914, in *The Promise of American Life*, a major statement of the progressive creed, Croly declared his faith that democracy was properly realized on the national level:

The American democracy can, consequently, safely trust its genuine interests to the keeping of those who represent the national interest. It both can do so, and it must do so. Only by faith in an efficient national organization, and by an exclusive and aggressive devotion to the national welfare, can the American democratic ideal be made good.

But who determined American democracy's genuine interests, and who represented the national interest?

At least for the time being, according to Croly, the federal government. That was because "under existing conditions and simply as a matter of expedience, the national advance of the American democracy does demand an increasing amount of centralized action and responsibility." Although he recognized that expanding its size had a cost, Croly nevertheless believed that the federal government in America was obliged to arrogate to itself greater powers. The necessity stemmed from serious flaws in American democracy and in the American people:

To be sure, any increase in centralized power and responsibility, expedient or inexpedient, is injurious to certain aspects of traditional American democracy. But the fault in that case lies with the democratic tradition; and the erroneous and misleading tradition must yield before the march of a constructive national democracy. The national advance will always be impeded by these misleading and erroneous ideas, and, what is more, it always should be impeded by them, because at bottom ideas of this kind are merely an expression of the fact that the average American individual is morally and intellectually inadequate to a serious and consistent conception of his responsibilities as a democrat. An American national democracy must always prove its right to a further advance, not only by the development of a policy and method adequate for the particular occasion, but by its ability to overcome the inevitable opposition of selfish interests and erroneous ideas [emphasis added].

Presumably, most progressives today will find Croly's language — "the average American individual is morally and intellectually inadequate to a serious and consistent conception of his responsibilities as a democrat" — mortifying. Or at least not fit for public consumption. Candidate Obama's characterization of working-class voters at a fund-raiser for wealthy San Francisco supporters — "And it's not surprising then they get bitter, they cling to guns or religion or antipathy to people who aren't like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations" — hearkens back to Croly's view. Except that it took place behind closed doors.

The new progressivism arose in post-1960s politics and has been refined and taken to a new level by President Obama. Like the old progressivism, the new progressivism proclaims its egalitarian desire to democratize American political institutions by making them more responsive to the will of the people. At the same time, and also like the old progressivism, it doubts the ability of the people to recognize their true interests while exuding confidence in the ability of highly trained elites to impartially administer federal programs on the people's behalf. But in contrast to the original progressivism, the new progressivism seeks to obscure its awkward combination of egalitarianism and elitism.

In contrast, the Constitution undertakes to reconcile the need for expert knowledge with the imperatives of self-government through institutional design — the creation of a system of representation aimed at refining the popular will, and a separation, balancing, and blending of powers among branches of the federal government and division of power between the federal government and state government. But the ultimate check on expertise and elites, according to the political theory on which the Constitution is based, is the people. In other words, the Constitution recognizes the importance of channeling individuals of special skill and ability into positions of power, while institutionally anchoring their exercise of power in accountability to the people. The old progressivism openly argued that the people's interest could be better served by reducing the limitations under which government labored. And the new progressivism — perhaps suffering a pang of conscience, perhaps concerned about its public image, perhaps both — conceals its devotion to top-down government in bottom-up rhetoric. It seeks to reduce dependence on the people by redefining democracy as the reforms undertaken by elites in the people's name.

The rhetoric of reform

Both Obama's determined effort to push dramatic transformation under the cover of moderation, pragmatism, and post-partisanship, and his claim to speak on behalf of the people while aggressively promoting programs at odds with majority wishes, are of a piece with several schools of academic moral, political, and legal theory³. This is not to say that the president's rhetoric on the campaign trail and his performance in office somehow follow a script written by professors. But the president is a product of elite educational institutions — Columbia ba, Harvard Law School jd, and twelve years teaching at the University of Chicago Law School. And his words and deeds closely fit the rhetoric of reform elaborated within the academy; they have received strong support from inside the groves of academe; distinguished professors have sought to explain Obama's approach in terms of leading theoretical approaches to politics; and Obama himself has invoked a popular law school theory to explain his understanding of constitutional adjudication and justify his choices for appointments to the Supreme Court.

The rhetoric of reform identifies progressive policies and goals with justice itself. It embraces at least three separate schools or doctrines: the Rawlsian-inspired deliberative democrats ground justice in the dictates of theoretical reason; pragmatists ground justice in the realities of practice; and the proponents of empathy ground justice in truths of the heart. These doctrines have been elaborated in scholarly books and articles over the last several decades, and have become solidly entrenched as conventional wisdom in the academy. And, for all their roots in progressive hopes and aspirations, they have anti-democratic and illiberal implications.

To understand these theories is to better understand the context of ideas and ambitions within which President Obama and many of those who support and advise him operate.

Rawls and Deliberative Democracy. The most elaborate effort to derive the progressive understanding of justice from theoretical reason is contained in the work of Harvard philosophy professor John Rawls (1921–2002). Rawls devoted his career to the task of elaborating the idea of

³ For an admiring account of the connection between President Obama's politics and leading academic theories see James T. Kloppenberg, *Reading Obama: Dreams, Hope, and the American Political Tradition* (Princeton Press, 2010).

justice as fairness and in the process became the most influential philosophy professor of his generation.

According to Rawls, justice concerns the principles that free and equal citizens would adopt to govern themselves if they thought impartially, objectively, and rationally about their condition as human beings. It has two basic parts: fundamental and inviolable liberties, and an obligation on the part of the state to adopt “measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms” [emphasis added]. In one respect Rawls reflects the weight of opinion about justice in a liberal democracy, which recognizes fundamental individual rights, and affirms the obligation on the part of the state to prepare citizens for freedom by making provisions for those who can’t provide for themselves. Partisans divide over which rights take priority, and concerning the size and scope of the state’s role.

Officially, Rawls’s theory is distinguished by the articulation of abstract principles and rules the purpose of which is to structure public debate in a liberal democracy. The rules are supposed to determine what kinds of policy arguments are legitimate in public and what kinds are not. But unofficially and in practice, Rawls’s theory of justice, certainly as adopted by professors of practical ethics and applied to public affairs, is distinguished by more. It also purports to derive from “public reason,” or the abstract principles and rules that structure public debate, substantive public policies and disqualify others. It’s as if the rules of baseball told you not only how to play the game, but also who ought to win and who ought to lose.

The obligation Rawls’s theory imputes to the state to adopt “measures ensuring for all citizens adequate, all-purpose means to make effective use of their freedoms” turns out to be more than a merely formal obligation. “Justice as fairness” builds a great deal of government intervention and redistribution of wealth into the words “adequate,” “all-purpose,” and “effective.” Put differently, Rawls’s theory infuses the formal reasoning that is supposed to structure public debate with considerable substantive content. Suffice it to say that the Rawlsian is rare who has derived even a single public policy position from Rawls’s theory that conflicts with the progressive political agenda.

To be sure, Rawls asserts that “justice as fairness is but one” of the many political conceptions of justice that deserve consideration in a liberal democracy. But he makes no such concession about fairness, which he takes to have a unitary meaning, and which most people equate with justice. Not only by equating his favored conception of justice with fairness itself, but also by demonstrating throughout his half-century career in academic philosophy a decided lack of interest in other opinions about justice, Rawls powerfully signaled that the progressive understanding of fairness was tantamount to justice itself.

A legion of second- and third-generation Rawlsians — today representing a major, if not the leading, school within academic political theory — developed a popular offshoot of the theory of justice as fairness they often called “deliberative democracy.” Its purpose is to apply Rawls’s theory of justice to practice. Many variants have been advanced, and the approach has been extended to international law and international relations. Elements of it can be seen in the academic writings of State Department Legal Counsel Harold Koh, who is former Dean of Yale Law School, and Director of the office of Policy Planning at the State Department Anne Marie Slaughter, former Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University. All versions respond to a common problem, develop a common solution, and embody a common conceit.

The professors’ problem was that, as good progressives, they took pride in their democratic bona fides. But the policies — on abortion, affirmative action, welfare, taxes, human rights, America’s responsibilities abroad, and others — that they regarded as dictates of justice frequently failed to command majority support. And unlike Croly, today’s progressives are reluctant to proclaim, at least in public, that “the average American individual is morally and intellectually inadequate to a serious and consistent conception of his responsibilities as a democrat.”

The professors' solution to the paradox of progressivism — how to reconcile a professed commitment to greater democracy with a powerful conviction, in conflict with the preferences of the people, that justice requires more centralized government and more elite rule — built on Rawls. Its intellectual roots can be traced to Rousseau's doctrine of the general will. And the intellectual sleight of hand on which it is based and its dangers to freedom were brilliantly exposed by Isaiah Berlin in his 1950s-era Cold War classic, "Two Concepts of Liberty."

The key is the claim that the policies that theoretical reason demonstrates are fair and just are democratic in a higher sense than the policies that the people have voted for, or want to adopt in the here and now, or may wish to enact in the future. Not content to conclude that the mismatch between the public policies they deduce from theory and the people's expressed political preferences reflects badly on the people, deliberative democrats go farther by decreeing majority preferences contrary to democracy, or at least the imperatives of democratic theory. It's not merely that deliberative democrats believe that their theories give expression to something better and loftier than what the majority of the electorate chooses. It's that the choices people would make — were it not for their poor education, combined with passions and prejudices corrupted by the imperfections of social life and the inequities of the market economy — are what deserve the designation democratic.

The professors' conceit was to suppose that their own education was adequate and that their theory yielded rational truths unsullied by rationalizations of their own passions and prejudices. Pleased with their analytic competence and persuaded of the purity of their moral intentions, deliberative democrats rarely considered the illiberal and antidemocratic implications of their approach to politics. But systematically disdaining the expressed preferences of majorities of your fellow citizens is disrespectful. Implicitly appointing yourself guardian of the fair and the just — who else besides professors can understand and apply the complicated theories that professors develop to determine just public policy? — promotes arrogance. And equating this self-aggrandizing arrogation of power with greater democracy encourages self-deception while making deception of the people integral to progressive politics.

Rorty and Pragmatism. A second prominent school of social and political thought in the academy that seeks to equate progressive reform with justice itself is pragmatism.

During the presidential campaign, then Harvard Law School professor Cass Sunstein vouched for the vitality and post-partisanship of Obama's pragmatism. Now head of the White House Office of Information and Regulatory Affairs, Sunstein is a friend, a former colleague of Obama's when both were on the faculty at the University of Chicago Law School, and he served as an informal adviser to Obama's presidential campaign. Sunstein is also a distinguished legal scholar and has written widely about political ideas, so he was well-positioned to judge Obama's intellectual orientation.

In January 2008, in the *New Republic*, Sunstein argued that Obama was a "visionary minimalist." Though "willing to think big and to endorse significant departures from the status quo," Obama would, asserted Sunstein, "prefer to do so after accommodating, learning from, and bringing on board a variety of different perspectives." Returning to the topic in the *New Republic* in September 2008, Sunstein emphasized that Obama "prefers solutions that can be accepted by people with a wide variety of theoretical inclinations." Obama's "skepticism about conventional ideological categories is principled, not strategic," and his "form of pragmatism is heavily empirical; he wants to know what will work." In short, Sunstein, assured, Obama's pragmatism was anything but partisan.

Pragmatism emerged as a school of philosophy in the late 19th and early 20th century. Charles Sanders Peirce, William James, and John Dewey were among its leading lights. In its original philosophical, or anti-philosophical, sense — as in its ordinary, everyday sense — pragmatism stands for flexibility in solving problems. It proceeds by way of hypothesis and experimentation, regarding all solutions as provisional and subject to further testing. And it argues that religious or metaphysical dogma and rigid moral and political agendas mesmerize the mind and

interfere with the discovery of workable solutions to our moral and political challenges. At its most extreme, philosophical pragmatism denies the very existence of objective moral truths, maintaining that opinions we declare true are merely those that have proved useful to solving one problem or another.

In the 1980s and 1990s, philosophy professor Richard Rorty — in scholarly papers, learned books, academic lectures, and generally accessible writings — revived pragmatism. In the process, he infused it with a decidedly partisan meaning. Or perhaps, as Rorty suggested, he embellished the original pragmatism's progressive intentions. His synthesis proved popular in philosophy departments, among political theorists, and at law schools. While Obama may never have read a word Rorty wrote, the new pragmatism, like Rawlsian liberalism, permeated the university world that Obama — and Sunstein — inhabited. One of its key contentions was that philosophical questions were subordinate to political questions. Another was that the proper political question in America is how to promote progressive ends. Pragmatists advanced these contentions with ideological rigidity, rarely pausing to consider other perspectives on their own terms or the empirical consequences of progressive policies.

Rorty stated his synthesis most succinctly in a short 1998 book called *Achieving Our Country: Leftist Thought in Twentieth-Century America*. He proceeds from the dogma that “nobody knows what it would be like to try to be objective when attempting to decide what one's country really is, what its history really means.” There is no point, therefore, he argues, in asking whether any particular account “of America is right.”

Rorty nevertheless certainly seemed to think he had accurately divined the nature of right and left in America. And he certainly seemed to think that the difference was of cardinal importance. The right, or conservatism, according to Rorty, seeks to uphold an unjust status quo, defined by the quest to preserve inherited privilege. In contrast, the left, or progressivism, takes its cue from Walt Whitman and John Dewey who, Rorty proclaims, are “prophets of a civic religion.” The left, of which they are spiritual leaders, is the party of hope; it seeks to bring the reality of America into harmony with democracy's progressive promise.

Rorty's pragmatism is dogmatically anti-traditional. He dismisses the whole history of philosophy as obviously refuted. And he flatly rejects biblical faith as childish nonsense. Yet, or fittingly, Rorty celebrates democracy's progressive promise not as an alternative to religion but as an alternative faith, agreeing with John Dewey that “democracy is neither a form of government nor a social expediency, but a metaphysic of the relation of man and his experience in nature.”

Nor is Rorty's quasi-religious language a slip. He goes on to say that the proper aim of American politics is nothing less than to embody in social and political life “a new conception of what it is to be human.” And the utopian overtones are no accident. This new conception, Rorty reveals, rejects all claims to “knowledge of God's will, Moral Law, the laws of History or the Facts of Science.” All the better, exhorts Rorty, to make “shared utopian dreams” the guide to pragmatic and progressive politics. It is hard to imagine a less pragmatic interpretation of pragmatism and progressivism than Rorty's, which happens also to be among the most influential.

Like deliberative democracy, the new pragmatism makes use of a fundamental deception. It purports to focus on practical consequences and to eschew fixed or dogmatic opinions. In fact, the new pragmatism equates what works with what works to increase government's responsibility to promote social justice in America as progressively understood.

But, in the process, it can't escape contradiction. On the one hand, it reduces morality to interest, and dismisses the distinction between true and false as a delusive vestige of an obsolete metaphysics. On the other hand, it treats the progressive interpretation of America as, in effect, the one good and true account, empirically and metaphysically. Under the guise of inclusiveness, it denigrates and excludes rival moral and political opinions.

So too it seems for Obama's pragmatism: It appears to be another name for achieving progressive ends; flexibility is confined to the means. This helps explain the sometimes glaring gap between candidate Obama's glistening post-partisan promises and President Obama's aggressively

partisan policies. Judging by his conduct — as pragmatism officially instructs — Obama appears to have concluded that the best way to maintain public support for progressive programs is to divert attention from the full range of their consequences and, where possible, to refrain from making progressive principles too explicit.

A truly post-partisan pragmatist — or a pragmatist of either party in the ordinary, everyday sense — would pay attention to the long-term economic consequences of vast government expansion. He would also show an interest in the full range of moral consequences of his policies, in particular the practical impact on citizens' incentives for responsibly managing their lives of a great enlargement of government responsibilities for managing their lives for them. Such considerations, however, have been noticeably absent from Obama's case for health care reform. Of course, for a pragmatist for whom it is second nature to measure all policy by how well it promotes a progressive agenda, it makes sense to ignore or deflect consideration of these awkward consequences.

In *The Audacity of Hope*, Obama deplored a politics in which “narrow interests vie for advantage and ideological minorities seek to impose their own versions of absolute truth.” He would pursue “a new kind of politics, one that can excavate and build upon those shared understandings that pull us together as Americans.” As president, however, he exploited the American hunger for a politics of compromise and accommodation on which he ran and the air of crisis in which he took office to ram through Congress sweeping partisan legislation.

The problem, though, is not the presidents' partisanship, which is to be expected in our two party system, but the disguising of partisan intentions in the rhetoric of nonpartisan, pragmatic problem-solving. It turns out to be nearer to the truth to say that pretending to pursue nonpartisan reform was for the president a pragmatic strategy for imposing far-reaching progressive policies. Obama's historic reversal of fortune in election 2010 has exposed that strategy as un-pragmatic, in the common sense meaning of the term, in that not only did it not work to persuade voters to go along with progressive transformation but turned them against it.

Moreover, Obama's pragmatism is un-pragmatic because it suppresses inconvenient consequences. It is disrespectful of citizens because it obscures its governing principles and ultimate intentions. And it is a threat to freedom, which depends on a lively understanding of our constitutional principles and an informed and robust debate about the full range of consequences — social, economic, moral, political, and strategic — of our political choices.

Obama, Sotomayor, Kagan, and Empathy. Empathy is a third ground developed in the academy over the last several decades to secure the equation of progressivism with justice itself, and, in the people's name, to override their expressed preferences. In *The Audacity of Hope*, then Senator Obama defined empathy as “not simply a call to sympathy or charity, but as something more demanding, a call to stand in somebody else's shoes and see through their eyes.” As with pragmatism, the issue is not with empathy itself but progressives' surreptitious infusion into it of progressive content, for as the president defined empathy it is neutral on the question of the range of government's competence and the scope of its legitimate authority.

Law professors have been at the forefront in burnishing empathy's luster. They argue that excellence in empathy depends on experiences of oppression and exclusion, which provide insights into justice that are otherwise unobtainable. But proponents of this school of thought do not regard all experiences of oppression and exclusion as equal. Although in *The Audacity of Hope* Obama recounted that his formative experience in learning about empathy came from appreciating the perspective of his white grandfather, law schools generally teach that the experience of discrimination based on race, class, or gender is particularly instructive, if not indispensable. Moreover, proponents of empathy deem its truths final, permitting no appeal from them, certainly not to reason or empirical evidence or alternative understandings of justice. Those lacking the approved experiences must accept the accounts of what justice demands from those who possess them. The knowledge yielded by empathy, it is further argued, is especially relevant to the judge's task. It justifies judges in overturning precedent and fashioning new rules of law from the bench.

The importance of empathy to progressive reform and its liabilities for the progressive cause can be seen in President Obama's use of, and retreat from, it. On May 26, 2009, the president emphasized empathy as the decisive judicial virtue in his White House remarks introducing Sonia Sotomayor as his nominee to the Supreme Court to replace retiring Justice David Souter. President Obama praised her "rigorous intellect" and lauded her conception of the "judicial role." She understood, according to Obama, "that a judge's job is to interpret, not make, law; to approach decisions without any particular ideology or agenda, but rather a commitment to impartial justice; a respect for precedent, and a determination to faithfully apply the law to the facts at hand."

These are indeed estimable qualities essential to the task assigned judges in our constitutional system. But Obama hastened to correct the traditional understanding by adding that these qualities "alone are insufficient" for appointment to the Supreme Court. Also needed, and what Sotomayor would bring in abundance to the bench, is "experience being tested by obstacles and barriers, by hardship and misfortune . . . that can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live."

Knowing how the world works and how ordinary people live is certainly relevant to the judge's task. There is, however, an additional dimension to the doctrine of empathy as promulgated in our law schools that Obama did not highlight during his White House introduction of Sotomayor to the nation. But over the years she highlighted it repeatedly. According to Sotomayor, and the law school sensibility she embraced, only people of certain backgrounds can excel at empathy. This is the meaning of her oft-repeated conviction "that a wise Latina woman with the richness of her experiences would, more often than not, reach a better conclusion than a white male who hasn't lived that life." In other words, white men, because of their race, sex and, in many cases, class are barred from imaginatively stepping into the shoes of ordinary people and those who suffer and from seeing the world from their eyes.

It therefore makes sense that empathy is just what then Senator Obama charged in 2005 that then Judge John Roberts lacked. Indeed, it was for lack of empathy, Obama explained when he took to the Senate floor, that he opposed Roberts's nomination to become the nation's 17th Chief Justice.

But Senator Obama confused matters. "There is absolutely no doubt in my mind," he declared, "that Judge Roberts is qualified to sit on the highest court in the land." If Obama meant what he said, if he had spoken truly, he should have stopped right there and announced his intention to support Roberts's nomination. This is particularly so if his goal were to practice a moderate, pragmatic, and post-partisan politics.

Instead, Obama proceeded to spell out Roberts's disqualifying deficiency. True, Obama acknowledged, Roberts was exceptionally intelligent, exhibited a judicial temperament, loved the law, respected precedent and procedure, exercised restraint interpreting statutes and cases, and displayed impartiality. However, these qualities, Obama maintained, would provide Roberts guidance in only 95 percent of Supreme Court cases.

As for the resolution of "the five percent of the cases that are truly difficult," declared Obama, those inevitably turn upon "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy." In deciding the five percent of truly difficult cases, "the critical ingredient is supplied by what is in the judge's heart."

How did Obama know what was, or was not, in Roberts's heart? Obama concluded that Roberts's heart was deficient because in his work in the White House and Solicitor General's office in the 1980s, Roberts advocated a limited role for government in fighting racial discrimination and empowering women.

Obama's inference is nonsense. In the first place, Roberts was a lawyer developing arguments for his client. Further, the limited government views that he elaborated reflected principles concerning the proper exercise of government power in a free society, empirical judgments about the kinds and degree of discrimination to which racial and ethnic minorities and women were then subject, and opinions about the passions and interests inscribed in human nature.

These principles, empirical judgments, and opinions have at a minimum a complex relationship to the capacity to think and feel what ordinary people think and feel. One might even legitimately believe that limited government principles, concerns about the overall impact of government programs on the people they are designed to help, and opinions about the passions and interests that cloud the judgment of politicians and bureaucrats concerning other people's interests put one in a better position to assess the impact of policies on the condition of ordinary people as well as the oppressed and excluded.

Accordingly, of course, if you believe that empathy is a function of race, class, and sex, and that successful white men are constitutionally incapable of it, then Obama's inference that Roberts lacks it is straightforward.

In 2006, Obama opposed Judge Samuel Alito's nomination to the Supreme Court. As he had the year before for Roberts, Obama affirmed that the nominee "has the training and qualifications to serve." As with Roberts, that should have decided the question for Obama and compelled him to vote for Alito's nomination.

But then, as he had for Roberts, Obama promptly contradicted himself. In fact, according to Obama, Alito lacked a crucial qualification to serve because he consistently ruled "on behalf of the powerful against the powerless; on behalf of a strong government or corporation against upholding Americans' individual rights." Since Obama refrained from discussing the merits of any of the cases in question, or identifying specific rights that Alito failed to uphold, it was unclear whether Obama believed that any of the Alito rulings to which he objected were contrary to law. One could be forgiven for supposing that Obama's real complaint was that the distinguished federal appeals court judge had failed to pursue a progressive agenda from the bench. Or rather, that failure to pursue a progressive political agenda is proof of lack of empathy, and therefore disqualifying for a seat on the Supreme Court.

Obama seemed to be arguing that empathy has substantive legal content, and that it decisively favors ordinary people and the powerless and downtrodden in constitutional adjudication whatever the relevant statutes, precedents, and constitutional provisions. More succinctly, the president's view appears to be that empathy well-exercised yields justice progressively understood. Although President Obama relied upon the doctrine of empathy to oppose the Supreme Court nominations of Justices Roberts and Alito and to announce the nomination of then Judge Sotomayor, he backed away from it when it came to her closely watched confirmation process. Indeed, Sotomayor repudiated it. "It's not the heart," she told the Senate Judiciary Committee, "that compels conclusions in cases; it's the law." But if that's true, if the heart is irrelevant to the determination of the law, even "in the five percent of the cases that are truly difficult," then Obama's case against Roberts and Alito collapses. So does his case for Sotomayor.

Perhaps Sotomayor had simply changed her mind about the role of the heart in constitutional adjudication, rejecting not only her oft-repeated views but also the president's. More likely, she and the White House concluded that the primacy of empathy is not a doctrine that persuades democratic majorities.

The Obama administration followed the same course this year with now Justice Elena Kagan as it did with Justice Sotomayor. In introducing the then solicitor general in May as his nominee to replace retiring Justice John Paul Stevens, Obama lauded her for fairness, her openness to rival perspectives, and her outstanding legal mind. In addition, though he refrained from using the word "empathy," he declared with admiration that her "understanding of law, not as an intellectual exercise or words on a page, but as it affects the lives of ordinary people, has animated every step of Elena's career."

Yet in her confirmation hearings, Kagan was unequivocal. In response to Senator Kyl's direct questioning about whether she agreed with the President that the critical ingredient for judges in deciding hard cases is what is in the judge's heart, or empathy, Kagan replied, "I think it's law all the way down." And she went on to state that "judges can't rely on what's in their heart. They don't

determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases, it's the law."

More important than whether it is popular or unpopular, the virtue of empathy that Obama invoked to disqualify Roberts and Alito, and to extol Sotomayor and Kagan, a virtue which both women disavowed as a component of judicial decision-making for their confirmation hearings, has been misconceived by progressive professors and the president. Empathy is not alien to traditional accounts of legal reasoning, which, for example, recognize the need for equity, or, where the laws turn out to be too broad or too narrow, correcting them by reference to the lawmakers' intention. In the hardest and most divisive constitutional cases, empathy yields no determinate result.

Whether, for example, the Constitution protects a woman's right to abortion cannot be determined by canvassing the feelings and understandings of women who cherish their freedom to choose and to control their own bodies, though how such women think and feel is pertinent to judicial reasoning. Nor can the question of constitutional law be determined by appreciating the understandings and feelings of those men and women devoted to safeguarding unborn life. The legal question turns on the powers the Constitution assigns to the federal government and those it leaves to the democratic process, to what extent the unborn are endowed with rights, and how to balance the rights of the unborn against those of pregnant women.

Whether the Constitution permits race-conscious measures to secure equality of results for blacks, other minorities, and women is not settled by seeing the world as it is seen by an aggrieved African-American or, for that matter, an aggrieved white American, though these are necessary considerations. It depends crucially, though, on constitutional text, structure, and history; on the constellation of rights involved; and the actual impact of race-conscious measures on the individuals that receive them and the society that provides them.

And whether the Constitution provides a right to same-sex marriage cannot be resolved by judicial divination of the emotions and perceptions of gay couples seeking to wed or of the emotions and perceptions of defenders, straight and gay, of the traditional definition of marriage, but the changing social understanding of marriage is a proper factor in judicial deliberations. That question is properly answered by examining the constitutionally correct relationship of the federal government toward marriage, the changing social meaning of marriage, and the social and political consequences of a change in marriage's legal meaning.

Empathy, or the ability to see and feel as others do, is relevant to reaching a lawful answer to each of these constitutional questions. And the traditional understanding of legal reasoning certainly recognizes that the impact of the law on those subject to it is a pertinent factor in adjudication. It is mistaken, however, to insist that the quality of empathy is a function of race, class, or gender, to separate it out as if it were endowed with the final authority to decide hard cases, and to infuse it with exclusively progressive meaning.

Progressives use this mistaken understanding of empathy to give democratic legitimacy to exercises of government power that circumvent majority wishes as reflected in the laws of the land. As with deliberative democracy and pragmatism, this has illiberal and antidemocratic implications. The equation of progressive policy outcomes with empathy encourages judges to go beyond their area of professional competence to probe the inner workings of the souls of the parties that come before them. And ironically it leads to the constriction of empathy, because it persuades progressives to dismiss as cold-hearted and benighted those who disagree with them about politics. That is, it inhibits progressives from feeling and understanding the world as do conservatives, not a few of whom are ordinary people.

Reforming progressivism's rhetoric of reform

One reason for the resounding rebuke delivered by the electorate to the Democratic Party and its leader last month was the immoderation and un-pragmatic character of President Obama's progressivism. In its pursuit of a transformative agenda, it treated the public as too simpleminded or

mean-spirited to adopt the correct policies for the correct reasons. It overlooked that while government is in a good position to provide equality before the law and equal opportunity, it is often a bad judge of what citizens deserve and poorly equipped to ensure equal outcomes. And in seeking to expand government's responsibility for managing citizens' lives, it ignored the prospects for diminishing citizens' freedom.

The president and his fellow progressives needn't be seen as having acted cynically. In the progressive mind — as illustrated by the president's rhetoric on the campaign trail and conduct in office, and professors' theories about deliberative democracy, pragmatism, and empathy — progressives are moderate and post-partisan because progressivism itself is not a flawed and incomplete perspective but rather the comprehensive perspective that has at last transcended the flawed and incomplete perspectives of the past. Progressivism's vision of reform, progressives suppose, is vouched for by reason, by practice, and by the heart. It is equivalent for them to justice itself.

It follows that those who depart from progressivism are unreasonable, indifferent to or disdainful of how the world really works, and heartless — in a word, unjust. From the point of view of the new progressivism, compromise is form of compassion; it means offering the unreasonable, the impractical, and the heartless a seat at the table and providing them an opportunity to recognize the wisdom of progressive ways. And moderation for the new progressivism is kind of resoluteness; it signifies flexibility, patience, and persistence in pursuing progressive ends.

Confidence that one possesses the complete and final understanding of morals and politics can encourage a politician to think of himself as a transformer and redeemer rather than as a statesman. It can impel a president confronting dramatic electoral backlash to attribute opposition to his party and his programs to a fear that blinds voters to "facts and science and argument." And it can drive him to rouse loyalists to adopt the ancient warriors' ethic and declare, "We're going to punish our enemies and we're going to reward our friends who stand with us on issues that are important to us." One reason that progressives under pressure so readily succumb to the common temptation to deride voters who disagree with them as frightened and foolish and to portray fellow citizens as adversaries to be vanquished is that progressive assumptions about knowledge and politics make such conclusions about those who decline to follow their lead hard to escape.

The United States can be proud of the progress it has made since its founding. And since its rise in the 19th century, progressivism can take pride in its leading role in bringing about salutary reform — from regulating the workplace to establishing a social safety net to anchoring civil rights in law. But the dogma embedded in the new progressivism, that it has transcended the legitimate and enduring divisions between left and right, is a potent mix of partisan self-deception and academic rationalization. It signifies not progress, but a dangerous decline.

And it proves that we still have much to learn from the Founders' understanding that moral and political opinions are bound to be partial and incomplete because of the imperfections of human nature and the irreducible differences among human beings; that our common ground in America is the conviction that government's central task is to protect individual liberty; that because of naturally competing interests and legitimately contending perspectives, citizens will inevitably divide over government's role in securing citizens' equal right to freedom; and that limits on government not only reflect respect for the individual but create room for families and the associations of civil society to foster the virtues on which liberty depends.

Progressivism's flaws do not obviate the need, the ever-present need, for reform. Edmund Burke persuasively argued that liberty requires devotion to the principles of conservation and correction or reform. John Stuart Mill rightly maintained that free societies need both a conservative party and a progressive party, the one specializing in preserving inherited order and the other concentrating on improving institutions and adapting them to changing circumstances. And the makers of the American constitution wisely taught that to sustain the American experiment in ordered liberty and democratic self-government, our representatives must avoid both pandering to the people's prejudices and disdaining the people's preferences

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¹ Jack Goldsmith, “The Cheney Fallacy,” New Republic (May 18, 2009), available at <http://www.tnr.com/article/politics/the-cheney-fallacy?id=1e733cac-c273-48e5-9140-80443ed1f5e2>

² This is a revised and updated version of a Bradley Lecture delivered at the American Enterprise Institute in November 2009. It draws upon arguments developed in “Pragmatism Obama Style,” Weekly Standard (May 4, 2009), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/425yustu.asp> (this and subsequent weblinks accessed November 4, 2010); “Obama’s Empathy Test,” Weekly Standard (online exclusive) (July 13, 2009), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/729yuyeg.asp>; “He’s No Ronald Reagan,” Weekly Standard (August 10, 2009), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/016/797jfdueh.asp>; “The New Progressivism: Same as the Old Progressivism?” Pajamas Media (January 21, 2010), available at <http://pajamasmedia.com/blog/the-new-progressivism-same-as-the-old-progressivism/>; and Peter Berkowitz, “The New Dogma of Fairness,” in Adam Bellow, ed., *New Threats to Freedom* (Templeton Foundation Press, 2010), available at <http://www.peterberkowitz.com/thenewdogmaoffairness.pdf>.

³ For an admiring account of the connection between President Obama’s politics and leading academic theories see James T. Kloppenberg, *Reading Obama: Dreams, Hope, and the American Political Tradition* (Princeton Press, 2010).

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