

# The Lost Promise of Progressive Formalism

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## ABSTRACT

Today, the Progressive Era is often pilloried as a moment when Americans, carried aloft on a foam of heady reformist sentiment, turned their back on fixed rights and structure in favor of a loose, unprincipled “living constitutionalism.” Such a view, however, obscures a multi-sided, vibrant debate that took place in this period about the Constitution’s relationship to American democracy. Along with a critique of nineteenth-century laissez faire principles that left the masses exposed to the vicissitudes of industrial democracy, the Progressives mounted a sustained attack on political institutions that insulated the law from change: courts, political parties, the federal bar—even the structure of the U.S. Constitution itself.

However, in terms of practical solutions, what said constitutional critique ultimately required was not a question admitting of easy answers. Some Progressives called for a constitutional convention to free the nation from “constitution worship” and the 1787 text entirely. Others proposed amendment of the text’s most undesirable features, the Senate, presidential reelection, and the Electoral College being frequent targets. Still others, however disenchanted, considered the Constitution at most a collection of “vague words” and “ambiguous expressions” that could be reread for diverse purposes. At the heart of these debates lay a deeper question of textual interpretation: does the law contain its own enduring truths, or are these supplied by the historical, political, and social context in which it is interpreted?

Though Progressive legal thought has been rightly associated with a “revolt against formalism,” this account offers limited insight into the fixation with “constitution tinkering” and the prodigious amount of constitutional amendment that *did* take place in the period. Moreover, by obscuring a tradition of reform-minded formalists, it has helped to reify an association between anti-formalism and the political left that survives until today. Along these lines, this Article makes two distinctive contributions. First, it uncovers and illustrates a “lost” tradition of *progressive formalism* that viewed the Constitution as bearing a relatively fixed meaning, particularly when it came to structure. Second, it explains how this strand of thought was marginalized by the competing tradition of *interpretivism*, which championed textual flexibility and in particular the powers of the President as a solution to the difficulties of rigid constitutional structure.

After tracing the contours of the debate, I show how progressive formalism fell by the wayside in the early decades of the twentieth century. Passage of the Sixteenth and Seventeenth Amendments blunted the popular critique of government, while the excesses of World War I and Prohibition turned the public away from state-sponsored meliorist projects and Progressive democracy generally. The most important cause was President Woodrow Wilson’s turn to interpretivism to free the President from the constraints of structure and allow the office, in turn, to supply government with an energy and purpose that had seemed impossible under the existing Constitution. A constitutional critic as an academic, Wilson became a supporter as a politician: what he had once deemed a rickety, rigid machine thwarting democratic politics he later called a “vehicle of life” whose “spirit is always the spirit of the age.”

In ensuing decades, interpretivism and a powerful presidency endowed the State with the strength and flexibility needed to confront a series of twentieth-century crises. But “los[ing] the ability to write” came with a cost: an emerging mismatch between empowered institutions and a patchwork of improvised doctrines to accommodate them in constitutional structure. Constitutional theory of an “unamendable text” becomes a top-heavy exercise of warring scholars and legal elites drawing attention to features of American democracy they insist are a proper part of America’s “unwritten” constitutional canon. Textual interpretation, in turn, betrays pathologies of self-referentiality, while democratic constitutional politics are stunted. A return to progressive formalism’s core tenets—taking seriously the implied limits of text, while insisting that the Constitution must evolve continually to fit modern times—could offer a corrective to the “constitution stretching” of which much contemporary constitutional scholarship is arguably guilty, as well as a chance to set our constitutional tradition upon stronger democratic foundations.

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## Introduction: Constitutionalism by Canonization and a “Bad Political Orchard”

“If, in the opinion of the people, the distribution of the constitutional powers be in any particular wrong, let it be corrected in the way which the Constitution designates. But let there be no change by usurpation, for this ... is the ordinary weapon by which free governments are destroyed.”

*George Washington*, Farewell Address, 1796

“Democracy seethes in me. I demand expression. I demand it for myself and for all those whose existence, like mine, is cooped up and reduced to a nothingness because every step, all initiative, is hindered by settled conditions whose fitness we deny, by a maze of regulation for human life which has been foisted upon this generation by its ancestors and has become folly by the progress and changes of which our ancestors did not dream and in which they had no part.”

*Anonymous Citizen*, quoted in *Frederick Cleveland*, ORGANIZED DEMOCRACY, 1914

“If we want things to stay as they are, things will have to change.”

*Giuseppe di Lampedusa*, THE LEOPARD, 1966

On January 3, 1916, a fifty-nine-year-old Louis Brandeis stood before the Chicago Bar Association. The purpose of his address: to explain how the law could survive in swiftly changing social and economic conditions. “In periods of rapid societal transformation,” explained Brandeis, challenges to existing law, “instead of being sporadic,” became general. In war-torn ancient Athens, the dramatist Euripides denounced “the trammellings of law which are not of the right.” As the Reformation swept Europe, German jurist Ulrich Zasius declared: “All sciences have put off their dirty clothes, only jurisprudence remains in its rags.” After the French Revolution, the poet-sage Goethe wrote a satirical poem to show that laws that outlived their time were a “curse” spreading “from race to race,” reduced to “nonsense” and a “pest” in new settings from which they could not be erased.

Brandeis demanded the attorneys seated before him:

Is not Goethe’s diagnosis applicable to the twentieth-century challenge of the law in the United States? Has not the recent dissatisfaction with our law as administered been due, in large measure, to the fact that it had not kept pace with the rapid development of our political, economic and social ideals? In other words, is not the challenge of legal justice due to its failure to conform to contemporary conceptions of social justice?<sup>1</sup>

A century later, Brandeis’s questions sound surprisingly fresh as a new generation experiences its own “collective revulsion against the privileges of great wealth allied with great power.”<sup>2</sup> Today’s pressing political concerns have more than a passing familiarity with those of that era. Stories of price-gouging in the pharmaceutical industry find an ancestor in Ida Tarbell’s muckraking exposé of the “ruthless methods” of Standard Oil in 1902.<sup>3</sup> Wisconsin’s “Fighting Bob” La Follette’s stormy speeches on the Senate floor in 1906 calling for increased railroad regulation sound not unlike

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<sup>1</sup> Louis Brandeis, *The Living Law*, 10 ILL. LAW REV. 4 (Feb. 1916); see MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE 431-3 (2009).

<sup>2</sup> Paul Starr, *How Gilded Ages End*, AMERICAN PROSPECT (Apr. 29, 2015). The term “Gilded Age” was coined by Mark Twain for the late 19th-century period when a veneer of refinement covered the brutal realities of industrial capitalism. Thomas Piketty’s 2013 blockbuster *Capital* exposed present-day levels of economic inequality as a historical anomaly with a parallel in the Gilded Age, helping to put inequality on the broader political radar. Many other scholarly and public policy works are making the connection between the Gilded Age and the present day, including LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2<sup>nd</sup> ed. 2018); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2008); LAWRENCE LESSIG, *AMERICA, COMPROMISED* (2018); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS* (2010); GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* (2017).

<sup>3</sup> Ida Tarbell, *On the Methods of the Standard Oil Company* (1902) in *THE PROGRESSIVE MOVEMENT, 1900-1915* 20 (Richard Hofstadter ed. 1963).

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Senator Elizabeth Warren’s admonitions about the need for consumer protection regulation against loan servicers and banks. The anti-trust invective of Theodore Roosevelt and Woodrow Wilson parallels a present-day concern with consolidation, especially in the tech and telecommunications fields, and a revival and retheorizing of anti-trust law.<sup>4</sup>

As in Brandeis’s time, economic upheaval has pushed out the boundaries of the political imagination. For the first time in several decades, American democracy itself is under sustained critique, the idea that the problem is not a batch of political “bad apples,” but a “bad orchard” steadily gaining currency.<sup>5</sup> Scholars diagnose a pronounced “malaise” in our democracy, while politicians on both the political left and right hammer home the point that the system is “rigged.”<sup>6</sup> Institutional tinkering is back on the radar, with a flurry of popular and scholarly proposals targeting the constitutional system’s more undemocratic features. This includes the abolishment of the Electoral College (or at least its circumvention by inter-state compact); term limits for Supreme Court justices; Senate representation for Washington, D.C. and Puerto Rico; and a constitutional amendment to overturn the Court’s 2010 *Citizens United* decision and sever the unholy alliance of money and politics.<sup>7</sup>

History imitates itself, but it does not repeat. For the Progressives, this latest flourishing of constitutional criticism would be small potatoes; almost a century-and-a-half ago, popular discontent was spurring calls to radically reimagine the Constitution in ways that would be unimaginable today. One of the defining constitutional theories of the time was that of economic historian Charles Beard, who saw the Constitution as irretrievably anti-democratic, its scheme of checks and balances part of an elaborate machinery concocted by a wealthy aristocratic class to shield property from the grasp of popular majorities.<sup>8</sup> Progressives saw their critiques of the Constitution, not as anti-American or exceptionally radical, but as part of a longer, veritably American tradition of Jeffersonian and Hamiltonian thought—Hamiltonian in calling for a government capable of swift and decisive action; Jeffersonian in the hope to free Americans from “worship” of the Constitution and allow democratic majorities to exercise mastery over their constitutional fate.<sup>9</sup> Progressives agreed in the main that *some* departure from the old text was necessary; the question was, a departure of what kind?

While the fundamental heterogeneity of Progressive thought on economic theory, race, religion, and gender has been well-established, scholars have not normally paid Progressive constitutional thought the same courtesy.<sup>10</sup> Progressive-era legal thought

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<sup>4</sup> JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* (2019); Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 *YALE L.J.* 564 (2017).

<sup>5</sup> JACOB HACKER & PAUL PIERSON, *AMERICAN AMNESIA* 342 (2016).

<sup>6</sup> Jack M. Balkin, *Constitutional Crisis and Constitution Rot in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 13 (Mark A. Graber et al eds. 2018); LAWRENCE LESSIG, *REPUBLIC, LOST: VERSION 2.0* (2015); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS* (2016). Politicians denouncing a “rigged system” include Elizabeth Warren, *Speech of February 9, 2019* (Lowell, Massachusetts); Bernie Sanders (@BernieSanders), Twitter (June 6, 2019, 5:57 PM), <https://twitter.com/bernieanders/status/1136754053369778176?lang=en>; Donald Trump, Address of July 22, 2019 (Washington, DC).

<sup>7</sup> See, e.g., CAMPAIGN FOR SCOTUS TERM LIMITS (<https://scotustermlimits.org>); Democracy For All Amendment of 2019, H.R. 2, 116th Congress (2019).

<sup>8</sup> See, e.g., CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); BEARD, *AMERICAN GOVERNMENT AND POLITICS* 132 (1928).

<sup>9</sup> HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 22, 54-55 (1914).

<sup>10</sup> On Progressivism as a “divided faith,” Arthur S. Link, *What Happened to the Progressive Movement in the 1920s?*, 64 *AM. HIST. REV.* 833, 836 (Jul. 1959) (“[T]he progressive movement never really existed as a recognizable organization with common goals and a political machinery geared to achieve them”); JAMES R. HURTGEN, *THE DIVIDED MIND OF AMERICAN LIBERALISM* (2002); Peter G. Filene, *An Obituary for ‘The Progressive Movement’*, 22 *AM. Q.* 20 (1970) (seeking to “prove that ‘the progressive

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is conventionally associated with a pragmatic and unsentimental “revolt against formalism” that deemphasized fixed rights and structure in favor of popular democracy, the ancestor of modern-day currents of *living constitutionalism*, in its pragmatist, radical, or popular varieties.<sup>11</sup> Yet a key question provoked a multiplicity of opinions: did the old 1787 structure “have enough internal resources to survive modern pressures, or would it have to be scrapped entirely?”<sup>12</sup> The debate boiled down to a fundamental question of textual interpretation. For some Progressives, the Constitution was represented by its Preamble, a compendium of lofty phrases—“vague words” and “ambiguous expressions,” wrote Beard—with little fixed content.<sup>13</sup> Nothing in the document prevented the people from suffusing the text with new meaning as they saw fit to meet their own needs and wishes: *constitutional reform*, therefore, required little more than *rereading*. This line of anti-formal thought, which I call *interpretivism*, represents the dominant picture of Progressive Era legal thought that has survived in scholarly work.

But whatever Beard and his ilk thought about the Constitution’s capacity for nearly endless reinvention, for other Progressives, the problem was less simple. For a radical democrat like Columbia University historian J. Allen Smith, because the Constitution’s very structural core was set against majority rule, no amount of creative interpretation could salvage its “spirit”—at least, not without major alternations.<sup>14</sup> Walter Clark, the chief justice of the Supreme Court of North Carolina, believed that the Constitution had been “made as undemocratic as possible,” and that “the sole remedy possible is by amendment of the Constitution to make it democratic.”<sup>15</sup> Such “external critics” of the Constitution embodied a *formalist* tradition of Progressive thought emphasizing the text’s hardwired features and its preservationist symbolic role in public culture.<sup>16</sup>

The formalist-interpretivist divide arose in a complicated political landscape of diverse viewpoints and parties: the Republican Party, increasingly torn between its reformist

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movement’ never existed”); Daniel T. Rodgers, *In Search of Progressivism*, 10 *REV. IN AM. HIST.* 113 (1982).

<sup>11</sup> This thesis is associated with the landmark scholarship of Morton White, Morton Horwitz and Edward Purcell Jr., as well as a revanchist conservative tradition that has used the Progressive Era as a mobilizational tool. MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1970); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1860-1960* (1992); EDWARD PURCELL JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973); Stephen M. Teles, *How the Progressives Became the Tea Party’s Mortal Enemy: Networks, Movements, and the Political Currency of Ideas in THE PROGRESSIVES’ CENTURY* 453 (Stephen Skowronek et al. ed 2016) (providing an overview of present-day right-wing critiques of the Progressive Era, particularly those that have used the Progressives as a mobilizing symbol).

<sup>12</sup> Aziz Rana, *Progressivism and the Disenchanted Constitution in THE PROGRESSIVES’ CENTURY* 25, 25 (Stephen Skowronek et al. ed 2016).

<sup>13</sup> Charles Beard, *The Living Constitution*, 185 *THE ANN. OF THE AM. ACAD. OF POL. & SOC. SCI.* 29, 30 (May 1936). *But see* Donald Lutz, *The United States Constitution as an Incomplete Text*, 496 *AN. OF THE AM. ACAD. OF POL. & SOC. SCI.* 23 (Mar. 1988) (arguing that gaps in the text of the Constitution should be filled by a purposive reading that includes the Declaration of Independence as part of the constitutional canon). Recently, comparative constitutional theorists are questioning the idea that constitutional preambles should of necessity be unenforceable, but as a matter of practice, they acknowledge that the U.S. preamble “remains the most neglected section in American constitutional theory.” Liav Orgad, *The preamble in constitutional interpretation*, 8 *INT. J. CON. L.* 4 714 (Oct. 2010).

<sup>14</sup> Curiously, this conclusion seems to follow from Beard’s own neo-Marxist account, although he did not see things that way.

<sup>15</sup> Walter Clark, *Some Defects of the Constitution of the United States* 3, 7 (Address to the Law Department of the University of Pennsylvania on April 27, 1906).

<sup>16</sup> Aziz Rana, in his excellent survey of constitutional critique in the Progressive Era, distinguishes between “internal” and “external critics” of the Constitution, a divide which corresponds to the one I draw between interpretivists and formalists. Internal critics, presumably more sympathetic to the text, believed that it could be salvaged. External critics, such as the Socialist Party, took it as settled that the text could not be salvaged without major revision. Rana, *supra* n. 12 at 49-50.

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and conservative wings, which were represented by Theodore Roosevelt and William Howard Taft, respectively; the Democrats, still the party of the South but nurturing a growing discontent among farmers and laborers toward the monied classes; Socialists, who saw repudiating the Constitution as a critical step toward constructing a classless society; and the Progressive Party, short-lived as a party but prominent in reorienting the terms of the political debate and spearheading reform at all levels. *Progressive formalism* scooped up elements of all these groups into an unlikely coalition of radical Constitution-skeptics like Smith and legalists like Taft, whose moderate Progressive sympathies lay uneasily with his concern to preserve law's formal integrity. To a loose extent, one's position on the formalism-interpretivism question was predicted, too, by profession: although lawyers and judges were among the early proponents of Progressive constitutional reforms, by the 1920s only a handful of national figures like the dogged Robert "Fighting Bob" La Follette (R-WI) believed Progressivism required putting higher law-making power directly into the hands of the people. Academics and legal scholars like Beard, Oliver Wendell Holmes, Woodrow Wilson, Louis Brandeis, and Felix Frankfurter turned, more soberly, to theory to solve the impasse between reformist goals and institutional limits.<sup>17</sup> What the Constitution did not provide, legal practitioners could read into it.

Layered upon these party and vocational groupings were regional ones, as well. A particularly pure form of Progressive democracy thrived at the state level in the American West, where critiques of moneyed interests and calls for direct democratic reforms sat well with frontier democrats writing brand-new constitutions.<sup>18</sup> In addition to causes like women's suffrage and regulation of the trusts, reformers advocated for greater popular control over higher law.<sup>19</sup> Oregon's William Simon U'Ren became a symbol of this strand of popular democratic Progressivism. At age 33, the former blacksmith decided his life's work would be to become a "tool make[r] for democracy," and his study of Swiss-style democracy convinced him that the referendum, the initiative, and the recall were the right tools for a modern American democracy.

Recovering the vibrant but largely-ignored tradition of Progressive formalism is the one of the principal contributions of this Article. A second is to explain how and why formalism lost out to its interpretivist counterpart. There were several contributing factors: the Sixteenth through Nineteenth Amendments, which sapped the public's appetite for further constitutional revision; the Wilson administration's success at coopting much of the Progressive agenda with the Clayton Antitrust Act of 1914, the establishment of the Federal Reserve Bank and the Federal Trade Commission, federal farm loan boards, the eight-hour workday, and women's suffrage; and the larger decline of Progressivism after the First World War and Prohibition soured many on the Progressives' top-down, bureaucratic vision of governance.<sup>20</sup>

Yet perhaps the crucial factor in the eclipse of progressive formalism lies in the tidy solution interpretivism offered to the problem of a rigid constitution. Wilson was again a key figure in this story, pivoting from a critic of the Constitution as a young academic to a supporter as a politician. What he had once considered a rickety, rigid

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<sup>17</sup> At the state level, constitutional reformism continued to thrive, however, well into the 1920s and 1930s, and indeed, the present day. See, e.g., John L. Shover, *The California Progressives and the 1924 Campaign*, 51 CAL. HIST. Q. 59, 59 (Spring 1972) ("California Progressivism remained a viable political movement in the nineteen twenties."). John Dinan thoroughly catalogues these practices in *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* (2018), esp. Ch. 1.

<sup>18</sup> AMY BRIDGES, *DEMOCRATIC BEGINNINGS 3* (2015) (describing the constitution-writers in the new states as working on changed understandings of "citizenship in a democratic republic"); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11 (1997).

<sup>19</sup> BRIDGES, *supra* n. 18.

<sup>20</sup> Link, *supra* n. 10 at 838-39.

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machine crippling strong popular leadership he later called a “vehicle of life” whose “spirit is always the spirit of the age.”<sup>21</sup> Wilson’s turn to interpretivism was paralleled by his evolution from a defender of parliamentarism in his 1884 *Congressional Government* to his championing, in his 1908 *Constitutional Government in the United States*, of a strong President as a force supplying government with energy and purpose. Wilson’s good friend, the political scientist Henry Jones Ford captured this sentiment when he wrote in his 1898 *The Rise and Growth of American Politics*: “The greatness of the presidency is the work of the people, breaking through the constitutional form.”<sup>22</sup>

Most Progressives probably had not read Italian sociologist Robert Michels’ 1911 classic *Political Parties*; if they had, they might have been dismayed by Michels’ “iron law” whereby democratic movements unavoidably evolve into top-heavy, oligarchic structures.<sup>23</sup> Just as, after 1912, the bulk of Progressives were eventually folded into the Democratic Party, so—particularly after World War I and Prohibition’s excesses sapped popular faith in democracy—did the spirit of radical reform disappear under the mantle of legal realism and New Deal technocratic paternalism. By the 1920s, popular crusaders like La Follette and California’s Hiram Johnson had come to seem naïve remnants of an earlier age. A young Felix Frankfurter supported Robert La Follette’s 1924 presidential campaign though he considered the elder statesman’s fixation with constitutional amendment proposals “pie-in-the-sky.”<sup>24</sup> FDR’s Brains Trust marked perhaps the culminating symbol of Progressivism’s abandonment of a pure democratic faith for a rule by experts.

There are several reasons why this story is worth retrieving at the present moment. Painting Progressive constitutional thought as purely the handiwork of pragmatists and realists not only reifies a view of modern-day liberalism as linked to constitutional anti-formalism<sup>25</sup>; it also leaves conspicuously unexplained the fact that the Progressive Era is one of the peaks of constitution-writing and amendment in American history.<sup>26</sup> Had interpretivism, so to speak, been the only game in town, it would be difficult to explain the passage of four constitutional amendments in a seven-year period, affecting some of the most contentious issues of the day—taxation, the direct election of senators, Prohibition, and women’s suffrage. Nor can the standard account explain the national preoccupation with “Constitution-tinkering,” as alarmed conservatives of the time called it: the popular initiative and referendum and abolishing judicial review, the appearance of national political party platforms including constitutional amendment proposals, or the remarkable 1,004 amendment proposals floated in Congress between 1899 and 1925 alone.<sup>27</sup> Calls for change were so widespread that

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<sup>21</sup> WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 69 (1908).

<sup>22</sup> HENRY JONES FORD, *THE RISE AND GROWTH OF AMERICAN POLITICS* 292–93 (1898). On Woodrow Wilson’s bona fides as a reformer, see *infra*, n. 39.

<sup>23</sup> *Id.* at 12 (“Organization implies the tendency to oligarchy. In every organization, whether it be a political party, a professional union, or any other association of the kind, the aristocratic tendency manifests itself very clearly. The mechanism of the organization, while conferring a solidity of structure, induces serious changes in the organized mass, completely inverting the respective position of the leaders and the led. As a result of organization, every party or professional union becomes divided into a minority of directors and a majority of directed.”)

<sup>24</sup> BRAD SNYDER, *THE HOUSE OF TRUTH* 349 (2017).

<sup>25</sup> *c.f.* Paul Killebrew, *Where Are All The Left-Wing Textualists?*, 82 NYU L. REV. 1895 (2007).

<sup>26</sup> This asymmetry places legal scholarship of the Progressive Era on very different footing than social or political accounts, which identify this period as a peak of popular mobilization. Histories of labor and feminist politics are particularly strong on this point, see, e.g., PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* (2008); ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877-1917* (1999); NELL IRVIN PAINTER, *STANDING AT ARMAGEDDON* (2008).

<sup>27</sup> As a typical statement of contemporary alarm about “Constitution-tinkering,” see Robert E. Lee Saner, “Has America Outgrown the Constitution?” (Address at the Annual Meeting of the Alabama State Bar Association on July 2, 1925), in *REP. OF PROCEEDINGS OF THE ANNUAL MEETING OF THE*

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real political pressure existed to convene a convention to draft a new Constitution—something that today would be entirely unthinkable.<sup>28</sup>

By comparison, today’s popular dissatisfaction turns its sights not onto reforming or reconstructing institutions, but on capturing, working around, or at most tweaking them. The narrow ambitions of present-day reform efforts reflect a fundamental difference between the Progressive Era and ours: namely, a lack of faith in the transformative power of democratic majorities. Even the swell of popular anger that carried Donald Trump to the White House was fundamentally status quoist, with the pledge to “Drain the swamp!” conceding that, with a new cast of characters, the problems would self-correct. There are many reasons for our present pessimism about democratic solutions: the rocky twentieth-century trajectory of direct democracy in states like California<sup>29</sup>; declining civic participation;<sup>30</sup> and, crucially, the “strong upper-class accent” of policymaking, exacerbated by organized lobbying, the concentration of wealth among top earners, and the Supreme Court’s effective elimination of legal barriers to the use of money in political campaigns.<sup>31</sup> The loss of a Progressive tradition of formal-democratic constitutionalism, while often neglected, is also among them.

The story told here offers another lesson for the debates of today. Interpretivism is ordinarily associated with evolving rights. When the Supreme Court, for instance, found a constitutional right to marry that could not be denied to same-sex couples, Justice Roberts memorably insisted in dissent that “the Constitution had nothing to do with” the result.<sup>32</sup> Constitutional structure, meanwhile, is supposed to be fixed, resistant to erosion by changing political winds. Yet this story calls precisely this conclusion into question. Interpretivism triumphed precisely because it offered a way to reroute the hardwired features of the Constitution by informal means: a Progressive presidency that would bridge constitutional separations by active leadership, enabling the government to tackle modern problems with energy and purpose. Yet today, it is not clear that there is an interpretivist solution to the problems posed by this new constitutional order.

As Bruce Ackerman adverts, because America has “lost the ability to write,” most of our “operational [constitutional] canon” (i.e., what courts deciding constitutional questions are “likely to do in fact”<sup>33</sup>) lies outside the four corners of the text.<sup>34</sup> We might

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ALA. ST. BAR 94 (Jul. 1-2, 1925). See also JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 151 (1992); MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITS OWN* 204-08, 226-31 (1986).

<sup>28</sup> Rana, *supra* n. 12 at 50.

<sup>29</sup> RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* (2002).

<sup>30</sup> William A. Galston, *Civic Engagement, Civic Education, and Civic Engagement: A Summary of Recent Research*, 30 INT. J. PUB. ADMIN. 623 (May 8, 2007); CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY (Theda Skocpol & Morris P. Fiorina ed. 1999); THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* (2004); Edward T. Walker, *Privatizing Participation: Civic Change and the Organizational Dynamics of Grassroots Lobbying Firms*, 74 AM. SOC. REV. 83 (2009).

<sup>31</sup> The phrase “strong upper-class accent” comes from E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE* (1960) (expressing a concern that liberal interest-group pluralism gave organized interests disproportionate influence over policy outcomes). On the political organization, behavior, and outsized policy influence of the wealthy, see e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* () and CHRISTOPHER H. ACHEN & LARRY BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* (2017); ANAND GIRIDHARADAS, *WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD* (2018); JANE MAYER, *DARK MONEY* (2017).

<sup>32</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_ 29 (2015) (slip op.) (ROBERTS, J., dissenting).

<sup>33</sup> Oliver Wendell Holmes, *The Path of the Law* 10 HARV. L. REV. 457, 461 (1897).

<sup>34</sup> Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1752 (2007).



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call this *constitutionalism by canonization*, and it has several problematic implications. First, a healthy constitutional system requires “reverence for the laws,”<sup>35</sup> yet some scholars believe that, as the years pass without major reform, a “sacralization of the text” is taking place that “discourag[e]s] recognition of its all-too-present imperfections.”<sup>36</sup> Even worse, the spread of a Manichean view that equates textual preservation with patriotism per se may strangle all forms of constitutional change—or in practice, political life. A second problem with constitutional theorizing outside a “frozen” text is that formalism itself becomes ever harder to sustain.<sup>37</sup> After two centuries of an American state (especially the American presidency) unfolding under a fixed constitution, the gap between text and reality is larger than ever. Conservative scholarship often takes this as a starting point for urging a “return” to original understandings, but these attempts often seem like opportunism—for instance, many conservatives indict the constitutionality of the administrative state but pass over America’s global military.<sup>38</sup> Trying to force modern problems within “the four corners of the text” requires increasingly heroic interpretive leaps. Constitutional text is invoked, in the words of one originalist scholar, “at such a high level of generality that it ceases to function as an effective constraint on the interpreter.”<sup>39</sup> Third and finally, as the Constitution becomes a frozen idol, American constitutional life becomes a performance of warring legal elites advancing canons of “super-precedents” that, they claim, *definitively* set the proper bounds of what is constitutional: the civil rights movement or the modern cult of the Second Amendment, for instance. While increasingly preaching to the choir, such claims lack persuasive authority to those of a different constitutional denomination, so to speak. The two problems, I suggest, are quite interrelated: as avenues for *literal* popular authorship of constitutional text have dried up, the power claims at stake in constitutional argumentation are increasingly obvious, which makes these arguments, in turn, increasingly suspect. This places us in a self-defeating predicament: the more exclusively we rely on constitutional construction to do the work of supplying constitutional meaning, the weaker the persuasive power of these arguments.

Progressive formalism always had its quixotic aspects.<sup>40</sup> To say that nothing short of revising our Constitution will do is an obvious non-starter. But even if a Constitutional Convention is not a possibility in any foreseeable future—and given present

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<sup>35</sup> James Madison, No. 49 in THE FEDERALIST (Clinton Rossiter ed. 1961 [1789]).

<sup>36</sup> Sanford Levinson, Introduction: Imperfection and Amendability in RESPONDING TO IMPERFECTION 4, *supra* n. 24. Aziz Rana echoes the diagnosis of what he calls “creedal constitutionalism” in THE RISE OF THE CONSTITUTION (manuscript on file with author); Rana, *supra* n. 12 at 56.

<sup>37</sup> See Thomas W. Merrill, Interpreting an Unamendable Text, 71 VANDERBILT L. REV. 547, 552 (2018) (arguing that unamendable texts have particular interpretive consequences, namely that “the interpreter will increasingly substitute analysis of precedent interpreting the text for interpretation of the text itself,” transforming the process of interpretation into “a species of common law incrementalism”).

<sup>38</sup> ERIC J. SEGALL, ORIGINALISM AS FAITH xi (2018) (“Originalism is a method of textual interpretation that is nothing more than a misleading label for conservative results for some (the Justices) and an article of faith for others including many legal scholars and the public at large.”); Lawrence Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 J. CONST. LAW 167 n. 29 (“One of the most common objections to constitutional originalism is that it is a “flag of convenience”).

<sup>39</sup> CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 395 (1994).

<sup>40</sup> Stephen Griffin describes a similar concept he calls “rule-of-law constitutionalism,” whose object “is to preserve a clear separation between constitutional law and everyday politics by making sure that everyone has the same understanding of what the Constitution means.” To achieve this unanimity in constitutional interpretation, rule-of-law constitutionalism “insists that every important change in constitutional practice be marked by an amendment, just as every important change in statutory law is marked by new legislation.” Griffin rejects this philosophy as overly literalistic and constricting of political growth. Stephen M. Griffin, Constitutionalism in the United States: From Theory to Politics in RESPONDING TO IMPERFECTION 42 (Sanford Levinson ed. 1995).

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political dissensus, such a Convention would almost certainly be unproductive—recovering Progressive formalist thought remains worthwhile in the present day. Orienting the conversation on political dysfunction around institutions, as the Progressives did, encourages us to think more like political scientists about our governing institutions: how are particular configurations working in practice, and which might be more useful? Vying to “disenthrall” Americans from “constitution worship” does not mean abandoning constitutional values of limited government, federalism, or individual rights. Indeed, a more pragmatic, instrumental attitude toward the Constitution could invite broader debate about which forms are best suited to maximizing these values. Furthermore, cultivating a more literal form of popular “authorship” over the text itself constitutes a particularly strong form of civic education, with the result being better popular understanding of, as well as allegiance to the text, not to mention enhancing the legitimacy of constitutional theory and argumentation itself.<sup>41</sup> Progressive formalism offers particular consolations for conservatives, as well: first, because it ties constitutional change to (more demanding) textual reform; secondly, because it takes seriously the implied limits of text in a way much constitutional debate today does not. Broad-based, open debate about how power is to be allocated and exercised in our democracy could help extricate us from a structure of constitutional norms built on shifting sands. A hundred years after the end of Progressive formalism, we are still in pursuit of the same end: submitting political power to legible democratic controls.

## The Progressive Crisis of Law and Democracy

As the nineteenth century drew to a close, Progressives took a hard look at American democracy and found much to be displeased with. In the words of historian Vernon Parrington, a series of “blowsy romanticisms”—the independent Jeffersonian farmer, Jacksonian democracy, frontier life, universal male suffrage, the Constitution—had lulled the American people into complacency.<sup>42</sup> Democracy lay in the hands of political parties; the economic life of the nation was prey to the whims of moneyed elites and “the predominant influence of lawyers.”<sup>43</sup> Party machines, with their deep pockets and tight-knit, bottom-up structure, hand-selected political candidates (including for President), set legislative priorities, and staffed the public bureaucracy. A cadre of newly moneyed elites was exploiting America’s “lawless and unregulated individualism” to turn the federal government into a “mouthpiece and agent of property interests.”<sup>44</sup> In its new role as protector of individual rights against state action, the Supreme Court was proving a disappointment, dismantling, under the aegis of the Fourteenth Amendment, the states’ and federal government’s first efforts to protect workers under law.<sup>45</sup> Collectively, it made for an American government uniquely unresponsive to the popular will: party politics were shot through with bribery and corruption, the federal bureaucracy was a morass of patronage and incompetence,

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<sup>41</sup> Heidi Schreck’s breakaway hit play of 2017, *What the Constitution Means to Me*, tellingly concludes with a staged impromptu debate over whether we should abolish the Constitution.

<sup>42</sup> Vernon Parrington, *Introduction in* J. ALLEN SMITH, *THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT* xi (1929).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 197-98 (1988) (describing the Court’s Fourteenth Amendment jurisprudence in this period as attempting to reconcile the twin imperatives of restraining the postwar South from discriminating against blacks and Northerners while, on the other hand, refraining from radically altering the powers of the federal government).

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Congress was prone to immobilism and capture by wealthy elites, and the President was a weakling beholden to his party.<sup>46</sup>

The Progressives saw hope on the horizon, however. A series of events had shaken the nation's faith in its institutions, making it a propitious time for reform: the Whiskey Ring and Crédit Mobilier scandals of the Grant administration; widespread discontent at Reconstruction and Jim Crow alike; the growing strength of the woman suffrage movement; protracted agrarian and labor unrest that culminated in the 1886 Haymarket bombings, the nationwide Pullman strike, and the 1896 presidential campaign of William Jennings Bryan; disputes over the tariff and the gold standard; and the constant thrum of "muck-raking" exposés of political corruption, urban squalor, and rampant price-gouging and monopolistic practices among the "trusts." "The Age of Innocence," writes Parrington, was "past, and a mood of honest realism was putting away the naive myths that passed for history and substituting homely authentic fact."<sup>47</sup>

The swelling discontent that percolated into the Progressive Movement took shape in the late 1870s in two very different settings. In the cities, a coalition of middle-class reform-oriented voters, academic experts, and reformers began to contest and win municipal elections in places like Detroit, Cleveland, Jersey City, and New York.<sup>48</sup> As they wrested back control of local government from the political bosses, urban Progressives advanced a series of reforms to make government more "businesslike" (more effective, efficient, and less corrupt), including the introduction of scientific methods into government, compulsory education, and administrative innovations.<sup>49</sup> Around the same time, Progressive ideas started to win adherents in the South and West, as struggling farmers bolted from small government Bourbon Democrats like Samuel Tilden and Grover Cleveland and toward reformers like Bryan, whose 1896 presidential campaign platform called for monetary inflation, stronger antitrust laws, strict regulation of railroads, a protective tariff, and an income tax—all of which required the expansion of governmental powers at the national level.<sup>50</sup> After an 1885 article in the *Nation* by British jurist A.V. Dicey praised the Swiss as "the most democratic population of Europe" and endorsed the referendum, which gave the People greater say over higher law, these devices took off at the state level. Bryan endorsed the initiative and recall in his 1896 presidential campaign, and in 1898, South Dakota became the first state to encode them into law. Between 1867 and 1914, twenty-five state constitutions came into existence or were substantially revised, fifteen of which adopted the popular initiative, referendum, and/or the recall.

But the heady wave of progress soon hit a wall. While radical "constitution tinkering" by the states, as contemporaries called it, survived Supreme Court scrutiny, economic regulation proved a bridge too far.<sup>51</sup> In 1877, the Court delivered reformers an early

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<sup>46</sup> STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982).

<sup>47</sup> Parrington, *supra* n. 42 at xi.

<sup>48</sup> Richard Hofstadter, *Introduction in* THE PROGRESSIVE MOVEMENT 1900-1915 5-10 (Richard Hofstadter ed. 1963); RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 132-135 (1955) (on the fusing of agrarian Populism and urban Progressivism after 1900).

<sup>49</sup> See, e.g., Woodrow Wilson, *The Study of Administration*, 2 POL. S. Q. 197 (Jun. 1887).

<sup>50</sup> It was in this period, many historians emphasize, that the Democratic Party shed its laissez-faire and small government roots and began to become the party of reform. The election of 1912 was the turning point, according to John Milton Cooper, *supra* n. 17 at 165. This case is also made strongly in DAVID SARASOHN, *THE PARTY OF REFORM: DEMOCRATS IN THE PROGRESSIVE ERA* (1989), and ELIZABETH SANDERS, *supra* n. 26.

<sup>51</sup> It is interesting to consider how different the American constitutional landscape would be had the Supreme Court given the "republican form of government clause" of Article IV, Section 2 the same jurisprudential weight as the Due Process Clause. Although state experiments in constitutionalism faced a number of challenges in this period under the former provision, none of these challenges survived. Prior to 1912, the Court's policy seems to have been to proceed to the merits of these

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victory with a decision in *Munn v. Illinois* holding that any business “affected with a public interest” could be regulated by states, including common carriers like railroads and grain elevators, which farmers needed to access railroads and national markets.<sup>52</sup> In a rare dissent, Justice Stephen Field vociferously insisted that business’s essentially private character was outside the power of democratic majorities to change.

A tailor’s or a shoemaker’s shop would still retain its private character even though the assembled wisdom of the State should declare, by organic act or legislative ordinance, that such a place was a public workshop and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors by giving them a new designation.<sup>53</sup>

Ensuing decades would prove Justice Field farsighted and *Munn* an aberration. Time and again, higher principles of law were invoked by the Court to invalidate democratic creations that threatened the power of business.<sup>54</sup> In its 1895 *Pollock v. Farmers’ Loan and Trust Co.* decision, the Court struck down the nation’s first income tax, which applied to just the top two percent of earners, on the grounds that the Constitution gave Congress no power to pass “direct taxes.”<sup>55</sup> In 1898, a unanimous Court invalidated, on due process grounds, a Nebraska statute that fixed railroad rates at a level the Court considered “unreasonably low.”<sup>56</sup> In the 1905 case that gave the period its name, *Lochner v. New York*, the Court held that a New York law setting a weekly maximum on workhours for bakers violated the Fourteenth Amendment’s protection of “liberty of contract as well as of person.”<sup>57</sup> These liberties featured again in a pair of cases striking down laws banning “yellow-dog” contracts, which forbade workers from joining a union.<sup>58</sup> Concerns of federalism loomed large for the Court when it ruled that a business conglomerate in control of 98% of the nation’s sugar refining capacity was beyond the reach of the 1890 Sherman Antitrust Act because the Constitution gave Congress power only to regulate “commerce,” whereas sugar refining was “manufacture,” and thus under the purview of the states.<sup>59</sup> Similar federalism concerns

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challenges, but without exception it found these forms “compatible” with the language of the Constitution. See Attorney General of the State of Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 239 (1905) (upholding legislative creation and alteration of school districts); Forsyth v. City of Hammond, 166 U.S. 506, 519 (1897) (finding that delegation of power to court to set municipal boundaries did not infringe republican form of government); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175-176 (1875) (denial of suffrage to women no violation of republican form of government). In its 1912 opinion in Pacific States Tel. Co. v. Oregon, the Court established once and for all that all such cases fell under the “political question” doctrine, and thereafter refused to reach their merits, e.g., 223 U.S. 118 (1912) (a challenge to a citizen initiative regarding tax policy); Kiernan v. City of Portland, 223 U.S. 151 (1912) (the initiative and referendum); Marshall v. Dye, 231 U.S. 250 (1913) (state constitutional amendment procedure); O’Neill v. Leamer, 239 U.S. 244 (1915) (delegation to a court to form drainage districts); Ohio ex rel. Davis v. Hildebrandt, 241 U.S. 565 (1916) (submission of legislation to referendum); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (workmen’s compensation); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930) (concurrence of all but one justice of state high court required to invalidate statute); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937) (delegation of legislative powers).

<sup>52</sup> 94 U.S. 113 (1877).

<sup>53</sup> *Id.* at 138 (FIELD, J., dissenting).

<sup>54</sup> Logan Sawyer III, Revising Constitutional History in A COMPANION TO THE GILDED AGE AND PROGRESSIVE ERA 351 (Christopher McKnight Nichols ed. 2017).

<sup>55</sup> Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895).

<sup>56</sup> Smyth v. Ames, 169 U.S. 466, 524 (1898) (observing that while ordinarily it was “not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage,” “judicial duty” required the Court “to restrain anything which, in the form of a regulation of rates,” denied railroad operators of “that equal protection which is the constitutional right of all owners of other property.”)

<sup>57</sup> Lochner v. New York, 198 U.S. 45 (1905).

<sup>58</sup> Adair v. U.S., 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915).

<sup>59</sup> United States v. E.C. Knight, 156 U.S. 1 (1898). Morton Horwitz sees this decision of emblematic of the Court’s unreconstructed formalism. HORWITZ, *supra* n. 14 at 84-85. In later decades, the Court would uphold some anti-trust prosecutions, including against J.P. Morgan’s Northern Securities Company, American Tobacco, and Standard Oil. But it deprived the Sherman Act of substantial bite by

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motivated the Court's invalidation of congressional attempts to prohibit child labor.<sup>60</sup> These same doctrines did not appear to trouble the Court when it approved use of the Sherman Act to break up labor unions and strikes.<sup>61</sup>

Disappointed Progressives lashed out against the courts.<sup>62</sup> "Why should social legislation for the twentieth century be limited by judicial norms propounded in the eighteenth century?" demanded Clyde King, a political scientist.<sup>63</sup> After *Pollock* came down, appeals court judge and *American Law Review* editor Seymour Thompson (Holmes's successor, in fact) thundered, "Our judicial annals do not afford an instance of a more unpatriotic subserviency to the demands of the rich and powerful classes."<sup>64</sup> Frank Goodnow, a Columbia University political scientist and pioneer in administrative law, insisted that the modern concept of due process was "not a legal concept at all; it comprises nothing more or less than a roving commission to judges to sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency."<sup>65</sup> Theodore Schroeder, a co-founder of the ACLU precursor Free Speech League who defended the anarchist Emma Goldman at trial, spewed forth in the *Yale Law Journal*, "So long as our judicial opinions are formed by the mental processes of the intellectual bankrupts these will only be crude justifications of predispositions acquired through personal or class interests and sympathy, 'moral' superstitions, or whim and caprice."<sup>66</sup>

Others like Harvard Law professor Roscoe Pound sympathized with the public frustration, but concluded more benignly that it was foolish to blame judges for a "want of sympathy with social legislation," when this was merely what they had been taught as young lawyers.<sup>67</sup> "I do not criticize these decisions," Pound wrote. "As the law stands, I do not doubt that they were rightly decided."<sup>68</sup> It was true, Pound admitted, that the law *tended* towards conservatism.<sup>69</sup> The longevity of institutions, common-law judges' adherence to precedent, the high hurdles placed on the passage of legislation and constitutional amendments—even the lengthy careers and advanced age of judges (Justice Field refused to leave the bench until he was over 80) were all stabilizing forces, making the law a frequent drag on political change.<sup>70</sup> But this was not *necessarily*

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narrowing its focus to, not bigness per se, but rather, "unreasonable" restraints of trade, defined as the use of "unfair methods" or "illegitimate means" to set prices or eliminate competitors. See Standard Oil Company of New Jersey et. al. v. United States, 221 U.S. 1 (1911) (establishing the "rule of reason" in anti-trust prosecutions); MARTIN SKLAR, *CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916* 153-54 (1998).

<sup>60</sup> Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture, 259 U.S. 20 (1922).

<sup>61</sup> Loewe v. Lawlor, 208 U.S. 274 (1908); In Re Debs, 158 U.S. 564 (1894).

<sup>62</sup> WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1993), *passim*; STEPHEN M. ENGEL, *AMERICAN POLITICIANS CONFRONT THE COURT* 225-284 (2011).

<sup>63</sup> Clyde Landon King, Review: Social Reform and the Constitution, by Frank J. Goodnow, 42 ANN. OF THE AM. ACAD. OF POL. AND SOC. SCI 371-372 (Jul. 1912).

<sup>64</sup> Seymour D. Thompson, Government by Lawyers, 30 AM. L. REV. 672 (1896).

<sup>65</sup> FRANK GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 271 (1912).

<sup>66</sup> Theodore Schroeder, Social Justice and the Courts, YALE L. J. 22, 26-27 (1912).

<sup>67</sup> Roscoe Pound, Social Justice and Legal Justice, 75 CENTRAL L. J. 455, 462 (1912).

<sup>68</sup> Pound, Do We Need a Philosophy of Law?, 5 COL. L. REV. 346, 346 (1905).

<sup>69</sup> Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 14 AM. LAWYER 445, 445 (1906) ("Law is often on very truth a government of the living by the dead").

<sup>70</sup> The law's conservative tendencies also supposedly resulted from the federal bar's excessive coziness with the private sector. Federal judges, wrote Walter Clark, chief justice of the North Carolina Supreme Court, had a "natural and perhaps unconscious bias from having spent their lives at the bar in advocacy of corporate claims." Walter Clark, *supra* n. 15 at 15. Louis Brandeis echoed Clark's diagnosis: "lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.'" Louis Brandeis, The Opportunity in the Law (Address to the Harvard Ethical Society on May 4, 1905).

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so. The problem, Pound concluded, lay in “our legal thinking and legal teaching.”<sup>71</sup> Pound decided that the problem was “the individualist spirit of our common law” that animated legal education, a spirit that “agree[d] ill with a collectivist age.”<sup>72</sup> For the modern-day sociologist and economist, “the isolated individual is no longer taken for the center of the universe.”<sup>73</sup> Yet individualist-oriented theories of property rights and freedom of contract still taught at law schools remained indifferent to modern circumstances.<sup>74</sup> A young Louis Brandeis agreed. The social sciences had adapted to the changes of the late nineteenth-century—a revolution, wrote Brandeis, “which affected the life of the people more fundamentally than any political revolution known to history.” But “legal science” remained “largely deaf and blind” to these changes.<sup>75</sup> Something had to give way.

How could the federal bar be coaxed into the modern age? The first step was to do away with sentimental old fictions that kept lawyers from seeing things clearly. In 1881, Brandeis’s hero Oliver Wendell Holmes had revolutionized American jurisprudence with his *The Common Law*, a hardboiled critique of nineteenth century formalist thought, with its mawkish faith in logical syllogisms and eternal, pre-political values.<sup>76</sup> For Holmes, these pretensions at universality merely served to mask the subjective decisions judges were making in fact.<sup>77</sup> Law was not a “brooding omnipresence in the sky,” as Holmes later wrote, but rather, in practice more likely to be the product of “the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men.”<sup>78</sup> These were the factors that influenced judges’ thinking, Holmes insisted, and which in turn defined the rules under which men and women lived.<sup>79</sup> The fix was to make the study of law more “rational” and scientific by infusing judicial decision-making with the teachings of history and economics. As Holmes wrote in his widely circulated 1897 speech, “The Path of the Law”:

[History] is a part of the rational study [of law], because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>80</sup>

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<sup>71</sup> Roscoe Pound, *supra* n. 67 at 462.

<sup>72</sup> *Id.* at 447.

<sup>73</sup> Pound, *supra* n. 68 at 346. (“[T]o-day the isolated individual is no longer taken for the center of the universe. We see now that he is an abstraction, and has never had a concrete existence. ... We recognize that society is in some wise a co-worker with each in what he is and in what he does, and that he does is quite as much wrought through him by society as wrought by him alone.”)

<sup>74</sup> Pound, *The Need of a Sociological Jurisprudence*, 31 ANN. REP. OF THE AM. BAR. ASSOC. 990 (1907).

<sup>75</sup> Brandeis, *supra* n. 1 at 463-64.

<sup>76</sup> A sizeable body of scholarship has been dedicated to rescuing the nineteenth-century jurist from the caricature of the “deductive formalist bogeyman” that Holmes left behind. Ronald Dworkin that anti-formalist critics had “so far [had] had little luck in caging and exhibiting mechanical jurisprudists (all specimens captured—even Blackstone and Joseph Beale—had to be released after careful reading of their texts.)” TAKING RIGHTS SERIOUSLY 15-16 (1978). Holmes may have been making a strawman out of his critics, but for my purposes here, it matters less whether we classify nineteenth-century legal thought as deductive, formalist, transcendentalist, or moral realist than that Holmes and his contemporaries helped to usher in new realism in the field of jurisprudence.

<sup>77</sup> SNYDER, *supra* n. 24 at 128.

<sup>78</sup> *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917) (HOLMES, J., dissenting); Holmes, *supra* n. 28.

<sup>79</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

<sup>80</sup> Holmes, *supra* n. 33 at 469.

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One immediate consequence of Holmes's challenge was the scientific revolution in the law that he had called for. As counsel for the state of Oregon in *Mueller v. Oregon* (1908), Brandeis submitted to the Court a 100-page brief studded with medical data, survey results, and social scientific theories about the unhealthy effects of excess work on female laborers.<sup>81</sup> A second consequence of Holmes's broadside was that, by the time of his celebrated quip in *Lochner*—"The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics"—a new generation had been led to doubt whether the law itself had any determinate content to it whatsoever.<sup>82</sup> In the middle third of the century, a plethora of theories would step in to fill the void left by Holmes's attack on formalism, including legal realism, positivism, and legal process theory.<sup>83</sup> But in its early twentieth-century form, *textual interpretivism*, the severing of law's form from its content, delivered legal thinkers a tool for salvaging the legitimacy of a tarnished bench. Sympathetic reformers could now meet criticism of the law's supposedly inherent conservative tendencies with an easy reply: the problem lay, not with the law itself, nor the institutions that applied it, but merely with misguided judges imbuing the law with the wrong set of values. These, after all, could be re-educated, or simply replaced.

## Two Strands of Progressive Constitutionalism

The same debate was going on in parallel with regard to constitutional law. Building upon the "muted fury" of early Progressives and muckrakers, a later generation of intellectuals would recast early critiques of the bench into a full-fledged indictment of the constitutional system.<sup>84</sup> On this account, the social injustice and economic inequality plaguing the country were attributable to a constitutional system which, while useful in its own time, could no longer serve the interests of a modern, industrial society. Common-law historicism loomed large in these critiques, just as it had in Holmes's attack on nineteenth-century formalism.

Progressives' charges against the Constitution included its protection of property rights, limitation of federal power, and the antimajoritarian nature of checks and balances. Political scientist Frank Goodnow argued, by way of critique, that the very "basis of the American constitutional system" was a Jeffersonian belief in "eternal" and "inalienable" rights.<sup>85</sup> Goodnow's junior colleague at Columbia, historian Charles Beard had equally little patience for theories that viewed the law as "made out of some abstract stuff known as 'justice.'" The law, instead, was a product of its time, and particularly the socioeconomic conditions in which it had been created and applied. For Beard, the Constitution was an artifact of Jefferson's America, an egalitarian, pre-industrial agrarian democratic oasis that the Industrial Revolution had buried and to which the United States would never return again.<sup>86</sup>

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<sup>81</sup> As Lucas Powe writes in a different context, "A lawyer reading [the Brandeis Brief] was sure to ask, 'where's the law?'" LUCAS A. POWE, *THE WARREN COURT IN AMERICAN POLITICS* 40 (2000) (discussing the Court's 1954 decision in *Brown v. Board of Education of Topeka, Kansas*).

<sup>82</sup> Ironically, after *Lochner* came out, the newspapers quoted, not Holmes, but the dissenting opinion of Justice John Harlan. It was not until 1909 that Roscoe Pound argued that Holmes' dissent contained "a few sentences that deserve to become classical." Still, the public mostly ignored it. SNYDER, *supra* n. 24 at 316.

<sup>83</sup> Purcell has exhaustively tracked the different strands: realists, positivists, Brandeisians (social justice reformers), legal process theory, among others, into which early legal realism would later evolve. PURCELL, *supra* n. 11 at 153-54.

<sup>84</sup> ROSS, *supra* n. 62; MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF PROGRESSIVISM, 1870-1920* (2003).

<sup>85</sup> GOODNOW, *supra* n. 65 at 4-5.

<sup>86</sup> CHARLES BEARD, *AN ECONOMIC INTERPRETATION*, *supra* n. 8 at 12-13.

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A further source of frustration with the Constitution was the sheer lack of power it left Congress to address the greatest concern of the day: the concentration of capital in a modern industrial economy. The rise of enormous conglomerates whose empires stretched across state, even national borders had generated an enormous regulatory vacuum. Yet the Constitution parceled out economic regulatory power, allowing each state to regulate its corporations and companies as it saw fit. Not only that, but it also blunted the power of democratic majorities through its needlessly complicated scheme of checks and balances: staggered elections, the Electoral College, and the jurisdiction of the federal bench were seen as particularly objectionable. The journalist Walter Weyl voiced a typical version of this complaint when he wrote, “Despite race and sex limitations, we have a practically democratic suffrage, and if we were once fairly united in opposition to any institution, however protected by money, we could vote it off the face of the continent.”<sup>87</sup> What stood in the way of such redemptive action was the deadening, fragmenting effect of the Government’s mediating institutions. The Progressives reached the conclusion that the Founding Fathers had had a crippling fear of majorities.

A flurry of accounts began to reexamine the Constitution’s origins with the aim of exposing its true guiding motives.<sup>88</sup> By far the most important was Charles Beard’s 1913 *An Economic Interpretation of the Constitution of the United States*, which famously described the Constitution as primarily “an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.”<sup>89</sup> Beard’s account built on the earlier one of his colleague Goodnow, but it was far less charitable: where Goodnow had seen philosophical error in Jefferson’s static conception of history, Beard saw intentional, self-interested connivance by a conservative, property-rich minority in the young nation.<sup>90</sup>

Beard’s story was echoed by scores of writers of the period. Walter Weyl provocatively described the Constitution as “a political trust.”<sup>91</sup> Franklin Pierce, a New York lawyer and anti-tariff and antitrust reformer, called the Constitution “the most undemocratic instrument to be found in any country in the world today.”<sup>92</sup> For Herbert Croly, whose 1909 *The Promise of American Life* was one of the most important works of the period, the very theory of checks and balances was the institutional manifestation of the Framers’ “profound suspicion of human nature,” an “organization of obstacles and precautions” that cemented in place a government “divided against itself,” so incapable of concerted, deliberate action as to be “deliberately and effectively weakened.”<sup>93</sup> A young Woodrow Wilson, while not a devotee of Beardian skepticism, nonetheless agreed that it would be difficult to find “a constitution upon record more complicated with balances than ours.”<sup>94</sup>

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<sup>87</sup> WALTER WEYL, *THE NEW DEMOCRACY* (1912).

<sup>88</sup> See, e.g., SYDNEY GEORGE FISHER, *TRUE HISTORY OF THE AMERICAN REVOLUTION* (1902); J. ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* (1907); SMITH, *supra* n. 42; ALLAN BENSON, *OUR DISHONEST CONSTITUTION* (1914); GUSTAVUS MYERS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1912); GILBERT ROE, *OUR JUDICIAL OLIGARCHY* (1912); LOUIS BOUDIN, *GOVERNMENT BY JUDICIARY* (1932).

<sup>89</sup> BEARD, *supra* n. 8 at 324-325. Beard based this claim on a discussion of Madison’s Federalist No. 10, and although modern historians reject Beard’s materialist lens, it is often to him that the modern relevance of Federalist 10 is credited. See, e.g., FORREST MCDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* xv (1958).

<sup>90</sup> CHARLES THACH, *THE CREATION OF THE PRESIDENCY, 1775-1789* 22 (1922).

<sup>91</sup> WEYL, *supra* n. 87 at 107, 118.

<sup>92</sup> FRANKLIN PIERCE, *FEDERAL USURPATION* 172 (1908).

<sup>93</sup> CROLY, *supra* n. 9 at 37, 40.

<sup>94</sup> WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (1884).



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Having exposed the Constitution's numerous faults, many Progressives argued it was time to wean the nation off its reactionary cult of constitutionalism. Lined up against the Progressives were what journalist Norman Hapgood derisively called the "Professional Patriots," groups like the American Bar Association and those of the several states, chambers of commerce, and Rotary and Kiwanis clubs committed to a campaign of constitutional revival.<sup>95</sup> These groups poured money and energy into educational campaigns that proclaimed the perfection of the text and the genius of the Founders, and construed necessary reform as disloyal because it violated a unique national heritage of individualism and market self-regulation. Herbert Croly inveighed against this "citadel of conservatism," whose "pathetic and priggish confidence in the power of rules" had turned the Constitution into a "monarchy of the Word."<sup>96</sup>

Mounting Progressive critiques were pointing to the path of rupture, but even many who wished for it saw the road as blocked by Article V of the Constitution, which established a stringent path to formal amendment.<sup>97</sup> Herman V. Ames, a longtime professor of constitutional history at the University of Pennsylvania who counted over 1,736 proposed amendments made to the Constitution in the period from 1791 to 1897, concluded with evident disappointment that "insurmountable constitutional obstacles" lay in the way of formal amendment.<sup>98</sup> In a 1905 article on the U.S. Constitution, the Australian judge H.B. Higgins wrote: "[It is a matter of wonder to us outsiders that [such a] great people should ... submit so placidly to the straitjacket for national purposes."<sup>99</sup> Historian J. Allen Smith picked up Dicey's idea of the "slumbering sovereign" to offer a critique of the theory of social contract more broadly. The familiar image of the Constitution as establishing "emphatically, and truly, a government of the people," in John Marshall's famous words, was just another noble lie to pacify the people with periodic reminders of their supposed "sovereignty."<sup>100</sup> "Nothing," Smith wrote, "was farther from the minds" of the Framers than the idea of creating a popular body "distinct from, and entirely outside of, the government, which would control the Constitution and through it all officials who exercised the political power."<sup>101</sup> It was clear, to Progressives at least, that the Constitution neither served the people's interests, nor had ever been intended to do so.

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<sup>95</sup> Rana, *supra* n. 36 at 46. On champions of constitutionalism in the Progressive Era, see KAMMEN, *supra* n. 27 at 185-213.

<sup>96</sup> CROLY, *supra* n. 9 at 44, 225.

<sup>97</sup> U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[.]")

<sup>98</sup> HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES* 13 (1897) ("The 'fathers' of the Constitution were not sanguine enough to suppose that the organic law which they had framed was so perfect that it would never need to be altered. [Their] experience ... under the Articles of Confederation convinced them that there was need of a system of amendment by which the Constitution could be made to conform to the requirements of future times").

<sup>99</sup> Henry Bournes Higgins, *The Rigid Constitution*, 20 POL SCI. Q. 203, 204 (Jun. 1905).

<sup>100</sup> *McCulloch v. Maryland*, 17 US (4 Wheat.) 316, 419-21 (1819). On the critique of social compact theory, see GOODNOW, *supra* n. 65 at 275-6, 279 ("By reason of the fact that the government controls the interpretation and enforcement of the fundamental law, it has the power in no small degree to remove, evade, or ignore the restraints by which its authority is supposed to be limited. The people having no part in the interpretation of constitutional law, except through the public officials who exercise this power, are as a matter of course bound by the Constitution as thus interpreted. Instead of controlling the Constitution, they are controlled by it as interpreted and enforced by governmental agencies.")

<sup>101</sup> SMITH, *supra* n. 88 at 157.

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## *The Birth of Interpretivism*

If it was useless to attack the Constitution directly, some thought it could be brought down by other means. The Holmesian “revolt against formalism” presented itself as the Trojan Horse that could penetrate the citadel. Since being appointed to the bench in 1902, Holmes himself was busy applying his pragmatic, historicist lens to the Constitution.

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>102</sup>

In a 1914 case involving a civil contempt proceeding against labor leader Samuel Gompers, Holmes allowed that, to make the document useful, form could cede to function: “Provisions of the Constitution of the United States are not mathematical formulas having their essence in their form, but are organic living institutions transplanted from English soil. Their significance is not to be gathered simply from the words and a dictionary, but by considering their origin and the line of their growth.”<sup>103</sup> With his historicism, Holmes construed the Constitution as a living, evolving “organism” untethered to any theoretical absolutes; his pragmatism in turn dictated that no “higher law” would govern its evolution but what humankind required as a matter of social necessity.

The notion of a living Constitution moving with the times became for many, a kind of credo of Progressive thought.<sup>104</sup> These critics argued that the written text need not be thought of as a constraint and that in fact extensive reform could be pursued by simply reimagining existing constitutional interpretations and values. By rereading the document to serve popular ends, citizens could empty it of any troubling symbolic power. Declared Woodrow Wilson while a professor at Princeton in 1908: “The Constitution contains no theories. It is as practical a document as Magna Carta.”<sup>105</sup> In his 1912 *Social Reform and the Constitution*, Frank Goodnow argued that those who saw the Constitution as inadequate to modern times should blame neither the instrument itself nor the Framers, but its modern interpreters, who could choose between restrictive principles that would strangle national life, and those that would allow the text to thrive well into the future.<sup>106</sup> Charles Beard also saw the Constitution as fundamentally open-ended and therefore susceptible of being reconstructed to serve whatever ends social movements desired. From these meditations on the law’s “flexibility” came a hopeful conclusion: whatever ailed American democracy, it could be cured by reading. As a result, these critics saw no basic reason to call for extensive formal revisions, since the document had little fixed content. As long as one maintained an emotional distance from the text, and did not invest it with inherent value, the Constitution in practice could be a malleable tool of social change without reinforcing nationalist fantasies.<sup>107</sup>

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<sup>102</sup> *State of Missouri v. Holland*, 252 U.S. 416 (1920)

<sup>103</sup> *Gompers v. U.S.*, 233 U.S. 604, 611 (1904).

<sup>104</sup> Aziz Rana, *supra* n. 36 at 69; LOUIS MENAND, *THE METAPHYSICAL CLUB* 422 (2001) (on Holmes’s pragmatism as the “judicial credo of progressivism.”) Another leading pragmatist of the period, the educational reformer John Dewey, wrote, “[S]ocial arrangements, laws, institutions are made for man, rather than that man is made for them.” DEWEY, *RECONSTRUCTION IN PHILOSOPHY*, in JOHN DEWEY, *THE MIDDLE WORKS, 1899-1924* 191 (Jo Ann Boydston ed. 2008).

<sup>105</sup> WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 177 (1908).

<sup>106</sup> GOODNOW, *supra* n. 65 at 276.

<sup>107</sup> Rana, *supra* n. 36 at 44.

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Many Progressives insisted that the interpretivist move was not a radical break at all. After all, wrote legal philosopher Morris Cohen, “[a]s a historic fact it cannot be denied that the vast body of constitutional law has been made by our courts in accordance with their sense of justice or public policy.”<sup>108</sup> This was the very process by which the Due Process clause had been stretched by the Reconstruction Court to cover unanticipated economic liberties—precisely the point made by Justice Holmes’s attack on the *Lochner* court’s reading of the Fourteenth Amendment to “enact Mr. Herbert Spencer’s Social Statics.” If Progressives read the Constitution in a light useful to them, it would not be the first time “that our constitution has been made by past judicial interpretation to take on a meaning which is not necessarily the only meaning which may be given to it.”<sup>109</sup>

One obvious problem with interpretivism was that it was unavoidably judge-centric and status quoist. Following in Alexis de Tocqueville’s footsteps, the English scholars Viscount James Bryce and Albert Venn Dicey observed in the late 1880’s that the rigidity of the U.S. Constitution led to a kind of aristocracy of the American legal profession as compared to the English bar.<sup>110</sup> Could the Progressives criticize the “guardianship of the robe” only to replace its members and leave it intact?<sup>111</sup> Justice David J. Brewer, a laissez fairist conservative of the period, warned in typical fashion that a strong judiciary was the only thing protecting the nation from attacks on private property by the “multitudes, with whom is the power.”<sup>112</sup> The conservative Alabama attorney, Hannis Taylor, wrote an encomium to the Constitution praising the ease “with which it has adapted itself, by the aid of judicial interpretation, to the ever-increasing wants of a rapidly swelling population, continually organizing new systems of local government beyond our original limits.” Taylor was no Progressive, but he was realistic about societal change, and he saw the alternative to judge-made law as naïve.

After formal legislation has exhausted its limited resources, ... the last decisive word must be spoken by the Supreme Court of the United States. ... When the intricacy and delicacy of the mighty task which [the Court] has been executing for more than a century is calmly considered, must not the scientific jurist frankly admit that it could only have been performed through the agency of judge-made law?<sup>113</sup>

Taylor’s position scarcely differed from Brandeis’s conclusion in his 1916 speech: “What we need is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task.”<sup>114</sup> Stripped of the formalists’ professed belief in the unchanging nature of the Constitution, it was telling that Progressive interpretivists now coincided with their enemies on the question of judicial supremacy.

Another problem with interpretivism was that it left Progressives exposed to the charge that theirs was a government, not of laws, but of men. The Supreme Court, insisted one supporter, was no usurper, but a devoted servant of the law correctly applying the “theory of strict construction.” The Court had, and would always, refuse “to admit the argument from convenience to overthrow the plain letter of the

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<sup>108</sup> Morris R. Cohen, *Legal Theories and Social Science*, 25 INT. J. OF ETHICS 484, 484 (1915).

<sup>109</sup> Frank J. Goodnow, *Judicial Interpretation of Constitutional Provisions*, 3 PROCEEDINGS OF THE ACAD. OF POL SCI. IN THE CITY OF NEW YORK 9 (1913).

<sup>110</sup> Thompson, *supra* n. 64 at 685.

<sup>111</sup> CROLY, *supra* n. 9 at 234.

<sup>112</sup> David J. Brewer, *The Movement of Coercion* (Address Before the New York Bar on Jan. 17, 1893).

<sup>113</sup> HANNIS TAYLOR, *THE ELASTICITY OF WRITTEN CONSTITUTIONS* 214 (1906).

<sup>114</sup> Brandeis, *supra* n. 1 at 11.

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constitution.”<sup>115</sup> Against the Progressive challenge, associate Supreme Court justice Horace Lurton fulminated: “Neither a Constitution nor a statute is to be treated by either the executive or a judiciary as if it were a ‘nose of wax,’ to be twisted and moulded according to the fancy of the occasion.” Lurton hurled a challenge back at critics: “If our Constitution is too rigid and the constraints upon our legislative power too great, let us amend the Constitution.”<sup>116</sup>

### *Progressive Formalism*

The conservative Lurton’s challenge was rhetorical, but in this period, a number of reformers were willing to take him at his word. For all its difficulties, many still viewed constitutional amendment as a possibility, indeed a necessity. These Progressives saw the Constitution as inherently ill equipped to serve as the basis of a just and modern society, too saddled with particular cultural baggage or tied to anti-democratic structures, such as Article V, to be salvaged by judicial reinterpretation or piecemeal amendment. This view surfaced in three main quarters: among leftist cultural critics who saw themselves as the modern-day heirs of the abolitionist William Lloyd Garrison, who described the Constitution as an infernal pact to preserve slavery; at the state level, where reformers bid to build entirely new democratic societies from the one the Framers had left; and among public intellectuals concerned with constitutional rigidity as a matter of the health of the republic.

### *The Socialists*

In 1832, the abolitionist William Lloyd Garrison described the Constitution as “the most bloody and heaven-daring arrangement ever made by men for the continuance and protection of a system of the most atrocious villainy ever exhibited on earth.”<sup>117</sup> In 1867, the Scottish-born journalist James Redpath saw a link between the Constitution’s slavery-protecting features and a more generalized infrastructure of “oligarchy” it established. The Founders’ design had implanted in American life “five fortresses of aristocracy”: slavery, class rule, gentry military leadership, the Senate, and the Supreme Court. Through these oppressive systems, wrote Redpath, revolutionary-era elites had “forged iron, with equal impartiality, into tongues for liberty bells and manacles for negro slaves. The best thing we can do for them is to imitate the dutiful son of old Noah—to look away and cast a mantle of charity over their too open nakedness.”<sup>118</sup>

A half-century later, many in the rising Socialist Party seized on the abolitionists’ vision of a counter-revolutionary Constitution committed to the preservation of feudal systems of domination and hegemony. Just as abolitionists had fought economic exploitation in the form of chattel slavery, Socialists now condemned the “wage slavery” of industrial life.<sup>119</sup> Writings of the period drew out the links between the abolitionists’ arguments and the persistence of feudal strains in American legal and political life. The influential Chicago journalist and activist Algie Martin Simons quoted extensively from the abolitionist Wendell Phillips, while the radicals Crystal and Max Eastman named their 1917 journal *The Liberator* in tribute to Garrison and to denote the continuity of the abolitionist and Socialist struggles.<sup>120</sup>

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<sup>115</sup> F. Charles Hume, *The Supreme Court of the United States*, 33 AM. LAW REV. 649 (1899).

<sup>116</sup> Horace H. Lurton, *A Government of Law or a Government of Men?*, 193 N. AM. REV. 9 (1911).

<sup>117</sup> William Lloyd Garrison, *On the Constitution and the Union*, THE LIBERATOR (Dec. 29, 1832).

<sup>118</sup> Redpath, *The Three Oligarchies*, THE NATIONAL ANTI-SLAVERY STANDARD (1867), quoted in RANA, *supra* n. 36 at 46.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

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The Socialist Party was deeply committed to wholesale constitutional reform. For the first three decades of the twentieth century (practically the entire lifespan of the party as a viable national vehicle), the national party platform included proposals for dramatic formal changes to the Constitution. When the Wisconsin Socialist Victor Berger was first elected to Congress in 1910, he made reforming that “outworn garment” a point of emphasis.<sup>121</sup> In April 1911, Berger introduced a resolution calling for the abolition of the Senate, which he described as an “obstructive and useless body, a menace to the liberties of the people,” persisting even after his scandalized colleagues in the House threatened to pass a censure motion against him.<sup>122</sup> In 1912, the Socialists crafted a national party platform calling for a number of sweeping constitutional reforms. This included “proportional representation, nationally as well as locally,” “the abolition of the Senate and of the veto power of the President,” “the election of the President and Vice-President by direct vote,” “the abolition of the power usurped by the Supreme Court of the United States to pass upon the constitutionality of ... legislation enacted by Congress,” “national laws to be repealed only by act of Congress or by a referendum vote of the whole people,” “abolition of the present restrictions upon the amendment of the constitution, so that instrument may be amenable by a majority of the votes in a majority of the States,” “the granting of the right to suffrage in the District of Columbia with representation in Congress and a democratic form of municipal government,” “unrestricted and equal suffrage for men and women,” “the election of all judges for short terms,” and finally, “the calling of a convention for the revision of the constitution of the United States.” In 1916, the Socialists ran as their presidential nominee a newspaper editor named Allan Benson who in 1914 had published the provocative *Our Dishonest Constitution*.

The Socialists’ uncompromising belief was that, for the United States to become a cooperative popular democracy, the Constitution would have to be thoroughly rewritten. This meant not only eliminating certain hardwired features of the 1787 text, such as the Senate and the Electoral College, which the Socialists viewed as inherently undemocratic and standing for rule by the few. Even more profoundly, Socialists envisioned a new theory of what a constitution should be.<sup>123</sup> Whereas the Framers had left behind a short document that laid out universal principles and was insulated from ordinary political change, the Socialists embraced a text that was much closer to the ground. They wanted the Constitution to include a more detailed list of policy goals, extensive provisions for positive socioeconomic rights, and a much more flexible amendment process. They saw, in short, a Constitution as being fundamentally responsive to immediate popular needs and more democratically accountable.

### *The State Reformers*

Another site of Progressive Era constitutional ferment was at the state level. Between 1867, when Maryland rewrote its constitution to expunge the vestiges of slavery, and 1912, when Arizona, on its way to becoming the forty-eighth state, drafted a constitution so radical that President Taft vetoed the first draft, a total of twenty-five state constitutions were substantially revised or drafted from scratch. Some established new institutions (mine inspectors, departments of agriculture and labor, regulatory commissions).<sup>124</sup> Some drafted long bills of rights, adding positive rights and sweeping mandates for states to fulfill these new obligations to their residents.<sup>125</sup> Many

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<sup>121</sup> VICTOR L. BERGER, *BERGER’S BROADSIDES* 54 (1912).

<sup>122</sup> Wants House Abolished: Berger of the House May Be Disciplined for Criticism in Resolution, *New York Times* (April 28, 1911).

<sup>123</sup> RANA, *supra* n. 36 at 51-52.

<sup>124</sup> BRIDGES, *supra* n. 18 at 1.

<sup>125</sup> *Id.*

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experimented with new democratic forms. Not one of them was designed to be anywhere near as rigid as the one that ruled the life of the nation as a whole.<sup>126</sup>

In the main, delegates at state constitutional conventions had a strikingly different understanding of their task from what the Founders had set out to do. The Founders had put pen to paper in 1787 conscious of the failure of the Articles of Confederation and anxious to establish a blueprint for a democratic republic that would last well into the future. That they created “a machine that would go of itself”—a framework of government essentially unchanged through the present day—has been taken as a marker of their genius.<sup>127</sup> By contrast, authors of state constitutions prized “institutional knowledge and experience that was unavailable to the eighteenth-century founders,”<sup>128</sup> and believed in experimentation, adaptation, and continuous learning. J.F. King, a delegate to Oklahoma’s founding convention in 1906-07, explained:

Time impairs constitutions as it does all things and if they be not amended and repaired to meet changing conditions, new questions, and the ever-altering situations of an enterprising and progressive people, there is an end to good government. ... This and every other generation of a free people has its own peculiar problems to face in Constitution making. ... We would be unworthy sons of worthy sires if we fail to meet and courageously solve the problems now pressing upon our people for solution.<sup>129</sup>

These novel constitutional theories rested on a whole new theory of democracy. Calls for mechanisms that gave power to the people had been launched in the antimonopoly campaigns of the 1880s, but Switzerland became a direct model for change after Dicey published an article in the *Nation* in 1885 examining the Swiss referendum as a sort of golden mean between American constitutional rigidity and British flexibility.<sup>130</sup> After Dicey’s article came out, a wave of American reformers traveled to Europe in search of constitutional insights. Especially important were William McCracken, an American living in Switzerland who published a series of articles in the 1890s extolling the Swiss model. In 1888, James W. Sullivan visited Switzerland, and in 1892 he published *Direct Legislation by the Citizenship through the Initiative and Referendum*, which sold a staggering fifteen thousand copies.<sup>131</sup> One of these was picked up by a bedridden William Simon U’Ren, a blacksmith turned miner, newspaper editor, practicing

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<sup>126</sup> See DINAN, *supra* n. 17; Dinan, State Constitutionalism in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION (2015) (arguing that the fifty state constitutions reveal an alternative view of constitutionalism within the American political tradition); Dinan, “The Earth Belongs Always to the Living Generation”: The Development of State Constitutional Amendment and Revision Procedures, 62 REV. OF POL. 645 (Fall 2000); Dinan, Framing a “People’s Government”: State Constitution Making in the Progressive Era, 30 RUTGERS L. J. 30 933 (Summer 1999); Emily Zackin & Mila Verstieg, American Constitutional Exceptionalism Revisited, 81 U. CHICAGO L. REV. 1641 (2014).

<sup>127</sup> BRIDGES, *supra* n. 18 at 2-3. As Michael Kammen points out, this phrase has never been an unproblematic one. Many progressive critics used the formulation ironically, including the nineteenth-century poet James Russell Lowell, who probably coined it. Their point was to show that many people professed the enduring genius of the Constitution without even *understanding* the text, much to speak of possessing a meaningful sense of ownership over it. For instance, the Yale Law professor and legal realist Walton Hamilton ironically defined constitutionalism in 1931 as “the name given to the trust which men repose in the power of words engraved on parchment to keep a government in order.” Hamilton dryly took aim, too, at constitutional veneration and the uncritical distance it could engender in a people: “If there is to be appraisal, the constitutionalism of the people must be distinguished from that of the bench. ... The object of worship is an ideal of law; the act of faith is almost untainted with knowledge.” KAMMEN, *supra* n. 27, *passim*, esp. at xiii-xiv.

<sup>128</sup> Quoted in BRIDGES, *supra* n. 18 at 3.

<sup>129</sup> *Id.*

<sup>130</sup> A.V. Dicey, The United States and the Swiss Confederation, NATION (Oct. 1885). On antimonopolist sentiment and the adoption of Swiss-style democratic institutions in this period, THOMAS GOEBEL, A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890-1940 (2002); THOMAS E. CROININ, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 44-48 (1989); JEREMY D. BAILEY, THE IDEA OF PRESIDENTIAL REPRESENTATION 85 (2019);

<sup>131</sup> BAILEY, *supra* n. 130 at 85.

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lawyer, and Republican Party worker who was convalescing from a severe asthma attack. After reading Sullivan's book, the former blacksmith decided to make it his life's work to spread "tools of democracy" like the initiative, recall, and referendum in his home state of Oregon and elsewhere.<sup>132</sup> By 1898, "Referendum U'Ren" had helped to launch the Oregon Direct Legislation League, which worked with counterparts springing up in other states, and helped secure passage of the initiative and referendum in Oregon as a state representative. In 1896, William Jennings Bryan endorsed the initiative and recall, and in 1898, South Dakota became the first state to encode them into law. Shortly thereafter, in 1899, Oregon followed.<sup>133</sup> Of the new state constitutions, fifteen of them adopted the initiative, referendum, and/or the recall by 1914.

Economist Frederick A. Cleveland, who had studied these innovations closely and proposed some of them at the national level, joyously proclaimed that this spate of constitution-writing was proof of "a wave of democracy ... sweeping the world, based on a broader intelligence and a more enlightened view of civic responsibility than has ever before obtained."<sup>134</sup> Not *all* the experimentations in constitution-writing were so lofty: in much of the South, a pattern developed whereby an early postbellum constitutional convention to adopt the Reconstruction Amendments was followed, a few decades later, by a subsequent convention entrenching Jim Crow under law. Mississippi delegates, for instance, had no scruples about declaring the establishment of "white supremacy" as the main purpose of coming together to write.<sup>135</sup> The same motives led many other states to embrace constitutional amendments mandating literacy tests or property thresholds for voting: six southern states did so between 1894 and 1914, Connecticut in 1892, Maine and California in 1894, and New Hampshire in 1903.

Yet undeniably the states experimented with a distinctive form of democracy-enhancing constitutionalism all their own.<sup>136</sup> Between 1860 and 1912, a growing percentage of charters were adopted by simple majority votes in their states.<sup>137</sup> The average lifespan of these texts was around twenty years at the time; and as the decades passed, the tendency was for reformers to make alteration easier (ordinarily via a bicameral legislative act requiring a supermajority, followed by a bare majority of the popular vote).<sup>138</sup> These texts also favored a dizzying array of devices to make government more responsive to the popular will. This included direct election of representatives and

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<sup>132</sup> U'Ren later told an interviewer of his encounter with Sullivan's book. "Blacksmithing was my trade and it has always given color to my view of things. I wanted to fix the evils in the conditions of life. I couldn't. There were no tools. We had tools to do almost anything with in the blacksmith shop; wonderful tools. So in other trades, arts and professions ... in everything but government. "In government, the common trade of all men and the basis of social life, men worked still with old tools, with old laws, with institutions and charters which hindered progress more than they helped it. Men suffered from this. There were enough lawyers: many of our ablest men were lawyers. Why didn't some of them invent legislative implements to help people govern themselves: Why had we no tool makers for democracy?" Quoted in ROBERT D. JOHNSTON, *THE RADICAL MIDDLE CLASS: POPULIST DEMOCRACY AND THE QUESTION OF CAPITALISM IN PROGRESSIVE ERA PORTLAND, OREGON* 131 (2003).

<sup>133</sup> See also THOMAS GOEBEL, *A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890-1940* 32-45 (2002); STEVEN L. PIOTT, *GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA* 1-15 (2003); THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 48-50 (1989).

<sup>134</sup> F.A. CLEVELAND, *ORGANIZED DEMOCRACY: AN INTRODUCTION TO THE STUDY OF AMERICAN POLITICS* 438 (1914).

<sup>135</sup> MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908* 100-103 (2001).

<sup>136</sup> See CLEVELAND, *supra* n. 134; WALTER F. DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* (1910).

<sup>137</sup> CLEVELAND, *supra* n. 134 at 272-73.

<sup>138</sup> *Id.* at 290, 362.

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senators, personal registration laws, primaries, proportional representation in legislative bodies, public hearings, popular initiation in legislation, recall, opening legislative sessions to the public, and the recall of representatives by initiative. With respect to public oversight of administrative agencies, new tools included rights of inquiry by citizens, publication of official reports, legislative inquiries, impeachment, removal of elected officers, and “constitutional inhibitions,” such as a bar on the suspension of habeas corpus. With regard to the judiciary, they included election of judges, recall of judges, recall of particular decisions, publicity of hearings, greater rights of appeal, removal, and restraint by state Bills of Rights.<sup>139</sup>

### *The Public Thinkers*

Many Americans shared the view of constitutional historian Herman Ames that, if perhaps the states’ penchant for constitution tinkering had been “carried too far,” these texts were still “better adapted to meet the needs of the present age” than the federal constitution.<sup>140</sup> A third strand of Progressive formalism reflected, not the Socialists’ imagined break with the American legal tradition, nor state reformers’ pure faith in democracy, but a scholarly preoccupation with good governance. This idea, in turn, reflected the influence on American thought of a relatively new tradition of British comparative scholarship asserting a close relationship between constitutional design and the health of the republic.<sup>141</sup> From this uniquely British perspective, the singularity of the American Constitution lay in its rigidity, and this seemed a cause for concern.

Soon after Parliament passed the British North America Act of 1867, which created a federal constitution for Canada and put a decisive end to the idea of Britain as a unitary state, a crop of British intellectuals began to betray a new interest in the American institutions of federalism, judicial review, and the written constitution. Among these thinkers were Walter Bagehot (*The English Constitution* (1867)), Albert Venn Dicey (*The Law of the Constitution* (1885)), and Viscount James Bryce (*The American Commonwealth* (1888)). Dicey, for one, contrasted England’s “flexible” constitution with the “rigid” American text. The essential difference between these two was that while the Crown and the two Houses could “modify or repeal any law whatever,” in America, changing higher law required the coming together of an “aggregate body” of three-fourths of the state legislatures acting in concert. That no such body existed was precisely the point: the American constitutional drafters had deliberately placed the amending power outside the Constitution. The American popular sovereign was, Dicey wrote, invoking Thomas Hobbes’ metaphor of the democratic sovereign in *De Cive*, “a despot hard to rouse”:

He is not, like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been roused to serious action but once during the course of more than a century. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.<sup>142</sup>

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<sup>139</sup> *Id.* at 362.

<sup>140</sup> AMES, *supra* n. 98 at 302.

<sup>141</sup> See DANIEL RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998); JAMES KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920* (1986).

<sup>142</sup> A.V. DICEY, *THE LAW OF THE CONSTITUTION* 18 (1885). For Hobbes’ metaphor of the sleeping sovereign, see *OF MAN AND CITIZEN* § 16, 98-99 (Richard Tuck ed. 1998 [1641]). For the idea of the modern referendum as an emanation of Rousseau’s thought on sovereignty (as distinct from government), see RICHARD TUCK, *THE SLEEPING SOVEREIGN* xi, 5-6, 254 (2017). Although Tuck sees the U.S.



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The sovereign's heavy sleep meant constitutional change would proceed by one of two routes in practice. For the United States, fortuitously, such change had so far come through "the growth of customs or institutions which have modified the working without altering the articles of the constitution."<sup>143</sup> A far less happy alternative was a cycle of discontent and revolution as had characterized France after the Revolution of 1791. This trajectory was described by John Stuart Mill in an 1849 essay ardently defending France's Revolution of 1848. Under the quasi-monarchist Charter of 1830, the French people had been saddled with the oppressive government of Louis Philippe, a regime "wholly without the spirit of improvement" that fused all the worst elements of French society into "a united band to oppose democracy."<sup>144</sup> Such rigidity had turned out to be fatal to its survival, Mill felt. Had reformers had "even a remote hope" of effecting change through the existing system, they could have tolerated even a flawed regime.

But when there is no hope at all; when the institutions themselves seem to oppose an unyielding barrier to the progress of improvement, the advancing tide heaps itself up behind them till it bears them down.

"No government," Mill concluded, could "expect to be permanent unless it guarantees progress as well as order, nor can it continue really to secure order, unless it promotes progress."<sup>145</sup> Dicey recognized that where constitutional rigidity "impedes change," the republic's fate could be the explosive one Mill described.<sup>146</sup>

From this comparative tradition emerged a vision of the good constitution as one that secured a virtuous middle point between stability and democratic responsiveness. It was a vision that reverberated across the pond, spawning a generation of American constitutional commentary fixated on Article V. In 1867, John A. Jameson, a professor and judge with strong anti-majoritarian convictions, described amendment procedures as "safety valves": they should be neither adjustable "with too great facility, lest they become the ordinary escape pipes of party passion," nor so stiff "that the force needed to induce action is sufficient to explode the machine."<sup>147</sup> Columbia University's John Burgess, no progressive himself, warned in 1890 that in a democratic political society, danger "from revolution and violence" could lie where a rigid amendment process allowed "the well matured, long and deliberately formed will of the undoubted majority [to] be persistently and successfully thwarted."<sup>148</sup> Constitutional historian Herman Ames posed the question in 1897: had not the Framers feared, not just "too frequent change of their fundamental code," but also the "opposite danger" of "making amendments too difficult?" The moderate Ames gently suggested two defects produced by Article V's rigidity: first, "discovered faults" had been allowed to flourish in the text uncorrected, and second, new advances in the "science of government" could not be applied to the text.<sup>149</sup> The next year, Judge Walter Clark, one of the North Carolina's most well-respected politicians, described the Constitution, adopted 110 years

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Constitution as instantiating the *government/sovereign* distinction, he views the American President as a kind of plebiscitary organ that somewhat blurs this line. *Id.* at 247.

<sup>143</sup> *Id.*

<sup>144</sup> J.S. MILL, Vindication of the French Revolution of February 1848 (1849), in XX ESSAYS ON FRENCH HISTORY AND HISTORIANS, COMPLETE WORKS 324 (John Robson & John Cairns eds. 1985).

<sup>145</sup> *Id.* at 324-25.

<sup>146</sup> DICEY, *supra* n. 142 at 70.

<sup>147</sup> J.A. JAMESON, THE CONSTITUTIONAL CONVENTION 549 (1887).

<sup>148</sup> JOHN BURGESS, POLITICAL SCIENCE AND CONSTITUTIONAL LAW 152 (1891).

<sup>149</sup> AMES, *supra* n. 89 at 303-04.

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before, “as now like the clothing of boyhood worn by the nearly mature man, which galls his massive limbs and interferes with his development.”<sup>150</sup>

In this period, a flurry of public intellectuals of national stature started to call for deep structural amendment of the U.S. Constitution, many by means of a new drafting Convention, if necessary. Alarmed conservatives of the period tended to denigrate progressive reform proposals as fetishistic “Constitution-tinkering,” a phrase implying haphazard shots in the dark by the befuddled masses, but, at least at the national level, the opposite in fact seems to have been true.<sup>151</sup> Unlike the mid-nineteenth century, where reform proposals had been “tentative” and often “trivial,” Progressive constitutional thinking was on the whole quite systematic.<sup>152</sup> Many of the proposals of the era arrived in well-regarded scholarly and popular works, and they advanced coherent visions of what American government should be.

Not coincidentally, these often resembled the British system, with their calls to expand Congress’s powers over education, marriage, commerce, and labor; their enthusiasm for a modified “cabinet government,” in the phrase popularized by Woodrow Wilson, so as to bridge the unproductive separation between Congress and the Executive in legislating; and their insistence on lowering the threshold for Article V amendment. Many viewed these changes as a corrective for nineteenth-century redundancy in the structure of government and inefficiency in its functioning. Others saw these changes as necessary for vindicating the revolutionary spirit of democracy, which the Constitution’s structure had partly obstructed. To this end, a good many proposed the national initiative and recall, as well as direct presidential election.<sup>153</sup> A partial list of these thinkers, in relative chronological order, includes:

- **Charles O’Conor**, a New York lawyer and 1872 Democratic presidential candidate, who in a series of articles and lectures from the late 1870s and early ‘80s proposed to remedy government corruption and redundancy via the introduction of unicameral legislatures in all states and at the national level; by eliminating all government debt, tariffs, and duties; by making voting obligatory and eliminating the secret ballot; and by changing the office of the Presidency to one filled on a monthly basis from among congressmembers. O’Conor also believed that, with the advent of the telegraph, the diplomatic corps might be rendered unnecessary,<sup>154</sup>
- **Albert Stickney**, a New York lawyer who once represented the Metropolitan Museum of Art, and called for a National Convention to rewrite the Constitution. Stickney envisioned a unicameral legislature with the authority to pass any necessary law; the elimination of the Vice-President for a system of cabinet officers; the abolishment of the presidential veto; the elimination of the Senate’s approval power over presidential appointments; and indefinite terms for members of the legislative and executive branches during good behavior. He also proposed federal judicial election and life terms,<sup>155</sup>
- **William B. Lawrence**, a well-connected lawyer and diplomat who served as a delegate to Rhode Island’s 1842 constitutional convention and as acting governor in 1852. In 1880, Lawrence published an article betraying concern over the President’s “monarchical” powers, and

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<sup>150</sup> Walter Clark, *The Revision of the Constitution of the United States*, 32 AM. L. REV. 1, 1-2 (Jan-Feb. 1898).

<sup>151</sup> KAMMEN, *supra* n. 27 at 204-08, 226-31.

<sup>152</sup> AMES, *supra* n. 89 at 301.

<sup>153</sup> The institution of the Presidency seems to have remained a puzzle for the Progressives: many wanted to make the President more accountable to, and more dependent on, Congress, somewhat like a prime minister. Others sought to make the office more powerful, albeit more directly accountable to the People. Although both sides viewed their proposals as a way to thread the needle between power and accountability, the tensions between these two visions of government were clearly never fully resolved. This is a theme picked by Jeffrey Tulis, who discussing the “two constitutions” that “buffeted” the presidency of Woodrow Wilson in *THE RHETORICAL PRESIDENCY* 21 (1988) and also Ch. 6.

<sup>154</sup> See, e.g., Charles O’Conor, Address Before the New York Historical Society at the Academy of Music (May 8, 1877); O’Conor, *Democracy in 1 JOHNSON’S NEW UNIVERSAL CYCLOPAEDIA: A TREASURY OF SCIENTIFIC AND POPULAR TREASURE OF USEFUL KNOWLEDGE* (A.J. Johnson ed. 1881).

<sup>155</sup> ALBERT STICKNEY, *THE TRUE REPUBLIC* (1879); STICKNEY, *DEMOCRATIC GOVERNMENT: A STUDY IN POLITICS* (1885).

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advocating a plural executive modeled after that of the Swiss, a seven-member council chosen for annual terms by the legislature. Lawrence also questioned the need for the Vice-President, the Electoral College, and political conventions;<sup>156</sup>

- **Henry C. Lockwood**, a New York lawyer, who wrote a popular 1884 book entitled *The Abolition of the Presidency* which attacked the office as an elected king. Lockwood proposed, following the Articles of Confederation, a unicameral Congress, an executive council whose members were appointed by and could be members of Congress, and a weakened judicial branch;<sup>157</sup>
- **Isaac L. Rice**, a Bavarian-born polymath, chess champion and engineer, who published an article in 1884 alleging that the separation of powers was the result of an error by Montesquieu and the Framers. These men had believed that tyranny entailed a concentration of power in a single body, whereas the British experience showed that only the concentration of power in a single *person* posed such danger. Rice advocated for a partial fusion of the executive and legislative branches; the expansion of Congress' power to handle "all questions of national concern"; and curtailment of judicial review;<sup>158</sup>
- **Caspar Hopkins**, a California businessman, who saw a risk that the Constitution would "utterly fail" to meet citizens' future needs "unless revised or greatly amended." He proposed extending Congress' regulatory powers over marriage, taxation, education, wills, real estate, and debt collection (while stripping its ability to pass special interest bills); allowing federal courts to hear suits against the government; cabinet government; special education for legislators in "statecraft"; restricting Senate membership to those making \$100,000 or more; restricting immigration and the vote to natural-born citizens only; abolishing the Electoral College and extending all terms while abolishing reelection of "all executive officers who have patronage to bestow"<sup>159</sup>;
- **Goldwin Smith**, an English-born historian and lawyer who in an 1898 article proposed to extend congressional terms; allow Cabinet members to propose legislation; extend the President's mandate; grant Congress power over taxation; and, in light of the controversies of the age on race and immigration, abolish the Fifteenth Amendment "till a distant future, when experience shall have fully revealed the effects of universal suffrage"<sup>160</sup>;
- **Walter Clark**, chief justice of the North Carolina Supreme Court, who complained of the Constitution's outdatedness and undemocratic features, calling for an amending Convention. He advocated popular election of Senators and proportional representation in the Senate; abolishing the presidential veto; judicial election for limited terms; changing the Electoral College to match population ratios; and a six-year presidential term;<sup>161</sup>
- **Walter K. Tuller**, a California lawyer who wrote a popular article in 1911 advocating an amending convention. His proposals included direct election of Senators; amending Article V to allow an amendment to be ratified upon acceptance by half the states; and language allowing Congress explicit power to regulate corporations;<sup>162</sup>
- **Yandell Henderson**, a physiology professor at Yale and active Progressive Party member, who published a 1913 article in the *Yale Review* advocating for fusing the legislative and executive branches or at least bringing them into "much closer coöperation"; a national "recall of judicial decisions"; and increasing the government's regulatory power over corporations;<sup>163</sup> and
- **William MacDonald**, a journalist and scholar, whose 1921 *A New Constitution for a New America* also advocated change to a parliamentary system. The terms included four-year term limits for Senators and Representatives; a cabinet government drawn from the legislature; a popularly elected President serving as a *de jure* head of state; and proportional representation in Congress, to represent profession as well as population; as well as an increase in the federal government's powers.<sup>164</sup>

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<sup>156</sup> William B. Lawrence, The Monarchical Principle in Our Constitution, 131 N. AM. REV. 385 (Nov. 1880).

<sup>157</sup> HENRY C. LOCKWOOD, THE ABOLITION OF THE PRESIDENCY (1884).

<sup>158</sup> Isaac L. Rice, Work for a Constitutional Convention, 28 CENTURY MAGAZINE 534 (Aug. 1884).

<sup>159</sup> Caspar T. Hopkins, Thoughts Toward Revising the Federal Constitution, 6 OVERLAND MONTHLY 388, 388 (Oct. 1885).

<sup>160</sup> Goldwin Smith, Is the Constitution Outworn?, 496 N. AM. REV. 257, 266 (Mar. 1898).

<sup>161</sup> Clark, *supra* n. 150; Clark, The Next Constitutional Convention of the United States, 16 YALE L. J. 65 (1906); Clark, *supra* n. 15.

<sup>162</sup> Walter K. Tuller, A Convention to Amend the Constitution—Why Needed—How It May Be Obtained, 193 N. AM. REV. 369 (Mar. 1911).

<sup>163</sup> Yandell Henderson, The Progressive Movement and Constitutional Reform, 3 YALE REV. 78 (1913).

<sup>164</sup> WILLIAM MACDONALD, A NEW CONSTITUTION FOR A NEW AMERICA (1921). *And see* John R. Vile, who has compiled a complete list of proposed amendments to the U.S. Constitution over the course of its history. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2010 2 vols. (2013).

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One more proposal of the period illustrates the strange admixtures of conservative and progressive thought that coexisted at the time. In his 1908 *Federal Usurpation*, New York lawyer and reformer Franklin Pierce advanced a package of similarly transformative reforms: amendment of Article V to allow proposal of amendments by one-third of the states and passage by a simple majority of voters; remedying gridlock by making the House of Representatives “supreme in lawmaking,” with the Senate allowed just a veto; a single presidential term of seven years with no reelection; elimination of the Senate’s consultation power over appointments; direct senatorial election; and the national popular referendum.<sup>165</sup> Pierce would also have expanded Congress’s regulatory power, albeit over a strictly enumerated list of objects, while stripping it of the power to pass “private bills and special legislation.”<sup>166</sup> However broad-ranging these proposals were, Pierce is an interesting specimen because he saw himself as a *defender* of the rule of law, his book as a “plea for the sacredness of the Constitution of the United States.”<sup>167</sup> A Progressive, Pierce felt a deep enmity towards President Roosevelt, who he felt had arrogated powers to himself outweighing “that of any constitutional monarch.” Pierce despised Roosevelt’s theory of presidential “stewardship,” and viewed interpretivism as wishy-washy and opportunistic. Accordingly, Pierce insisted that, while the Constitution’s existing “rigid provisions [and] its system of checks and balances” were an “obstacle to popular government,” the proper course of action for vindicating the Framers’ intentions was to change them “by amendment, *but never by construction or usurpation.*”<sup>168</sup>

### *Constitutional Amendment in Practice*

In 1925, an alarmed speaker at the Annual Meeting of the Alabama Bar Association warned, “The age through which we are now passing may well be termed the Age of Constitutional Amendments and Federal Encroachment.” It was a time, lamented the lawyer Robert E. Lee Saner “of political quacks and political quackery.” “Constitution tinkering” had become “the leading outdoor sport with the typical politician,” who seemed to base his candidacy “upon the proposition of adding one or more amendments to the Constitution of the United States, not for the purpose of the betterment of the Constitution, but for the purpose of momentarily riding into office through this unpatriotic appeal made to these elements of discontent.”<sup>169</sup>

Today, as easy as it is to see “Constitution tinkering” as the work of the political fringe, it is worth recalling the sheer intensity of Progressive-Era calls to formally alter the language of the Constitution. In 1897, Herman Ames had collected 1,736 amendment proposals in American history. Between Ames’ study and 1929, when the Pennsylvania lawyer M. A. Musmanno produced his *Proposed Amendments to the Constitution*, a study commissioned by the GAO, some 1,370 amendments were floated in Congress.<sup>170</sup> Furthermore, calls for change were so widespread and far-reaching that real political pressure existed to convene a convention to draft a new constitution. Malapportionment in the Senate, as well as the “cumbersome” Article V, were seen by many as unbearable anachronisms, and the former was impossible to change without a drafting convention.<sup>171</sup> North Carolina chief justice Walter Clark hammered

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<sup>165</sup> PIERCE, *supra* n. 92 at 175-76.

<sup>166</sup> *Id.* at 175. Pierce’s list of proper domains of federal legislative regulation included: taxation, war, treaties, foreign and interstate commerce, postal service, bankruptcy, copyrights, patent rights, naturalization, and coinage.

<sup>167</sup> *Id.* at ix.

<sup>168</sup> *Id.* (italics mine).

<sup>169</sup> Saner, *supra* n. 27.

<sup>170</sup> VILE, *supra* n. 164.

<sup>171</sup> See Tuller and Henderson, *supra* n. 162 and 163.

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home this point in a number of essays and lectures: the Constitution had to be deeply revised to make it suitable for modern times. “How could a Federal constitution of 110 years ago be suitable to this day, when each State has so often had to change its organic law?”<sup>172</sup> Between 1893 and 1911, thirty-one states passed seventy-three petitions demanding a convention to propose an amendment for the direct election of senators.<sup>173</sup> Even more telling, over a dozen of these petitions contained general requests for conventions to revise root-and-branch the existing text.<sup>174</sup>

Of course, the showiest indicator of Progressive formalism’s reach was the flurry of constitutional amendments actually passed in the period, a rate of prolificness only exceeded by the Bill of Rights. Considering the skepticism that prevailed on formal amendment through the “cumbrous” Article V, the passage of four constitutional amendments in a seven-year period speaks to how sustained political pressure for formal amendment was. This included, of course, the Sixteenth, establishing the income tax (passed 1909, ratified 1913); the Seventeenth, establishing direct elections for senators (passed 1912, ratified 1913); the Eighteenth, banning all transport and sale of alcohol (passed 1917, ratified 1919); and the Nineteenth, granting women the vote (passed 1919, ratified 1920).

During its brief reign, Progressive formalism even reached into unlikely quarters. Mocked in his own time as a “reactionary” and a “fathead” (by his erstwhile friend T.R. no less), President Taft occasionally found common cause with Progressives on grounds of good governance, sharing their dissatisfaction with the corrupt, retrograde bureaucracy, Congress’ limited regulatory powers, and politicians forced to campaign instead of govern by the tight schedule of elections the Constitution imposed.<sup>175</sup> In 1916 Taft admitted that he was “strongly inclined to the view” that the Constitution should limit the President to a one-year term of seven years to give him “greater courage and independence in the discharge of his duties.” Taft also believed government would be more productive had its drafters brought “the executive a little closer in touch with Congress” in drafting legislation, particularly when it came to budgets.<sup>176</sup>

Taft was also the only man of the era who had actually guided a constitutional amendment through Congress. On June 16, 1909, addressing a joint legislative session of Congress, Taft suggested that the nation’s rapidly increasing deficit required new kinds of taxation, and that in light of *Pollock*, the Court’s 1895 decision striking down the income tax, Taft had become “satisfied” that amendment was the only possible way for Congress to exercise such an “indispensable” power. Taft explained:

This course is much to be preferred to the one proposed of reenacting a law once judicially declared to be unconstitutional. For the Congress to assume that the court will reverse itself, and to enact legislation on such an assumption, will not strengthen popular confidence in the stability of judicial construction of the Constitution. It is much wiser policy to accept the decision and remedy the defect by amendment in due and regular course.

Ever the lawyer, Taft saw that passing the income tax via the route of formal amendment would help maintain respect for institutions and ensure that the law on the books formed a comprehensible, coherent whole. He knew that the amendment route was fraught with “difficulty and delay,” but he was convinced that the population

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<sup>172</sup> Clark, *supra* n. 150 at 7.

<sup>173</sup> Rana, *supra* n. 36 at 50.

<sup>174</sup> *Id.*

<sup>175</sup> WILLIAM R. NESTER, *THEODORE ROOSEVELT AND THE ART OF AMERICAN POWER: AN AMERICAN FOR ALL TIME* 256-57 (2019).

<sup>176</sup> WILLIAM H. TAFT, *THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS* 4-5 (1916).

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would come around to this view and secure passage. He was, of course, soon proven right.

## The Eclipse of Progressive Formalism

On the night of June 15, 1912, an incensed Theodore Roosevelt hopped off a train and headed to Chicago's Orchestra Hall to address a frenzied crowd of 5,000. It was the night before the 1912 Republican National Convention, and all around, rumors were going around that Republican bigwigs were planning to steal away the nomination from Roosevelt. Since the days of Jacksonian democracy, presidential selection had been in the hands of string-pulling party bosses, but recently, states had begun experimenting with primary elections in an effort to give control back to popular majorities. The year 1912 was the first in which these played any significant role: Roosevelt, who had swept all but one state primary between April and June of 1912, came into the Republican Convention the clear people's choice. However, he knew the party bigwigs were against him, and he made the scandalous and unprecedented decision to personally attend the nominating convention in an attempt to sway the decision with the force of his charisma. The night before the proceedings opened, Roosevelt warned his supporters to be vigilant over the counting of delegates; there was "a great moral issue" at stake. He concluded in memorable fashion: "We fight in honorable fashion for the good of mankind; fearless of the future; unheeding of our individual fates; with unflinching hearts and undimmed eyes; we stand at Armageddon, and we battle for the Lord!"

The 1912 presidential campaign *was*, in some ways, a battle for the nation's soul. Not just a contest over the proper size of government, it was one of the few elections in American history to put a constitutional theory at stake.<sup>177</sup> The four-way competition pitted the Republican Party incumbent Taft against the Democrats' Woodrow Wilson; Teddy Roosevelt, who had bolted the Republican Party to form the Progressive Party (also called the Bull Moose Party, after a popular nickname for Roosevelt); and the charismatic Socialist reformer, Eugene V. Debs. Not only did three out of four candidates support Progressive principles, three of four party platforms also placed one or more constitutional amendments on the agenda. For Progressive formalism, 1912 was a highwater mark as well as an inflection point. Wilson, a rising star in the Democratic Party, embodied a reformist tradition with a pragmatic attitude toward the Constitution. Roosevelt, as a newly recast Progressive, had come to believe that Progressive democracy required major structural alterations. Wilson's victory over Roosevelt was a triumph for the political goals of the Progressive movement.<sup>178</sup> But for Progressive formalism, it was the beginning of the end.

We are not used to thinking of the Progressive Era as a boomtime for formalism. Whether anti-formalism is taken as a sign of maturity<sup>179</sup> or of cultural decline,<sup>180</sup> the consensus is that formalism was done in during the Progressive Era. A 2017 Harvard

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<sup>177</sup> On the epochal nature of the 1912 election, see JOHN MILTON COOPER, *THE WARRIOR AND THE PRIEST: WOODROW WILSON AND THEODORE ROOSEVELT* (1983); COOPER, *PIVOTAL DECADES: THE UNITED STATES, 1900-1920* (1990); JAMES CHASE, *1912: WILSON, ROOSEVELT, TAFT AND DEBS—THE ELECTION THAT CHANGED THE COUNTRY* 220 (2004); Sidney M. Milkis & Daniel J. Tichenor, "Direct Democracy" and Social Justice: *The Progressive Party Campaign of 1912*, 8 *STUD. IN AM. POL. DEVT.* 282 (Fall 1994);

<sup>178</sup> See n. 50, *supra*.

<sup>179</sup> See, e.g., Mark Tushnet, *Some Current Controversies in Critical Legal Studies*, 12 *GER. L.J.* 290, 291 (2011) (quoting the phrase, "We are all realists now.")

<sup>180</sup> KEN KERSCH, *CONSERVATIVES AND THE CONSTITUTION* xvi (2019) (describing the conservative view of the Constitution as the "anchor" of society and progressives of diverse generations as having "abandoned that Founding anchor.")

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Law School symposium on the formalism of its one-time dean Christopher Columbus Langdell announced its topic with the following proviso: “There is no proposition to which virtually all members of the Harvard Law Faculty would assent, except perhaps one: The exception is the idea that, in law, the rejection of formalism is the beginning of all wisdom.” On this account, Progressives engaged in a “series of compromises with the Founders’ constitutionalism,” by superimposing their reform projects—e.g., direct democracy, the rhetorical President, the welfare state—atop the old foundation, without ever totally dismantling it.<sup>181</sup> In this section, I sketch an explanation of why this became the dominant account.

The man who wrote that, as President, he had vowed “affirmatively to do all he could for the people and not to content himself with the negative merit of keeping his talents undamaged in a napkin,” is not often, or easily, associated with legal formalism.<sup>182</sup> Theodore Roosevelt’s theory of the presidency as the “steward” of the nation seemed to contemplate an “undefined residuum of [executive] power” beyond the strict provisions of the law, as Taft wrote in a later critique, an implication many found troubling.<sup>183</sup> Indeed, in a now-famous address of December 12, 1906, Roosevelt’s Secretary of State, Elihu Root, promised supporters that if the public wanted something done, “sooner or later” certain “constructions of the Constitution” would be “found” to permit the Government to do it.<sup>184</sup> It was such a philosophy that prompted the lawyer Franklin Pierce to accuse Roosevelt of arrogating to himself quasi-monarchical powers by “construction” or “usurpation.”

Interestingly, Roosevelt’s time out of his office sharpened his political radicalism and with it, his belief that the Constitution was fundamentally defective. The spectacle of his Republican Party breaking down, particularly over the Payne-Aldrich Tariff Act of 1909, and of Taft’s ineffectual attempts at compromise brokering, “closed Roosevelt’s mind to caution” and increased his distaste for compromise with the Old Guard.<sup>185</sup> While old friends in the party like Henry Cabot Lodge backed Roosevelt when he “threw his hat in the ring” in 1912 out of personal loyalty to him, in private many were gravely concerned about his new views.<sup>186</sup> On February 21, in a speech entitled “A Charter of Democracy,” Roosevelt adumbrated a progressive agenda capped by a call for a national popular recall over both judges and judicial decisions.

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<sup>181</sup> Schambra, *supra* n. 189 (“As much as the Progressives succeeded in challenging the intellectual underpinnings of the American constitutional system, they nonetheless faced the difficulty that the system itself -- the large commercial republic and a separation of powers, reflecting and cultivating individual self-interest and ambition -- remained in place. As their early modern designers hoped and predicted, these institutions continued to generate a certain kind of political behavior in accord with presuppositions of the Founders even as Progressive elites continued for the past 100 years to denounce that behavior as self-centered, materialistic, and insufficiently community-minded and public-spirited.”)

<sup>182</sup> THEODORE ROOSEVELT, *THE AUTOBIOGRAPHY OF THEODORE ROOSEVELT* 197 (1913).

<sup>183</sup> WILLIAM H. TAFT, *POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE, AND ITS PERILS* xiv (1913)

<sup>184</sup> Quoted in PIERCE, *supra* n. 92 at 88.

<sup>185</sup> JOHN M. BLUM, *THE REPUBLICAN ROOSEVELT* 147 (1954).

<sup>186</sup> NESTER, *supra* n. 175 at 256. Some critics have questioned whether Roosevelt’s partnership with the Progressive Party was not one of mutual self-interest, but Roosevelt’s commitment to key tenets of Progressivism was genuine. See, e.g., Harold L. Ickes, *Who Killed the Progressive Party*, 46 *Am. Hist. Rev.* 306, 311-12 (1941); COOPER, *WARRIOR AND PRIEST* 399 n. 2 (on the “considerable controversy” raised among historians by Roosevelt’s progressivism); JOHN MORTON BLUM, *THE REPUBLICAN ROOSEVELT* ix-x, 7, 86, 143 (on critics attack on Roosevelt as a “traitor to progressivism,” Roosevelt’s particular strand of progressivism, and his eventual endorsement of the initiative, referendum, and recall). In 1910, Roosevelt had picked up Herbert Croly’s *The Promise of American Life*, a work calling for muscular “Hamiltonian” democracy to support “Jeffersonian” ends, which came to be considered “the bible of Progressives.” SNYDER, *supra* n. 24 at 66. Struck by Croly’s perspicacity and vision, Roosevelt made him something of a personal consigliere. Croly consulted for Roosevelt during his 1912 campaign, and the slogan “New Nationalism” is even credited to him.

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Insisted Roosevelt, the purpose “of every American constitution must be to obtain justice between man and man by means of genuine popular self-government.” If the Constitution could be used to block efforts to remedy injustice, “it is proof positive either that the Constitution needs immediate amendment or that it is being wrongfully and improperly construed.”<sup>187</sup> At the Progressive Party Convention in August 1912, Roosevelt proclaimed: “The people themselves must be the ultimate makers of the their own constitution.”<sup>188</sup> Yet another stump speech saw Roosevelt proposing to “go even further than the Progressive Platform,” with the idea of a general recall “applied to *everybody*, including the President.” The remark prompted a horrified *New York Times* to report, “Roosevelt tonight exceeded the speed limit in radicalism.”<sup>189</sup>

For his part, as a young man Woodrow Wilson had also been a staunch critic of the Constitution. On July 4, 1876, as a 20-year-old student at the College of New Jersey (now Princeton University), Wilson wrote in his diary, “How much happier [America] would be if she had England’s form of government instead of this miserable delusion of a republic.”<sup>190</sup> In an unpublished 1882 essay, “Government by Debate,” Wilson proposed two constitutional changes to move the nation closer towards the British form of government. First, the President would be primarily a symbolic head of state, with an indefinite term to last on “good behavior,” though he would have power to appoint cabinet secretaries and a legislative veto. Cabinet members, in turn, would initiate legislation and lead debate on the House floor, though they would be required to resign if Congress rejected “any important part of their plans.”<sup>191</sup> Second, House members’ terms would be extended from two to six or eight years, but the president would have the power to dissolve the legislature earlier and call for new elections in the event of deadlock.<sup>192</sup> In just a few years, Wilson would come to view these positions, so earnestly held by his younger self, as childish. A man on a “mission of statesmanship” had to offer realistic solutions, not utopianism. Wilson’s thinking was surely swayed, too, by Harper Press’s refusal to publish his 1882 piece on account of its constitutional proposals being too radical. In fact, when a review of his 1885 book *Congressional Government* came out lavishing praise on a Wilson it considered a hardline constitutional formalist in light of his earlier (unpublished) work, Wilson was furious that his past views had been aired.<sup>193</sup>

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<sup>187</sup> NESTER, *supra* n. 175 at 256.

<sup>188</sup> SIDNEY MILKIS, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 217 (2009).

<sup>189</sup> *Id.* at 218-9. And construing Roosevelt’s near-miss as a critical inflection point that saved the Constitution from the “quick fixes and gimmicks” of the Progressive formalists, William Schambra, Commentary on Thomas E. West, The Progressive Movement and the Transformation of American Politics, 12 HERITAGE ORG. FIRST PRINCIPLES SERIES 12 (Jul. 18, 2007) (“Had Roosevelt managed to win the nomination of his party ... , it is likely that it would have put its weight behind these reforms [the initiative, referendum, and recall] and others that appeared later in the platform of the Progressive Party, including, critically, a more expeditious method of amending the Constitution. That would probably have meant amendment by a majority of the popular vote in a majority of the states, as Robert LaFollette suggested. Had that happened -- had the Constitution come down to us today amended and re-amended, burdened with all the quick fixes and gimmicks that, at one point or another over the 20th century, captured fleeting majorities -- the effort to recover the Founders’ constitutionalism and reorient American politics toward it would obviously have been a much, much trickier proposition.”)

<sup>190</sup> Quoted in DANIEL D. STID, THE PRESIDENT AS STATESMAN: WOODROW WILSON AND THE CONSTITUTION 10 (1998).

<sup>191</sup> Woodrow Wilson, Government by Debate: Being a Short View of Our National Government as It Is and as It Might Be (1882), in 2 THE PAPERS OF WOODROW WILSON 202 (Arthur S. Link eds. 1967).

<sup>192</sup> STID, *supra* n. 190 at 20-21.

<sup>193</sup> After this rejection, Wilson complained to a friend, “[P]erhaps [these proposed] changes are *too* radical; but if one goes one step with me, he cannot, as it seems to me, escape going all the way. To stop short of the length to which I carry the argument would be simply to be afraid of the legitimate and logical conclusions towards it inclines with an inevitable tendency.” *Id.* at 21-22.



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This was a far cry from the Wilson who, in his 1908 *Constitutional Government in the United States*, praised the Constitution as a “thoroughly workable model,” and the Framers for their “experienced eye for affairs” and “quick practical sagacity in respect of the actual structure of government.”<sup>194</sup> Vestiges of the old Wilson remained: it was true that the “constitutional structure of the government [had] hampered and limited” the President’s action in important roles. But it did not entirely thwart it. Somehow, felicitously, “the definitions and prescriptions of constitutional law, although conceived in the Newtonian spirit and upon the Newtonian principle,” were “sufficiently broad and elastic to allow for the play of life and circumstance.”<sup>195</sup> In Wilson’s hands the historicism and organicism of Holmes became a weapon capable of defanging the sharpest of reformers’ constitutional critiques. Progressive democracy could now be reconciled with constitutional fealty: if the Framers had not foreseen the development of an interventionist federal government, they had knowingly built an endlessly adaptable system—an evolving organism, following the metaphors of the day, not a machine.<sup>196</sup>

If the Darwinian organism represented Wilson’s idea of the Constitution, the metaphor of the machine better describes what he saw as the President’s ideal constitutional role: the engine of the system.<sup>197</sup> Wilson proved an important figure in constructing as a theorist—and bringing about as a politician—a *presidential* democracy built around the chief executive. Many Progressives agreed that no other national office could snap the Constitution out of its self-induced stupor: political parties were too parochial; courts too backward-looking; Congress was cumbersome and beholden to special interests. “Only the presidency had the national vision to articulate the public’s evolving interests, the political incentive to represent those interests in action, and the wherewithal to act upon them with dispatch.”<sup>198</sup> His duty was to keep national opinion mobilized behind great public purposes and to thereby overcome all constitutional obstacles in the path to their achievement: “If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and caliber. Its instinct is for unified action, and it craves a single leader.”<sup>199</sup> For Wilson, Ford, and other progressives like Croly and Beard, the modern president was a modern adaptation permitting the salvaging of a “defective apparatus” (the Constitution) by allowing popular energy to course through it, “breaking through the constitutional form.”<sup>200</sup>

By the time Wilson and Teddy Roosevelt confronted each other in 1912, the two had switched places in their constitutional thought. Wilson traveled from critic to apologist, thanks to the magic formula of interpretivism; Roosevelt, by contrast, evolved from a loose constructionist to a Progressive formalist, on the strength of his growing commitment to “pure democracy,” which he now viewed as impossible under the existing Constitution.<sup>201</sup> In an important sense, the 1912 campaign was a referendum

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<sup>194</sup> WILSON, *supra* n. 105 at 57.

<sup>195</sup> *Id.* at 56-60.

<sup>196</sup> On the imagistic metaphors used in diverse periods to refer to the Constitution, see KAMMEN, *supra* n. 27 at 17-20.

<sup>197</sup> RICHARD J. ELLIS, *THE DEVELOPMENT OF THE AMERICAN PRESIDENCY* 108 (3<sup>rd</sup> ed. 2018).

<sup>198</sup> Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2087 (2009).

<sup>199</sup> WILSON, *supra* n. 105 at 68.

<sup>200</sup> A great amount of scholarship has been written on the changes the Progressives left on the face of the office. See, e.g., MILKIS, *supra* n. 188; TULIS, *supra* n. 153; JAMES CEASER, *PRESIDENTIAL SELECTION 170-212* (1979); PERI ARNOLD, *REMAKING THE PRESIDENCY: ROOSEVELT, TAFT, AND WILSON, 1901-1916* (2009).

<sup>201</sup> See MILKIS, *supra* n. 188 at 217. Assuredly, in the evolving trajectories of Teddy Roosevelt and Woodrow Wilson’s constitutional thought is a lesson about political power and opportunism. Certainly, neither man expressed particular dissatisfaction with the U.S. Constitution while in office, however

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on these dueling visions of the Constitution. These were not second-order issues, but front and center of the campaign. Progressives like Herbert Croly, who consulted for Roosevelt on the party agenda—even coining the phrase “New Nationalism,” may have been better at articulating grand reform visions than the precise legal path by which they would be carried out. Yet the Progressives’ campaign was formalist through and through. The official party platform pledged “to secure such alterations in the fundamental law of the several States and of the United States as shall insure the representative character of the Government.”<sup>202</sup> These included direct primaries for state and national offices; presidential primaries; the direct election of senators; the initiative, referendum and recall; and extending Congress’ power over matters like labor, economics, and public health “[u]p to the limit of the Constitution, and later by amendment of the Constitution, if found necessary.” The Progressives also called for revision to Article V: “[B]elieving that a free people should have the power from time to time to amend their fundamental law so as to adapt it progressively to the changing needs of the people, [the Progressive Party] pledges itself to provide a more easy and expeditious method of amending the Federal Constitution.” (The Democratic platform, meanwhile, had far fewer such ambitious proposals, though it did call for an amendment making the President eligible for just a single term.<sup>203</sup>)

Wilson would harp on this point in elucidating the difference between the Progressives’ plan and his own “New Freedom,” which was far more sympathetic to courts and parties. Although Wilson believed almost as ardently as Roosevelt did in popular democracy oriented around strong executive leadership, the Democrat deliberately stopped short of calling for referenda on court decisions and the recall of all public officials.<sup>204</sup> Ironically, it probably was Roosevelt’s own example as President that convinced Wilson to turn away from his opponent’s new emphasis on forms. What, after all, was T.R. but living proof that, through the power of the “bully pulpit,” the President could bridge the Constitution’s mechanical separations to lead party and nation, and become “as a big a man as he can”?<sup>205</sup>

Under the Wilson presidency, formalism became the road not taken. To be sure, Wilson presided over the greatest period of constitution-revising in American history after the Bill of Rights. But these victories had little to do with Wilson or his agenda. The income tax amendment, approved by Congress in 1909, had been steered through Congress by Taft. Direct senatorial election was, as we have seen from reform proposals of the era, a movement that predated Wilson’s presidency, and the Seventeenth Amendment’s success was mostly the work of Republican reformers in Congress like La Follette, Senators Joseph Bristow (R-KS) and William Borah (R-ID) and Representative George Norris (R-NE). Prohibition split the Democrats, and Wilson personally did not come out in favor of the proposal.<sup>206</sup> As for women’s suffrage, Wilson had never endorsed it before World War I, leading many to suspect that he took up the cause only as a means to bolster the appeal of his scheme for a global League of Nations.<sup>207</sup> These amendments did not reach in any way, moreover, the deep

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concerned they were as civilians. At a larger level, however, the dueling visions these two expressed were entrenched in society more broadly.

<sup>202</sup> 1912 Progressive Party Platform (June 25, 1912), *The American Presidency Project*.

<sup>203</sup> 1912 Democratic Party Platform (June 25, 1912), *The American Presidency Project*.

<sup>204</sup> MILKIS, *supra* n. 188 at 186-7.

<sup>205</sup> Andrea S. Katz, *The Progressive Presidency and the Shaping of the Modern Executive* (Paper presented at the 2011 American Political Science Association Conference in Seattle, WA, on file with author).

<sup>206</sup> In fact, Wilson vetoed an act giving Congress enforcement power over alcohol production, but the Volstead Act passed over his veto in 1919.

<sup>207</sup> Elizabeth Sanders, *Presidents and Social Movements: A Logic and Preliminary Results in FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING* 234 (Stephen Skowronek and Matthew Glassman eds. 2007).

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structural problems reformers had identified and decried decades before: divided government, immobility, deadlock, judicial supremacy, the separation of legislative and administrative functions. Nor, as has become more obvious, did these ever deal with the question of “usurpation,” or how to square increased government powers and structures with a rule-of-law Constitution.

By 1920, World War I and Progressivism were over, and across American politics, a palpable kind of conservatism and disillusionment was settling in. The Republican candidate for president, Warren G. Harding, ran a sober campaign promising the nation nothing more than “a return to normalcy.”<sup>208</sup> En route to winning the Republican nomination, Harding defeated California Senator Hiram Johnson, T.R.’s vice-presidential running mate in 1912 and a reminder of the Republican Party’s fading associations with Progressivism. Johnson had himself been courted by the Progressive Party to be its flagbearer after the death of T.R. in 1919, but he declined, choosing to seek the presidential nomination on the Republican ticket. In 1924, the indefatigable “Fighting Bob” La Follette dusted off the Progressive Party for one more presidential run in 1924, but by this time, the seventy-year-old had come to seem like an old knight tilting at windmills.<sup>209</sup>

Croly’s journal *The New Republic* had appeared on the scene in 1914, a highbrow voice for Progressive ideas that became a bellwether of broader currents in the nation’s intellectual life, and which turned its co-founders, Croly, Walter Weyl, and Walter Lippmann into stars. Croly—and the editorial pages of *The New Republic*—had initially been cool towards Wilson, unsure whether Wilson’s progressivism was real or pretended, but Wilson’s active leadership and legislative victories in his first legislative term warmed the journal to him, and made him a Progressive hero.

But by 1919, the unity of the Progressive front, such as it had been, was irreparably damaged. The Great War split isolationists like William Jennings Bryan from interventionists (some said “warmongers”) like Teddy Roosevelt. Progressivism’s unfortunate associations with unsavory social experiments like eugenics and prohibition, plus the Wilson administration’s zealous prosecution of radicals under the Sedition Act of 1918, soured many on social meliorism, and provoked a reorientation of attitudes towards big government in particular. This was particularly true for legal Progressives like Felix Frankfurter and Louis Brandeis, whose thoughts on free speech were heavily shaped in the period.<sup>210</sup> The League of Nations was the straw that broke the camel’s back: under the spell of his illusions, Lippman wrote, President Wilson “had lost his grip on America.” Frankfurter, in a letter to Lippman, was even more cutting: Wilson

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<sup>208</sup> Warren G. Harding, Readjustment (Speech and Nation’s Forum Collection, Library of Congress), <https://www.loc.gov/item/2016655168/>.

<sup>209</sup> One last gasp of Progressive formalism was the proposed Twentieth Amendment, a response to the Supreme Court’s *Bailey v. Drexel Furniture* decisions invalidating statutes banning or penalizing child labor, which came down on May 15, 1922. By May 17, Representative Roy Fitzgerald (R-OH) had introduced a resolution supporting an amendment that would give Congress the ability to limit or prohibit children from under 18 from working. The amendment passed both Houses by June 1924. After that, however, opponents mobilized against it, and after twenty-eight states signed it, the campaign fizzled in the late 1920s, and the amendment was never ratified. Novkov argues that the child labor amendment “should not be seen in isolation from constitutional politics” of the period. Tellingly, among the apparent reasons for the ratification movement’s losing steam was “lingering resentment over the success of prohibition and the extension of suffrage to women.” See Julie Novkov, Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor, 44 AM. J. LEG. HIST. 369, 374, 395-6 (Oct. 2000).

<sup>210</sup> SNYDER, *supra* n. 27 at 116, 276, 281-2. As Snyder recounts, the “Red Scare” of anti-Communist paranoia touched Brandeis and Frankfurter personally when it spread to Harvard Law School, jeopardizing the careers of Frankfurter and Dean Roscoe Pound.

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and his advisors “were the naivest children in the world.”<sup>211</sup> The Progressive coalition was fraying, and losing its faith in democratic ideals.

Walter Lippman’s intellectual trajectory was dramatic, but by no means unrepresentative of a larger turn by intellectuals away from Progressivism.<sup>212</sup> A younger Lippman had galvanized the country with his 1914 *Drift and Mastery*, urging the nation to abandon its policy of aimless “drift,” hitch its political fortunes to the wisdom of scientific progress, and become master of its own destiny.<sup>213</sup> Yet disappointments with public life—Wilson’s failed barnstorming tour of America to sell the nation on the League of Nations, the Sacco-Vanzetti case, among others—helped convince Lippman of the fickleness of the public, and ultimately of the futility of democracy. By the time of his 1922 *Public Opinion* and his 1928 *Phantom Public*, whatever democratic spirit Lippman had had in his youth had been stamped out, leaving behind only a cynical relativism and technocratic elitism.

Brandeis and Frankfurter held onto their progressive commitments, but they, too, came to see the emphasis on forms as naïve.<sup>214</sup> For all his democratic commitments, Brandeis never lost his faith in courts, his long and distinguished career a testament to his attempts to reconcile Supreme Court power and judicial review with legislative supremacy and a progressive agenda.<sup>215</sup> Frankfurter remained a solid Progressive in his commitments, but he, too, turned away from reformist projects. For instance, although Frankfurter personally believed that the Due Process Clause would have been best written out of the Constitution, he believed that the slim chances of such an amendment made it a futile cause.<sup>216</sup> Frankfurter remained a devoted supporter of La Follette campaign of 1924, notwithstanding its radical attacks on the Court and solemn amendment proposals (including one to amend the Constitution to prevent the federal courts from voiding laws). Frankfurter still admired La Follette’s disinterestedness and egalitarianism, but increasingly, his thought was headed in another direction: away from populist plans to rewrite the Constitution and more towards a progressive jurisprudence that could reconcile judicial supremacy with progressive societal ends.<sup>217</sup>

For Croly, the decade after 1919 were “years of despair.”<sup>218</sup> Croly and *The New Republic*’s editors described the Treaty of Versailles as an “inhuman monster,” and they felt betrayed at Wilson’s capitulation to a settlement that virtually guaranteed “a Europe of wars and revolution and agony.” They confessed: “We were wrong. We hoped and lost.”<sup>219</sup> Croly lost, not only illusions, but many of his best friends, too. Some perished in the influenza epidemic of 1919; others, like Walter Weyl, died of throat cancer; others, including Learned Hand and Walter Lippman, grew estranged from Croly over growing philosophical differences. Croly remained a contributor to *The New*

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<sup>211</sup> *Id.* at 261.

<sup>212</sup> Arthur Link, *supra* n. 10 at 844 (noting that, after the flight of the middle classes, a second factor “in the decline of the progressive movement after 1918 was the desertion from its ranks of a good part of the intellectual leadership of the country. Indeed, more than simple desertion ... ; it was often a matter of a cynical repudiation of the ideals from which progressivism derived its strength [ideals such as the very cause of democracy].”)

<sup>213</sup> WALTER LIPPMAN, *DRIFT AND MASTERY* 147-148 (1914).

<sup>214</sup> *See., e.g.*, UROFSKY, *supra* n. 1 at 432 (“Brandeis rejected notions like judicial recall to correct the problems of judges who failed to heed social changes.”)

<sup>215</sup> UROFSKY, *supra* n. 1 at 431-33; EDWARD PURCELL JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 1-2 (2000).

<sup>216</sup> SNYDER, *supra* n. 27 at 345-46.

<sup>217</sup> *Id.* at 349.

<sup>218</sup> DAVID W. LEVY, *HERBERT CROLY OF THE NEW REPUBLIC: THE LIFE AND THOUGHT OF AN AMERICAN PROGRESSIVE* 266-270 (1985).

<sup>219</sup> *Id.* at 266.

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*Republic* until his death in 1930, but in spirit, the magazine was never the same. Croly had always been something of a slippery Progressive: his visions were grand, but elusive. Like the interpretivists, Croly believed that public opinion could be vindicated through progressive judicial philosophies, but he also seemed to believe that the channels of government needed to be opened in more literal ways, too.<sup>220</sup> He vaguely gestured at the initiative, abolishment of the distinction between domestic and interstate commerce, a reorganization of the separation of powers, and amendment of Article V, but these ideas were scarcely developed in his books.<sup>221</sup> Croly famously claimed that his thought combined the hard-edged realism of Alexander Hamilton with the democratic spirit of Thomas Jefferson, and compared to the “utopian” La Follette Republicans, Croly has gone down as a clear-eyed realist.<sup>222</sup> Yet in reality, he was always better at envisioning ways to empower the State than at devising instruments for holding it popularly accountable.<sup>223</sup> Stripped of the tools to channel the popular will, Progressive democracy became as empty a formula as the social contract in J. Allen Smith’s telling. It seems that the “utopian” Progressive formalists were those who best understood this point.

Just as the remnants of Progressive formalism were tamed by Wilson’s reformist energy and interpretivist methods, and later brought, once and for all, into the Democratic Party fold during the administration of T.R.’s nephew, Franklin D. Roosevelt, so, too, did the spirit of radical reform disappear under the mantle of legal realism and New Deal technocratic paternalism.<sup>224</sup> Somewhat fittingly, these two narratives would expose Progressives to the same critique by a later generation of opponents: substituting scientific expertise for democratic will was, in the words of Ellsworth Faris, the chairman of Chicago’s sociology department, “indeed to rule man out.”<sup>225</sup>

## The Lost Formalist Promise

In his 1905 study of the American constitution, the Australian statesman Henry B. Higgins shared an anecdote. Some years ago, on a trip to New Zealand, Higgins had been shown a thick-trunked timber tree, the *rimu*, gracefully encircled by a flowering vine called the *rata*. Higgins was surprised to learn from his hosts that, with time, “the fair and clinging *rata*” would grow stronger and thicker, eventually choking to death the *rimu*, “for all its pride and seeming might.” Higgins reflected, “so it may be

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<sup>220</sup> *Id.* at 20.

<sup>221</sup> *Id.* at 231, 287, 291.

<sup>222</sup> HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 20-22 (1909); CROLY, *supra* n. 9 at 54-55.

<sup>223</sup> Christopher Lasch, *Herbert Croly’s America*, *NY REV. OF BOOKS* (Jul. 1, 1965).

<sup>224</sup> Bruce Ackerman has recently and persuasively shown that Roosevelt New Dealers actively contemplated the path of constitutional reform in the face of persistent obstruction by the Supreme Court. The 1936 Democratic Party platform contained a more or less implied repudiation of the Court’s thereto restrictive Commerce Clause jurisprudence in its insistence that problems such as “drought, dust storms, floods, minimum wages, maximum hours, child labor, and working conditions in industry” could not be solved by the state legislatures, and if Congress lacked power to solve these under the Constitution, “we shall seek such clarifying amendment” as would assure it such. Nevertheless, argues Ackerman, in 1937, Roosevelt made a “highly self-conscious decision” to reject his party’s amendment proposals, choosing instead the route of court-packing to steamroll the Court’s resistance. However flawed it proved at the time, this decision, says Ackerman, came with a “long-term cost to higher lawmaking” similar to the one I describe here: “[C]ourt-packing did not require progressives to move beyond Washington, DC, to mobilize broad popular support to win the endorsement of their proposed amendments and state referenda. Rather than make popular sovereignty a living reality, court packing would leave it to the judges to create a new constitutional order through legal opinions spoken in a legalistic language that required professional training to comprehend.” ACKERMAN, *REVOLUTIONARY CONSTITUTIONS* 390-92 (2018).

<sup>225</sup> Quoted in PURCELL, *supra* n. 11 at 192-3.

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with this rigid constitution and [its extra-constitutional] parasitic growths.”<sup>226</sup> What, Higgins wondered, would the Framers think of an American President who, during wartime, became “a dictator with almost unlimited powers,” a vice president whose role was mainly symbolic, a Congress dominated by overgrown party machines, judicial appointments dictated by partisanship and venality, or the mighty impeachment power, reduced to a “mere scarecrow,” even where executives like Jefferson, Jackson and Lincoln disregarded the law?<sup>227</sup>

Henry Higgins was by then following the well-grooved path of a number of nineteenth-century legal scholars struck by the nation’s “extra-constitutional” constitutional life. None of these scholars chose to view this fact as proof that the system was thriving by ingenious adaptation.<sup>228</sup> Instead, the images they turned to (a vine choking a tree, a safety valve ready to burst, a straitjacket, a wall of water bearing down upon a dam) spoke of a democratic people subjected to, and suffocated by a text instead of mastering it. Extending his arboreal metaphor, Higgins wrote: “A tree may grow notwithstanding the iron band bound around it as a sapling; but it grows deformed, stunted, wanting rondure and completeness.”<sup>229</sup>

This view, so important to the political life of a century ago, finds practically no defenders today.<sup>230</sup> The vast majority of constitutional scholars takes for granted what many Progressives did not: that textual amendment is impossible, undesirable, or in any case superfluous.<sup>231</sup> On the right, conservatives share Higgins’ concerns about “extra-constitutional growths”: indeed, a cottage industry has sprung up of scholarship attacking the constitutionality of twentieth-century innovations like congressional commerce clause powers, the social welfare state, or the constitutional right of privacy.<sup>232</sup> Yet, these scholars would vigorously reject Higgins’ characterization of Article V as an “iron band,” and on the whole, view the immobility of the Constitution as a

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<sup>226</sup> Higgins, *supra* n. 90 at 214.

<sup>227</sup> *Id.*

<sup>228</sup> Their intellectual ancestor was, of course, Alexis de Tocqueville, although the latter’s study of American political life in the 1830s started from opposite theoretical foundations. Whereas Bryce & Co. viewed the Constitution as imposing obstacles to coordinated, purposive democratic action, Tocqueville’s analysis did not anticipate the rise of a singular national democracy, and it viewed the Constitution as largely a “mediating structure” between the states and a limited federal government. Bruce P. Frohnen, Constitution-Reading Through Tocqueville’s Eyes, 42 CAP. U. L. REV. 879, 904-5 (2014); John O. McGinnis, Reviving Tocqueville’s America: The Supreme Court’s New Jurisprudence of Social Discovery, 90 CAL. L. REV. 485 (2002); *c.f.* Phillip C. Kissam, Tocqueville and American Constitutional Law, 59 MAINE L. REV. 35, 37 (arguing that Tocqueville’s egalitarianism provides a basis for a strong national tradition of judicial rights production).

<sup>229</sup> *Id.* at 213-15.

<sup>230</sup> One important exception is Sanford Levinson, the rare modern-day Progressive who considers the Constitution irremediably defined by “hardwired” undemocratic features like bicameralism and the “indefensibly apportioned Senate,” and which therefore can only be salvaged by a new drafting convention. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 21-22 (2006). Unlike Higgins or Bryce, however, Levinson’s preoccupation is not with the *rata*’s growth but the *rimu* tree’s inherent defectiveness. Other notable constitution-skeptics include ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001); LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012). And, making the point that constitutional rigidity creates pathologies from the point of view of textual interpretation, see Thomas Merrill, *supra* n. 37.

<sup>231</sup> Gerald Magliocca, Constitutional Change in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 909, 919 (Mark Tushnet et al ed. 2015) (“[C]onstitutional amendments are typically unnecessary to change constitutional law or culture. There is no significant advantage to using the Article Five process when other options are available, which is why political activists of all stripes focus on litigation and influencing public opinion rather than hammering out proposed changes to the Constitution itself.”)

<sup>232</sup> See, e.g., RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Gary Lawson & Steven G. Calabresi, The Depravity of the 1930s and the Modern Administrative State, 94 NOTRE DAME L. REV. 821 (2018). Ken Kersch canvases these and other strands of conservative thought in KERSCH, *supra* n. 180 at 1-102.

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solemn virtue that, indeed, the Progressives hostilely denigrated.<sup>233</sup> Constitutional progressives, meanwhile, sympathize deeply with the concern that an unchanging Constitution is asphyxiating and presumptively undemocratic, but what James Bryce called “flexible parasites on a rigid system,” today’s liberal constitutionalists instead view as legitimate and necessary adaptations to an inflexible text.<sup>234</sup>

The present state of affairs is associated with several constitutional pathologies legal scholars have already identified: first, the sacralization of the Constitution, with its corresponding stultifying effect on political life; second, the marginalization of popular constitutionalism; third, rising interpretive difficulties and an accompanying crisis of legitimacy of constitutional law. I conclude this Article by sketching these out with the hope that the formalist-interpretive lens I employ here can cast these issues in a new light.

### 1. *Constitutional Sacralization*

A healthy constitutional system requires “reverence for the laws,”<sup>235</sup> as Madison wrote in *The Federalist*, yet even the Founders disagreed about how much distance from the text was *too* much. Jefferson famously called for triggering a constitutional convention every nineteen years, reasoning that if the people viewed their Constitution “like the arc of the covenant, too sacred to be touched,” they would effectively cede their popular sovereignty to a founding generation that, however farsighted, was far from omnipotent.<sup>236</sup> Some scholars have come to believe that, as the years pass without major reform, just such a “sacralization of the text” is taking place.<sup>237</sup>

Much more than a blueprint for government, the Constitution is the root of American national identity.<sup>238</sup> Today, for all the sharp tenor of their disagreements, liberals and conservatives alike overwhelmingly embrace visions of constitutional meaning that correspond to sociologist Gunnar Myrdal’s celebrated midcentury thesis that the Constitution and the American creed are one and the same.<sup>239</sup> Conservative formalists imagine a relatively fixed text, but they ascribe to it enduring values purportedly defining a special national character which risks being “lost” through destructive change.<sup>240</sup> Liberal antiformalists, on the other hand, follow Charles Beard in imagining a living Constitution of prodigious flexibility, but unlike Beard, they see such change as proof of the country’s capacity to achieve the historic promise encoded in

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<sup>233</sup> Two classic examples of scholarship in this tradition, which, among other things, was devoted to eradicating the Beardian view of the Constitution as elitist and undemocratic, are MARTIN DIAMOND, *THE FOUNDING OF THE DEMOCRATIC REPUBLIC* (1981) and McDONALD, *supra* n. 78. For work with a similar thrust that treats the Progressive Era as a constitutional fall from grace, see EPSTEIN, *supra* n. 230; RONALD PESTRITTO, *WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM* (2005); JEAN M. YARBROUGH, *THEODORE ROOSEVELT AND THE AMERICAN POLITICAL TRADITION* (2012). Canvassing accounts that traced a decline in constitutional fidelity and certainty to the Progressive Era, see Ken Kersch, *Constitutional Conservatives Remember the Progressive Era*, in *THE PROGRESSIVES’ CENTURY 130* (Stephen Skowronek et al eds. 2016).

<sup>234</sup> VISCOUNT JAMES BRYCE, *STUDIES IN HISTORY & JURISPRUDENCE*, vol. 1 120 (1901). Among such historically minded constitutionalist theories, among the most well-known are Bruce Ackerman’s *We The People* trilogy, *WE THE PEOPLE: FOUNDATIONS, TRANSFORMATION, AND THE CIVIL RIGHTS REVOLUTION*, vols. 1-3 (1991, 1996 and 2014); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

<sup>235</sup> James Madison, *supra* n. 35.

<sup>236</sup> Thomas Jefferson, Letter to Samuel Kercheval, July 12, 1816, quoted in James R. Zink and Christopher T. Dawes, *The Dead Hand of the Past? Toward an Understanding of Constitutional Veneration*, *POL. BEHAVIOR* (2015).

<sup>237</sup> Sanford Levinson, *supra* n. 36 at 4; LEVINSON, *CONSTITUTIONAL FAITH* (2011). Aziz Rana echoes the diagnosis of what he calls “creedal constitutionalism.” Rana, *supra* n. 36 at 1-4.

<sup>238</sup> RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* xi (1995).

<sup>239</sup> Rana, *supra* n. 36 at 58; GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944).

<sup>240</sup> See, e.g., KERSCH, *supra* n. 233 at 1-6.

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the text itself.<sup>241</sup> As Aziz Rana writes, “we essentially have an enchanted version of the old debate between [Progressive] formalists and antiformalists.”<sup>242</sup> Even in today’s period of political disenchantment, not even the most hardbitten critics threaten to disturb the midcentury settlement inscribing onto the text aspirational narratives of fulfillment.

Veneration of the Constitution not only “discourage[s] recognition of its all-too-present imperfections,” but also has stimulated a Manichean strand of constitutional politics which construes even friendly critique as tantamount to treason.<sup>243</sup> Stephen Teles describes, for instance, the Tea Party and the conservative House Freedom Caucus as “fundamentalist” organizations which construed struggles over the meaning of the Constitution in just these sorts of elemental terms.<sup>244</sup> Such a view has justified, in turn, an active stance of permanent opposition, a rejection of compromise as heretical, and above all, a refusal to concede the legitimacy of other actors in the political system. Such behavior is far from contained to these sectors, as Congress’ recent skirmishes over judicial appointments well illustrates, and in itself, it constitutes a form of institutional crisis.<sup>245</sup>

Enduring constitutional values and a national identity associated therewith are not a problem per se. But in the present day, with democratic discontent mounting, a more productive attitude toward the text might be that of the progressive formalist Franklin Pierce, who combined a utilitarian pragmatism about the Constitution’s “hardwired” structure with an enduring romanticism about its symbolic meaning. Pierce wanted to scrap the institutions of the Constitution in order “to save it.”<sup>246</sup> Perhaps a similar disenchanting attitude, not toward the Constitution per se, but towards its constituent elements could be productive in our day.<sup>247</sup>

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<sup>241</sup> See, e.g., BARACK OBAMA, *THE AUDACITY OF HOPE* 231-32 (2005) (extolling a “vision of America finally freed from the past of Jim Crow and slavery, Japanese internment camps and Mexican braceros, workplace tensions and cultural conflict,” and insisting that in attaining this vision, “we’ve been aided by a Constitution that—despite being marred by the original sin of slavery—has at its very core the idea of equal citizenship under the law; and an economic system that, more than any other, has offered opportunity to all comers, regardless of status or title or rank.”)

<sup>242</sup> Rana, *supra* n. 36 at 58.

<sup>243</sup> David Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

<sup>244</sup> Stephen Teles sees the conservative House Freedom Caucus as organized such “fundamentalist” constitutional principles, which justify a stance of permanent opposition.

All fundamentalisms are rooted in an account of history that begins with an authoritative founding, followed by a fall from right ordering, and succeeded by a battle to return to the founding orthodoxy. The Tea Party, with its public call for a return to the Constitution and reverence for the Framers as secular saints, was nothing if not a kind of fundamentalism. ... In [its] narrative construction, President Obama was not dismissed as a moderate liberal reformer. He was something much more sinister, a representative of ideas wholly alien to America’s constitutional and cultural traditions. These beliefs provided a framework within which complete, uncompromising conservative opposition to the president, and unrelenting pressure on their Republican allies to refuse to compromise or collaborate in any way, made sense.

Teles, *supra* n. 11 at 455.

<sup>245</sup> Alice Ristroph, *Is Law – Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENTARY 431, 432 (2009) (defining institutional crisis as a condition where “actors within the constitutional system disagree about their roles and authority and are willing to go to the mat to defend their competing interpretations.”)

<sup>246</sup> This is not unlike what Richard Bernstein and Jerome Agel mean when they write, of historical attempts to revise the Constitution, “Because we venerate it so much, we want the Constitution to fit ever more closely with our hopes and expectations for American life.” BERNSTEIN & AGEL, *supra* n. 236 at xiii.

<sup>247</sup> LEVINSON, *supra* n. 237 at 21-22 (on the Constitution’s hardwired features, suggesting the same separation of formal structural content and symbolic meaning).



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## 2. Interpreting an Unamendable Text

Even for those not of the constitutional fundamentalist persuasion, it can be difficult to articulate standards of textual interpretation that do *not* sound in “constitution worship.” There is a reason our judges, even those who are aligned with a more pragmatic or sociological style of jurisprudence, tend not to describe themselves as “living constitutionalists.”<sup>248</sup> For all that Justice Sonia Sotomayor will be enduringly remembered as a “wise Latina woman” whose judicial thought was informed by “the richness of her experiences,” at her confirmation hearing she still insisted, of her judicial decision-making: “[I]t is law all the way down.”<sup>249</sup> In the same mode was Justice Kagan’s insistence at *her* confirmation hearing: “We are all originalists.” Today, to foreswear allegiance to the text is a nonstarter, even for progressives.

The methodological correlate of this “consensus attitude” is a highly acute version of what legal philosopher Brian Tamanaha calls a “problematic asymmetry” between left and right legal discourse.<sup>250</sup> Whereas conservatives construe their own legal approach as just “calling balls and strikes,” and textual fidelity as their calling card, the left is at pains to demonstrate its own textual fidelity, scrubbing out any hint that extra-judicial considerations of justice and policy may enter judicial decisionmaking. Stripped of the possibility of constructive constitutional critique, liberal constitutionalism is forced into an awkward balancing act between trying to preserve popular constitutional authorship on the one hand, and the need to pay tribute to a formalist methodology on the other.<sup>251</sup> This was a problem, to say the least, that did not particularly trouble Justices Holmes and Brandeis.

Whatever its facial or professed similarities with formalism, originalism, perhaps the dominant interpretive method of our time—at least judged on the degree of rhetorical homage legal interpreters pay it—does not offer a way out of the impasse, nor an equivalent to a modern-day formalism of the sort described here.<sup>252</sup> In addition to the methodological issues its critics have long pointed out, or the normative undesirability of its premises of fidelity to an unchanging text and of a bounded *demos* confined to those alive in 1787 who adhered to the original pact (assumptions which hold up particularly badly to Progressives’ critiques of a fictitious, abstract social compact), originalism has a more practical problem: it is a particularly bad fit for a text that, already a century ago, was described as an ill-fitting set of children’s clothing pinching the adult stuffed into them.<sup>253</sup> The problem is the growing intractability of what

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<sup>248</sup> Two exceptions are Justice Stephen Breyer and Richard Posner. On their pragmatist philosophies of jurisprudence, see BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* (2010); RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003).

<sup>249</sup> Quoted in Tamanaha, *supra* n. 224 at 67.

<sup>250</sup> See Brian Z. Tamanaha, The Progressive Struggle with the Courts: A Problematic Asymmetry, in *THE PROGRESSIVES’ CENTURY* 65-86 (Stephen Skowronek et al eds. 2016); TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010) (illustrating that early-twentieth-century jurists had realistic perceptions of judging).

<sup>251</sup> Pragmatically-minded judges trying to make room for the play of time and experience in constitutional meaning will often finesse the difference between fixity and change, appealing to fidelity to constitutional *principles* if not text. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>252</sup> See SEGALL, *supra* n. 38 at 123-24 (demonstrating that, in practice, originalism did not often guide the judicial opinions of Justices Thomas and Scalia, two of its most ardent defenders); see Solum, *supra* n. 28 at 163, 166, 169-175 (distinguishing a principled form of “neo-formalism” from originalism); Unearthing a form of textualism compatible with political liberalism, Paul Killebrew, Where Are All the Left-Wing Textualists?, 82 N.Y.U. L. REV. 1895 (2007).

<sup>253</sup> Among many critiques of originalism, see SEGALL, *supra* n. 38; Paul Brest, The Misconceived Quest for Original Understanding, 60 B.U. L. Rev. 204 (1980); Robert Post & Reva Siegel, Originalism as a Political Practice: The Right’s Living Constitution, 75 FORDHAM L. REV. 545 (2006); Robert Post and Reva Siegel, “Democratic Constitutionalism,” in *THE CONSTITUTION IN 2020* 26 (Jack Balkin & Reva Siegel eds. 2009); Keith E. Whittington, The New Originalism, 2 GEORGETOWN J. OF L. AND PUB.

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Lawrence Lessig has called the problem of “translation,”<sup>254</sup> or what Thomas Merrill describes as the “pathologies” of “interpreting an unamendable text.”<sup>255</sup> As the Founding recedes ever farther into the distance, and the American State—indeed, the world in which the Constitution is presently applied—resembles less and less the one of “original understandings,” literal or “plain meaning” readings of the text require increasingly heroic interpretive leaps. As a result, constitutional text must be invoked, in the words of one originalist scholar, “at such a high level of generality that it ceases to function as an effective constraint on the interpreter.”<sup>256</sup>

One illustrative example is the debate of where the Constitution vests the power to declare war. Lined up on one side are eminent scholars such as Raoul Berger, Alexander Bickel, John Hart Ely, Louis Fisher, Harold Koh, Leonard Levy, Charles Lofgren, Arthur Schlesinger, Jr., William Van Alstyne, and Bruce Ackerman who contend that, on an original understanding, the President cannot commit troops to combat without congressional authorization, save for a limited power to repel sudden attacks.<sup>257</sup> On the other side, scholars including Phillip Bobbitt, Robert Bork, Edward Corwin, Henry Monaghan, Eugene Rostow, Robert Turner, W. Michael Reisman, and John Yoo have argued that the power to “declare” war was intended to be the limited one of classifying a conflict as a war for purposes of international law.<sup>258</sup> The debate remains an academic one, as the federal courts have declined to reach the

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POL. 599 (2004). On the normative critique, see JAMES FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION* (2015); Brest, *supra* n. 190 at 205-07.

<sup>254</sup> Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1193).

<sup>255</sup> Merrill, *supra* n. 37.

<sup>256</sup> CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 395 (1994).

<sup>257</sup> See Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972), Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131 (1971), JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3-10, 139-52 (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 74-77 (1990); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 30-53 (1988); Charles A. Lofgren, *On War-Making, Original Intent, and Ultra-Whiggery*, 21 VAL. U. L. REV. 53 (1986); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 1-26 (1973); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972); Bruce Ackerman and Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447 (Feb. 2011).

<sup>258</sup> See Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1370-1388 (1994); Robert Bork, *Foreword to THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* ix (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989); Robert Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 698 (1990); EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 234, 256 (5th ed. rev. 1984); Henry P. Monaghan, *Presidential War-making*, 50 B.U. L. REV. 19 (Spring 1970); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864-66 (1972); Eugene V. Rostow, *“Once More unto the Breach:” The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 6 (1986); ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* 80-81 (1991); W. Michael Reisman, *Some Lessons from Iraq: International Law and Democratic Politics*, 16 YALE J. INT'L L. 203, 212 (1991); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

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merits of the issue,<sup>259</sup> and an unsettled one, at that.<sup>260</sup> In other words, for an office whose evolution has been radical and transformative, and whose limited formal powers were laid out centuries ago in a couple of bare lines of text, the formalist approach looks more and more like a dead end.<sup>261</sup> This is partly what Merrill means when he likens constitutional interpretation to a one-sided “echo chamber” where judicial precedent itself substitutes for authoritative sources stemming from the text itself.<sup>262</sup>

A second example shows a different, but related problem: clinging to forms where time has shifted the norms underlying them can produce obtuse results.<sup>263</sup> In 2014, the Supreme Court invalidated two recess appointments made by President Obama to the National Labor Relations Board (NLRB) under the Recess Appointments Clause.<sup>264</sup> The difficulty of the case lay in the underlying context of political gamesmanship: an intransigent GOP-led Senate was making it a policy to hold up Obama nominations, holding *pro forma* sessions attended by a skeleton crew of senators to stave off formal recess. The administration, meanwhile, adopted a transparently self-interested theory of the appointment power that allowed President Obama to ignore these *pro forma* sessions and effectively bypass senatorial consent. In a 9-0 opinion, the Court reasoned that neither the drafters’ intent nor the legislative history of the Recess Appointment Clause supported the Administration’s position. In an ironic twist, it was arch-formalist Justice Scalia who, in concurrence, chastised the majority opinion (authored by the Court’s reigning pragmatist, Justice Stephen Breyer) for disregarding the nontextual “self-evident purpose” of the Clause: to preserve the balance of power between the President and the Senate regarding appointments.<sup>265</sup> Formalism was indeed a crude lens for an interbranch conflict that was about politicking through and through, with a number of larger subtextual issues, to boot: the decades-long conservative assault on the NLRB and administrative agencies more broadly, the Senate’s increasing use of the “approval and consent” power to shelve nominations, a looming “vacancy crisis” on the federal bench,<sup>266</sup> and even the question of why, in an era of jet travel, Congress should have recesses at all.<sup>267</sup>

The more remote the constitutional text grows from practical legal problems, the more “play in the joints” there is in constitutional argument, and the less reliable the Constitution becomes as an authority. A recent wave of conservative scholarship sees the Progressives’ legacy as the ultimate destruction of constitutional meaning, and it calls

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<sup>259</sup> For recent cases challenging the constitutionality of the President’s unilateral power to deploy troops, see Smith v. Obama, 2016 WL 6839357 (D.D.C. Nov. 21, 2016) (dismissing, for lack of standing and as a political question, a challenge by an active-duty soldier asserting that his overseas deployment in the war against the Islamic State was unconstitutional, as Congress had not authorized it), Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000) (dismissing, for lack of standing, a suit by 31 Members of Congress challenging the President’s use of American forces in the former Yugoslavia); Kucinich v. Bush, 236 F. Supp. 2d 1, 2 (D.D.C. 2002) (dismissing, for lack of standing, a challenge by 32 Members of the House to President Bush’s unilateral withdrawal from the 1972 Anti-Ballistic Missile Treaty); Kucinich v. Obama, 821 F. Supp. 2d 110, 112 (D.D.C. 2011) (dismissing, for lack of standing, a challenge by 10 Members of the House of President Obama’s order of airstrikes in Libya).

<sup>260</sup> William Treanor, Fame, the Founding, and the Power to Declare War, 68 WASH. U. Q. 693, 698 (1990). (“The debate [over the war power] has reached a point of stalemate. As Professor Stephen Carter concluded, “[E]vidence concerning the original understanding ... does not come down firmly on one side or the other.”)

<sup>261</sup> See, e.g., David M. Golove, Against Free-Form Formalism, 73 NYU L. REV. 1791 (Dec. 1998) (arguing, in a different context, that neither the text nor legislative history of Article II support a singular construction of the Treaty Clause).

<sup>262</sup> Merrill, *supra* n. 37 at 547.

<sup>263</sup> See Pozen, *supra* n. 243 (on the Court’s refusal to consider, or censure, norms of constitutional “bad faith”).

<sup>264</sup> NLRB v. Noel Canning, 573 U.S. \_\_ (2014).

<sup>265</sup> *Id.* (SCALIA, J., concurring).

<sup>266</sup> Carl Tobias, Curing the Federal Court Vacancy Crisis, 53 WAKE FOREST L. REV. 883 (2018).

<sup>267</sup> Jeffrey Toobin, Our Broken Constitution, THE NEW YORKER (Dec. 12, 2013).

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for a “return” to original understandings.<sup>268</sup> Yet scholars of American political development have drawn attention to a well-established pattern of conservative political actors appropriating Progressive tools (e.g., the administrative state<sup>269</sup>, presidential public opinion leadership,<sup>270</sup> judicial activism<sup>271</sup>, and crisis government<sup>272</sup>) to serve their own ends. Originalism tries to put the genie back in the bottle, so to speak, yet when scrutinized based on sociologist Paul Starr’s distinction between rules that entrench universally applicable *rules*, as opposed to rules that merely entrench power, these efforts do not regularly pinch the particular beliefs of the interpreter that applies them.<sup>273</sup> Originalism, in its modern incarnation, thus increasingly resembles interpretivism by another name.

### 3. *The Eclipse of Popular Constitutionalism*

With systemic constitutional critique and formal amendment off the table, as in the Progressives’ time, notable changes in governing authority under our Constitution take place through informal, incremental change in the behavior of political actors.<sup>274</sup> Congress may pass statutes in new areas, for instance nineteenth-century laws supporting construction and improvement of roads, canals, and harbors; presidents may take on greater decisionmaking power, for instance, in war making; the Supreme Court may recognize and approve of such changes, or even take preemptive action itself, as in recognizing abortion rights.<sup>275</sup> Judicial sanction of ordinary political change is the keystone of the system. As Bruce Ackerman writes, “[i]t is judicial revolution, not formal amendment, that serves as one of the great pathways for fundamental change” under our Constitution.<sup>276</sup>

Today, the great constitutional debates of the age—about abortion, religion, federalism, and the powers of the presidency—take place before the bench. This is not to discount the vibrancy of social movements in the making of constitutional culture, nor to deny that judges often pay heed to public opinion.<sup>277</sup> At the same time, these voices are stunted by their dependence on legal interpreters—the advocate who

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<sup>268</sup> Kersch, *supra* n. 233; Teles, *supra* n. 11.

<sup>269</sup> Skowronek, *supra* n. 198; Sheila Jasanoff, A Century of Reason: Experts and Citizens in the Administrative State in THE PROGRESSIVES’ CENTURY 382 (Stephen Skowronek et al eds. 2016); Joana Grisinger, The (Long) Administrative Century: Progressive Models of Governance in THE PROGRESSIVES’ CENTURY 360 (Stephen Skowronek et al eds. 2016); Sidney Milkis, The Progressive Party and the Rise of Executive-Centered Partisanship, in THE PROGRESSIVES’ CENTURY 174 (Stephen Skowronek et al eds. 2016).

<sup>270</sup> JEFFREY TULIS, *supra* n. 153 at 175-6 (1988).

<sup>271</sup> “When it comes to serious [constitutional] business, movement-activists in the Republican Party are trying to change our Constitution by following the higher lawmaking script elaborated during the New Deal. They are looking for brilliant jurists who could emulate Justices Black, Frankfurter, and Jackson in writing landmark opinions that sweep away the law of the preceding era and create a brave new world for the constitutional future.” Ackerman, *supra* n. 34 at 1741-42.

<sup>272</sup> TULIS, *supra* n. 153 at 181.

<sup>273</sup> PAUL STARR, ENTRENCHMENT (2019); SEGALL, *supra* n. 38 at 4 (arguing that originalism as a doctrine provides few constraints on judges’ reasoning, which is in turn much more likely to be guided primarily by their personal values.)

<sup>274</sup> *But see*, describing and sounding a note of warning a “growing tendency to use [amendment politics] either as an alibi for not solving major political problems through the ordinary political process or as a means to distract the electorate from more pressing issues,” Richard B. Bernstein, The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment, 61 FORDHAM L. REV. 497, 555 (1992).

<sup>275</sup> Contrasting such behavior with formal amendment at the state level, DINAN, *supra* n. 17 at 2. *See also* Richard Albert, Constitutional Amendment by Constitutional Desuetude, 62 AM. J. OF COMP. L. 641 (2014).

<sup>276</sup> Ackerman, *supra* n. 34 at 1742.

<sup>277</sup> *See., e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2009) (arguing that, in exercising judicial review, judges are often enforcing the will of the people).

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translates claims into legally cognizable categories; the judge who passes on such claims; the legal scholar who anoints these struggles with a constitutional imprimatur. Moreover, a left jurisprudence that purports to embody textual fidelity—a doctrinal reasoning inherently at odds with social democratic jurisgenerativity—still shows the lingering effects of the devastating midcentury conservative critique of Progressive anti-formalism as nihilistic or value-free.<sup>278</sup>

It is important to recall the vehemence with which Progressives rejected the standard social compact account of the Constitution as the fixed imprint of a contract signed between the sovereign People and its government, the task of courts being to vindicate choices the People had made by faithfully interpreting that contract.<sup>279</sup> The Columbia historian J. Allen Smith saw such abstract appeals to the People’s sovereignty over “their” higher law as a myth disseminated by conservatives to pacify the masses and insulate judicial review from popular ire.<sup>280</sup> Smith would have none of these metaphors of sovereignty when the way the Constitution functioned *in practice* was so different. Smith wanted cold, hard proof of popular mastery of higher law—a national referendum on judicial decisions, for instance.<sup>281</sup> In like fashion, Judge Walter Clark urged, “Let us not be deceived by forms, but look at the substance. Government rests not upon forms, but upon a true reply to the question, ‘Where does the governing power reside?’”<sup>282</sup>

Today, the particular topography of constitutional discourse—constitution-affirming and court-centered—means that, more than ever, when we speak of “constitutional law,” we mean the creations of scholars, judges, or other legal practitioners. We could fairly call this *constitutionalism by canonization*. Scholars construe the constitutionalist project as one of insisting that new political settlements are consistent with or in fact vindicate old principles and values. Works of constitutional scholarship treat the New Deal as an epochal “constitutional moment” outside of the text; the feminist wave of the ‘70s and ‘80s as establishing a “de facto ERA” compensating for the failure of the real amendment; or LGBT legal mobilization as moving the constitutional needle in unconventional, non-“juricentric” ways.<sup>283</sup> The conservative constitutional project purports to be doing nothing of the sort, insisting that its adherents are merely translating “the Constitution’s objective communicative content.”<sup>284</sup> Yet in practice, conservatives can also be seen employing a progressive method of popular constitutionalism to provide shelter under the text for any number of new-fangled conservative projects.<sup>285</sup>

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<sup>278</sup> On the concept of jurisgenerativity, Robert Cover, *Nomos and Narrative*, THE SUPREME COURT 1982 TERM, 97 HARV. L. REV. 4 (1983-84); Siegel, *supra* n. 188 at 1325. On Brandeis’ judicial philosophy, PURCELL, *supra* n. 215 at 1-2. On the conservative critique of Progressive value neutrality, see Tamanaha, *supra* n. 224 at 74-76; PURCELL, *supra* n. 11 at 42-45 (on the realists’ flirtation with nihilism).

<sup>279</sup> A modern version is KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

<sup>280</sup> SMITH, *supra* n. 42 at 94, 150-51, 256, 275-6 (1903) (critiquing the social compact and summarizing other works of the period critical of the theory).

<sup>281</sup> “Popular ratification of all constitutional changes ... is absolutely necessary if the constitution is to afford the people any protection in the enjoyment of their political rights.” *Id.* at 136.

<sup>282</sup> Clark, *supra* n. 15 at 6.

<sup>283</sup> BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS VOL. 1 (1991); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323-1419 (2006); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) and NeJaime, *The Family’s Constitution*, CONST. COMMENTARY 280 (2017). On “juricentric” popular constitutional change, Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004).

<sup>284</sup> Gary Lawson, *Right About the Constitution*, BALKINIZATION (Blog post of June 5, 2019).

<sup>285</sup> See Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, HARV. L. REV. 192, 193-4 (2008) (showing how *Heller*’s originalism enforced understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism).

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Thinking of our present political dysfunction in terms of popular anger at the elite tenor of constitutional politics could be fruitful. For all that popular constitutionalism remains vibrant in a sociological sense, the present situation leaves the popular sovereign with a distinctly truncated role. This augurs problems, not just for the citizenry, but for legal practice itself. As avenues for *literal* popular authorship of constitutional text dry up, American constitutional life becomes a performance of warring legal elites advancing canons of “super-precedents” that, they claim, *definitively* set the proper bounds of what is constitutional. The power claims at stake in these arguments are increasingly obvious, which makes them, in turn, increasingly suspect. Paradoxically, too, as the Constitution itself grows increasingly fixed, features of the “unwritten Constitution” may be harder to entrench. The common law-like body of constitutional interpretation Merrill describes lies, essentially, at the command of judges.<sup>286</sup> Those who view the New Deal or the Civil Rights era as constitutional settlements, for instance, are witnessing with dismay a mounting rollback of the protections of *Roe v. Wade* or the so-called *Auer* principled of deference to administrative agencies.<sup>287</sup> Constitutional canonization is not, it seems, a perfect substitute for a real democratic constitutional politics.<sup>288</sup>

A rising tide of court-skepticism, particularly on the left, may augur a renaissance of the Progressive-era view of the federal bench as irremediably disposed to protecting private property and corporate enterprise.<sup>289</sup> Conceivably, said pessimism could trigger a new practical reach for the work of scholars like Stephen Gardbaum, Ran Hirschl, Mark Tushnet, and Jeremy Waldron, who have long been lobbing small p-progressive attacks on the institution of judicial review.<sup>290</sup> Tushnet, in particular, advocates for a “populist” constitutional law in which judicial declarations are given no particular status.<sup>291</sup> This could trigger a return to a kind of Progressive-era popular constitutional tradition that linked its critiques of judicial decisions to the *literal* production of higher law. The point, as J. Allen Smith recognized, is that in an enlightened democracy, no abstract appeal to the “popular sovereign” can substitute for productive social conflict over constitutional meaning.<sup>292</sup>

As societal conflicts and challenges prompt increasing comparisons between the Gilded Age and our own time, Progressive critiques of their status quo have insights for concerned citizens in the present day. In their time, the Progressives launched an all-fronts assault on obstacles they saw as standing in the way of their social ambitions. The institutional solutions they contemplated included proposals (some assuredly ill-advised) such as the recall of judges and judicial decisions, the redesign of the legislative and executive branches, the abolishment of judicial review, and a lower threshold for constitutional amendments, among many others.

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<sup>286</sup> Merrill, *supra* n. 37.

<sup>287</sup> On *Auer* deference, Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017).

<sup>288</sup> DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995* xvii (1995) (concluding that “in practice as well as by design formal amendment has no equal in the American constitutional order.”)

<sup>289</sup> See, e.g., Samuel Moyn, *Resisting the Juristocracy*, BOSTON REV. (Oct. 05, 2018).

<sup>290</sup> See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000); RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004); STEPHEN GARDBAUM, *THE COMMONWEALTH MODEL*; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). Interestingly, all of these scholars have comparative experience studying the British model, perhaps echoing the similar critique made over a hundred years ago by Bagehot, Bryce, and Dicey.

<sup>291</sup> TUSHNET, *supra* n. 291f.

<sup>292</sup> On the concept of jurisgenerativity, Robert Cover, *Nomos and Narrative*, THE SUPREME COURT TERM 1982 TERM, 97 HARV. L. REV. 4 (1983-84); Siegel, *supra* n. 283 at 1325.

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A century later, progressive frustrations with rising corporate power, corruption, economic inequality, and political dysfunction are again prompting reformers to search for solutions: initiatives floated today include curbing court power, reducing the anti-majoritarian composition of institutions like the Senate and the Electoral College, and erecting statutory firewalls between politics and the influence of capital.<sup>293</sup> However, one major difference between these proposals and their forebears is that, for all their transformative aims, today's reforms show a profound pessimism regarding their ability to capture broad-based democratic approval. It almost goes without saying that few see the use in calling for a new constitutional convention.

Back in the Progressive Era, however, the idea of serious constitutional revision was not the remote province of law professors with idealistic tendencies or policy wonks with a particular axe to grind (to wit, the tax-payer amendment proposal of 1982). To the contrary, it was the life's work of a generation of committed reformers who have in large part been lost to history. Revisiting the era not only shatters the illusion of a sacrosanct Constitution whose stewardship of the nation has endured unassailed since the time of the Founders; it also provides an example upon which a serious modern politics of constitutional reform might be built. Perhaps the main contribution the lost doctrine of Progressive formalism offers us today is to elucidate the possible, and to focus us on a moment when democratic theories of constitutionalism were focused on what should be, rather than what can.

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<sup>293</sup> See, e.g., Mark Tushnet, *Democracy Versus Judicial Review: Is It Time to Amend the Constitution?*, 52 *DISSENT* 59 (2005); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 249-53 (2004). See also *supra*, n. 7.