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The First Conservatives: The Constitutional Challenge to Progressivism

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Abstract: *Although it is readily apparent that conservatism is united in its principled hostility to modern Progressive Liberalism, it is often more difficult to pin down just what the movement stands for. Johnathan O'Neill suggests that a focus on defending and preserving the Constitution could unite the otherwise fractious conservative movement. In this spirit, he examines four early conservative responses to Progressivism, all of which continue to have supporters today: Burkean traditionalism, Southern Agrarianism, libertarianism, and constitutional conservatism. While the first three had a strained, ambiguous, or hostile relationship to the constitutional order that limited their ability to respond to Progressivism, the latter offered informed and forthright resistance to Progressivism based on an affirmation of American constitutionalism. These conservatives met Progressivism with principled arguments rooted in the constitutional tradition, and they give us a historical example that can offer guidance to today's conservatives.*

Electoral defeats and long-standing differences of principle have separated the strands of conservatism held together for so long by the leadership of William F. Buckley and Ronald Reagan. Libertarians, who value individual liberty above all, have gained adherents due to dissatisfaction with the steadily increasing power of modern government. Traditionalist conservatism, often informed by religion, has invigorated opposition to abortion and remains vibrant, but its emphasis on virtue and moral restraint distances it from the moral relativist orientation typical of libertarianism. The neoconservative understanding of human nature and dedication to an activist foreign policy, both built on a version of American exceptionalism, are sometimes rejected by libertarians and traditionalists.

Yet all of these enduring schools of contemporary conservatism treat the Constitution as a good and generally politically sound document, even if they might question aspects of it or disagree among themselves on other matters. This truth suggests that one way toward another era of practical accord among the different types of conservatism is a focus on defending and preserving the Constitution.[1] Whatever the ultimate principles and immediate aims of the various types of conservatism, they have more to gain from focusing the political conversation on the Constitution than do their adversaries, contemporary liberals or

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progressives, who more likely would prefer to abandon it.

How might politics look if conservatism oriented itself around preservation of the Constitution? We can gain historical perspective on this question by considering how conservatives responded when Progressivism challenged the established constitutional order in the early 20th century.

Progressivism was an intellectual and political reform movement that aimed to alter the American constitutional system.[2] At the deepest level, as expressed especially in the thought of Woodrow Wilson and Herbert Croly, Progressives aimed to refound America based on the managerial–administrative political philosophy of the European state. Consequently, Progressives typically rejected the foundational American principles of natural rights and limited government for their own understanding of "progress," defined as governmental experts' management of social change toward an ever more just and essentially socialist future.

Progressives called for more activist regulatory power in the federal government via administrative bureaucracies and more direct democratic control of political decision making to wrest it from the supposedly corrupt hands of big business and the party system. Progressives were confident that they knew the direction of history and could tutor and direct Americans in what was required to be in harmony with it, so they zealously attacked or redefined aspects of constitutionalism that they regarded as outmoded or simply false.

Accordingly, for Progressives, the local self-government protected by federalism was an obstacle to be overcome, as was the Supreme Court's resistance to many of their desired regulations. The President would become the representative of a properly instructed public opinion and then would oversee the bureaucracy that would effect the will of the masses.

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As this description suggests, in many respects, Progressives created the world we now inhabit, and Progressivism's modern Liberal incarnation remains very much with us. Those who would resist the further elaboration of the Progressive vision would do well to study the arguments and limitations of those who first opposed it.

It is in this spirit that we will examine several noted conservatives who criticized Progressivism and who yet had a strained, ambiguous, or hostile relationship to the constitutional order. This discussion will analyze the period's most noted exemplars of Burkean traditionalist conservatism, Southern Agrarianism, and libertarianism, all of which continue to have supporters among today's conservatives. These groups' principles, though considered and sometimes profound, limited their commitment to American constitutionalism and thereby prevented a stronger and more coherent conservative response to Progressivism. Their insufficient attachment to the Constitution, at the time when it most needed them, should serve as a warning to today's conservatives.

[1] For recent discussions of this idea, see Peter Berkowitz, "Constitutional Conservatism: A Way Forward for a Troubled Political Coalition," *Policy Review*, Vol. 153 (February–March 2009); "The Mount Vernon Statement: Constitutional Conservatism: A Statement for the 21st Century," at *http://www.mountvernonstatement.org*; and "What Happened to the Constitution?" Special Issue, *National Review*, May 17, 2010.

[2] The academic literature on Progressivism is immense. More accessible recent critiques are Thomas West and William Schambra, "The Progressive Movement and the Transformation of American Politics," Heritage Foundation *First Principles Report* No. 12, July 18, 2007, at *http://www.heritage.org/Research/Reports/2007/07/The-Progressive-Movement-and-the-Transformation-of-American-Politics*, and "The Four Hoursemen of Progressivism: The Men Who Created Our World," *National Review*, December 31, 2009.

We will then examine a now-neglected group of conservatives who also rejected Progressivism but did so precisely by rededicating themselves to American constitutionalism. This group articulated the classic constitutionalist arguments for federalism, for an independent judiciary dedicated to the rule of law but not somehow superior to the Constitution, and for a presidency checked by and moored to other institutions of government rather than to mere public opinion.

CONSERVATIVES ALIENATED FROM AMERICAN CONSTITUTIONALISM

Humanism and the Limits of Burkean Conservatism

In the 1920s, Irving Babbitt (1865–1933), a professor at Harvard University, began a movement of conservative cultural criticism known as Humanism. Led by Babbitt's influential writing and his popularity as a university instructor, Humanism rejected the wooly-headed utopianism and crude self-indulgence it saw as degrading modern culture, especially literature.

Humanism steadily gained adherents among conservatives, and Babbitt remains an abiding referent for traditionalists who cast a wary eye on American culture. His deepest intellectual loyalty was to Edmund Burke, whose thought informed Babbitt's brief but pointed attack on Progressivism. Though Babbitt was not primarily a political thinker, his *Democracy and Leadership* (1924) is a fine example of a Burkean approach to the political and constitutional questions of the day.

Babbitt condemned Progressives' confiscatory reform schemes and defended the absolute necessity of property rights for any decent society (though always remaining critical of crude materialism). He praised the Supreme Court as the institutional embodiment of the principled restraint central to his thought. He also cautioned against increased presidential power, ridiculed Prohibition as a characteristic modern intrusion on liberty, and warned that the Progressives' zeal for direct democracy was profoundly dangerous to republican government. Moreover, Babbitt valorized Washington and Lincoln as paragons of principled leadership who knew that ethical restraint was needed if democracy was to endure.

In the teeth of Progressivism, then, Babbitt's deep learning generated a kind of constitutional conservatism, yet his Burkean orientation ultimately distanced him from America's foundational principles. Babbitt held that on one side of man's dual nature stood insatiable appetite and passion; on the other, moral self-restraint and willed moderation that constituted the "inner check" or "veto power" on the former. He deployed this dualism, which he knew had a long history in Western thought, as a powerful critique of democratic culture, materialism, and politics. Drawing somewhat on Aristotle and more on Burke, Babbitt argued that only an aristocracy could orient society toward ethical standards and self-restraint, thereby moderating the selfishness, vulgarity, and redistributionist meddling loosed by modern mass democracy.

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But his Burkean distaste for democracy distanced him from the natural rights and popular sovereignty principles announced in the Declaration of Independence and sustained by the constitutional order. Focused on ethical standards and self-restraint, Babbitt saw in Locke and in Jefferson's Declaration only the assertion of "abstract rights" shorn of duties and thus the inevitable modern slide into vulgarity and petty self-interest. "The liberty of the Jeffersonian," he wrote, "makes against ethical union like every liberty that rests on the assertion of abstract rights." With more than an echo of Burke, Babbitt too quickly conflated the French and American Revolutions, dismiss-

ing the "supposed rights of man" as serving only the destructive leveling of democracy.[3]

Babbitt hoped that aristocratic leadership and ethical standards could be revived, but this was a hope against what he viewed as the low and irredeemably appetitive character of American principles. Consequently, his conservatism backed into a defense of important aspects of the constitutional order yet rejected its foundation in the early modern liberal theory of natural rights, popular sovereignty, and social contract.

Russell Kirk, the Burkean giant of post–New Deal conservatism, lauded the Constitution as a conservative bulwark for the American Revolution's vindication of traditional English liberties—but not natural rights.

Babbitt denied himself recourse to America's foundational ideas just at the time the Progressives were severely undermining them. This limitation was encapsulated in his juxtaposition of antebellum abolitionists' appeal to natural rights (and that of Lincoln, one might add) with the states' rights claims of Calhounite fire-eaters. He said both sides took equally "extremist" positions. So "the whole question of union, instead of being settled on ethical lines, had to be submitted to the arbitrament of force."[4] But Babbitt's form of conservatism, as has been noted, "could not determine whether some rights supercede some duties; his argument gives the impression that a stable social order is all-important, even though it mean some men and women live enslaved."[5]

After the New Deal victory, some Burkean traditionalists reconsidered whether their position might form a closer attachment to the American Founding than Babbitt had managed in the Progressive era. Russell Kirk, the Burkean giant of post–New Deal conservatism so influenced by Babbitt, initiated this shift by lauding the Constitution as a conservative bulwark for the American Revolution's vindication of traditional English liberties—but not natural rights.[6]

Kirk keenly appreciated that American conservatism depended on the achievements of Western civilization and that the Americans would be aided and sustained by recovering this broader historical context. Yet Kirk and Burkean conservatism more generally were never fully reconciled to the idea of natural rights and persisted in viewing America as a somewhat disappointing offshoot of English civilization. Engagement with this set of problems, inherited from Babbitt, gradually helped form major fault lines among traditionalism and other strands of post–New Deal conservatism as they related themselves to America's principles and Constitution.

The Limits of Southern Agrarian Conservatism

Another significant strand of conservatism in the early 20th century was Southern Agrarianism, whose founding manifesto was an essay collection published in 1930 and titled *I'll Take My Stand*. Southern Agrarians' basic claim was that the South was a culturally distinct section, based on agriculture, which must be liberated from the alleged domination of the mercantile, industrial, and crudely materialist North.

As a group, Agrarians were devoted to individual liberty, local self-government, and Southern culture. They typically argued that the real reason for the Civil War was the North's oppression of the South, not slavery's offense to natural rights. Over time, this separation from the American idea of natural rights, and from the Constitution, increased as advocates of "states' rights," influenced by the Agrarians, defended secession and the Confederacy.

[3] Irving Babbitt, *Democracy and Leadership* (Boston: Houghton Mifflin, 1924), pp. 247, 246.

[4] *Ibid.*, p. 248.

[5] Stephen C. Brennan and Stephen R. Yarbrough, *Irving Babbitt* (Boston: Twayne, 1987), p. 122.

[6] Russell Kirk, *The Conservative Mind* (Chicago: Regnery, 1953; 6th printing, 1964), pp. 63, 96, 44.

Frank L. Owsley (1890–1956) was an original Agrarian and influential historian who taught at Vanderbilt University and the University of Alabama. He influenced M. E. Bradford, a major figure in post–New Deal Southern Agrarianism, who wrote that Owsley articulated "better than the rest" of the movement's early figures its combination of libertarian localism and communitarian traditionalism.[7]

While Agrarianism did not arise in direct response to Progressivism, several of its principles opposed the collectivist and regulatory tendencies of Progressivism and the New Deal. Ultimately, though, Owsley's conception of sectionalism, skillfully elaborated from the famed historian Frederick Jackson Turner, outweighed all else in his thought. It fostered his acceptance of the quasi-Marxist analysis of the Progressive historian Charles Beard, which led Owsley to view the Constitution as just one more tool of the Northern mercantile elite.[8] Accordingly, the New Deal ultimately revealed how tenuous was Owsley's connection to the Constitution, and hence the limitations of Agrarianism as rejoinder to the Progressive program.

Simply put, Owsley's sectional, Agrarian loyalties trumped constitutional principles. Indeed, he regarded even states' rights as something of a shibboleth: Antebellum Southerners, he said, used it tactically as a defense of their section against the North more than they regarded it as a foundational constitutional principle. Likewise, fixation on states' rights undermined the shared Southern identity and unity necessary for the South to have won the Civil War.

So when in the Progressive and New Deal periods Northerners appealed to states' rights or federalism against centralizing statism, he could not take them seriously. Tutored by Beard's view of the Constitution, he saw in such appeals only the obfuscation of corporate greed so that the North could continue to dominate the South. Moreover, when the early New Deal undertook some agrarian land reform and threatened Northern industrial elites, Owsley welcomed the increased federal power and called for more to revive the Agrarians' yeoman farmer ideal.

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Just how fundamentally Owsley set Southern sectionalism over the Constitution was evident in "The Pillars of Agrarianism," an essay published in 1935. Since the "United States is less a nation than an empire made up of a congeries of regions marked off by geographic, climatic, and racial characteristics," the South would never be treated fairly under current governing arrangements. What was needed was "a new constitutional deal" that accounted for the conflicting regional interests and mores. Owsley then sketched a "new set-up [for] the federal government" that would have utterly redefined the constitutional order in keeping with his regionalism and Agrarianism.[9] For Owsley, the New Deal was to be used on behalf of the South, not resisted on behalf of the Constitution.

[7] M. E. Bradford, "What We Can Know for Certain: Frank L. Owsley and the Recovery of Southern History," *Sewanee Review*, Vol. 78 (1970), pp. 664, 668. See also M. E. Bradford, "Frank L. Owsley," in *Dictionary of Literary Biography, Volume Seventeen: Twentieth-Century American Historians*, ed. Clyde N. Wilson (Detroit: Gale, 1983), pp. 336–342.

[8] Twelve Southerners, *I'll Take My Stand: The South and the Agrarian Tradition* (New York: Harper: 1930). The 12 Southerners were Donald Davidson, John Gould Fletcher, Henry Blue Kline, Lyle H. Lanier, Stark Young, Allen Tate, Andrew Nelson Lytle, Herman Clarence Nixon, Frank Lawrence Owsley, John Crowe Ransom, John Donald Wade, and Robert Penn Warren. Two informative studies are Edward S. Shapiro, "Frank L. Owsley and the Defense of Southern Identity," *Tennessee Historical Quarterly*, Vol. 36 (1977), p. 75, and Michael O'Brien, *The Idea of the American South, 1920–41* (Baltimore: Johns Hopkins University Press, 1979), pp. 162–184.

[9] Harriet Chappell Owsley, ed., *The South: Old and New Frontiers: Selected Essays of Frank Lawrence Owsley* (Athens: University of Georgia Press, 1969), pp. 186, 187.

Even so, the Jeffersonian in Owsley could never quite abandon the American idea of natural rights as the basis for individual liberty and limited, responsible government. He defended natural rights before the New Deal and afterward as part of a switch-of-course defense of constitutionalism as sound as any at mid-century. But he also vehemently denied that natural rights had any bearing on the issues of slavery and the Civil War, and his racism obviated any suggestion that natural rights might underlie a just approach to American race relations. Nor did he recognize any tension between his defense of natural rights and his emphasis on regional economic competition and class struggle as the driving forces in American history.

Given such large inconsistencies, most post–New Deal Southern Agrarians opted for a more Burkean traditionalist conservatism that openly rejected natural rights.[10] Thus, despite Owsley's proffered loyalty to America's founding doctrine, his primary devotion to Southern regionalism prevented a strong defense of American constitutionalism amid the challenges of Progressivism and the New Deal. When post–New Deal Southern Agrarianism altogether abandoned natural rights, its connection to American constitutionalism became even more doubtful than it had been for Owsley.

The Limits of Libertarianism

Modern libertarianism, with its defense of individual liberty above all else, formed in direct response to the increase in centralized regulatory government under Progressivism and the New Deal. One of its leading lights was Albert Jay Nock (1870–1945), a journalist and author.

Variously a minister, professor, and full-time writer, from the late 1910s until his death, Nock published in the most important magazines of his era. With erudition and wit he railed against the growth and centralization of state power, bureaucratization, and corrupt legislation that was beholden to private interests (including those of big business). Murray Rothbard, a major figure in the post–New Deal libertarian movement, wrote that "more than any other person [Nock] supplied twentieth-century libertarianism with a positive, systematic theory."[11] Nock's anti-statist critique remains influential, despite his unsavory Darwinian and anti-Semitic leanings in his final embittered years.

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In his journal *The Freeman* (1920–1924) and the elaboration of its perspective in *Our Enemy, the State* (1935), Nock described himself as a "philosophical anarchist." He tolerated only a severely constricted role for state authority—a radical version of the classical liberal or libertarian position. While "government" had always existed in some form to manage the concerns natural to any community, brigands founded the "state" in conquest and confiscation to seize the land and exploit the production of others. The state was in essence a criminal enterprise, the "political means" for expropriation from honest folk who made their living by productive "economic" means.

Nock applied these ideas to American constitutionalism. He built explicitly on Charles Beard's quasi-Marxist claim that the motor of history was conflict between economic classes, although he eschewed Beard's socialism. Beard's supposed revelation of the Constitution as a coup d'état on behalf of property

[10] Andrew Lytle, "Foreword," in *ibid.*, pp. xiii–xiv; M. E. Bradford, "The Heresy of Equality: Bradford Replies to Jaffa," *Modern Age*, Vol. 20 (1976), p. 62. See also O'Brien, *The Idea of the American South*, pp. 180–181.

[11] Murray N. Rothbard, *The Betrayal of the American Right* (Auburn, Ala: Ludwig Von Mises Institute, 2007), p. 18.

interests proved that Nock's own view applied to America: It was no different from any other inherently exploitative state.[12]

Unsurprisingly, then, and despite his zeal for human liberty, Nock did not think much of the Constitution and had little patience with any claim of a principled politics in defense of it. Early in his career, he observed that *The Freeman* was "never very strong for the Constitution…. We sometimes think that it is the appointed function of the United States to clear the way for a regime of philosophical anarchism elsewhere in the world."[13] The doctrines of natural rights and popular sovereignty announced in the Declaration of Independence quickly had come to justify merely "an unlimited economic pseudo-individualism on the part of the State's beneficiaries," who served themselves while only appearing to act in the name of the public.[14]

Equally fundamental, Nock denied the possibility of politics as classically understood. What masqueraded as principled deliberation about common things only obscured the battle for control of the state. America's republican, representative politics derived from natural rights and popular sovereignty was "futile." "Our nominally republican system is actually built on an imperial model, with our professional politicians standing in the place of the praetorian guards; they meet from time to time, decide what can be 'got away with,' and how, and who is to do it; and the electorate votes according to their prescriptions."[15] Indeed, Lincoln's "'of the people, by the people, for the people' was probably the most effective single stroke of propaganda ever made in behalf of republican State prestige."[16]

Especially fraudulent was any politics "put on show as 'constitutional principles.'" Such constitution talk was only "an elaborate system of fetiches," so much "sophistry" and "agonized fustian" that hid the "only actual principle of party action—the principle of keeping open the channels of access to the political means."[17]

Thus, as Progressivism lurched toward the New Deal, Nock condemned American government along with all other government. The stinging critique of statism drawn from his libertarian and sometimes anarchist views alienated him as much from American constitutionalism as from everything else. As a consequence, Nock was unable to respond adequately to the fundamental constitutional challenges of Progressivism and the New Deal. Whether libertarianism could be reconciled to American constitutionalism would become another important question for post–New Deal conservatives.

CONSTITUTIONAL PRINCIPLES AND THE PROGRESSIVE CHALLENGE

Another group of conservatives did offer informed and forthright resistance to Progressivism based on explication and affirmation of American constitutionalism. Most of these intellectuals, scholars, and politicians were loosely affiliated with the National Association for Constitutional Government (NACG) and its publication *Constitutional Review*. Their constitutional conservatism proceeded without the reservations or fixed aversions evident in Babbitt, Owsley, and Nock, and in them we have a historical example of how such a program might proceed.

In 1913, David Jayne Hill, a former ambassador to Germany and former university president, proposed the NACG in a galvanizing article attacking socialism, Progressivism, and proposals for constitutional change that had circulated in the election of 1912.[18]

[12] Albert Jay Nock, *Our Enemy, The State* (New York: Morrow, 1935), pp. 158–174.

[13] Quoted in Michael Wreszin, *The Superfluous Anarchist: Albert Jay Nock* (Providence, R.I.: Brown University Press, 1971), p. 59.

[14] Nock, *Our Enemy, The State*, pp. 130 (quote), 140, 142, 145, 173–174.

[15] *Ibid*., pp. 140, 18–19.

[16] *Ibid*., pp. 57 (quote), 82–84.

[17] *Ibid*., pp. 176–177, 52 (note 12), 180.

[18] David Jayne Hill, "The Crisis in Constitutionalism," *North American Review*, Vol. 198 (December 1913), pp. 769–778; reprinted in David Jayne Hill, *Americanism: What It Is* (New York: Appleton, 1916), pp. 49–82.

The organization was founded that year with Hill as its president and included among its honorary members Elihu Root, an influential former Secretary of State, Secretary of War, and Senator.

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In 1917, the NACG began publishing *Constitutional Review*, which ran through 1929 and included work by Supreme Court Chief Justice William Howard Taft; former Senator and soon-to-be Justice George Sutherland; Galliard Hunt, the biographer and editor of the papers of James Madison; Max Farrand, the compiler of *The Records of the Federal Convention of 1787*; and Nicholas Murray Butler, the president of Columbia University. The *Review* was edited by Henry Campbell Black, an established legal writer known most widely for *Black's Law Dictionary*, who contributed detailed editorials to most issues. After Black's death in March 1927, the *Review*'s editorial board included Charles Warren, the leading constitutional historian of the era, and James M. Beck, a former Solicitor General, Congressman from Pennsylvania, and noted author.

The publication's circulation was never large, but NACG, the *Review*, and a few other like-minded public figures articulated an informed constitutional conservatism throughout the 1920s. They expressed themselves in the statesmanlike idiom of constitutional principle and in more popularly accessible and persuasive writing and speech. Drawing from the Founding, they focused on four key principles:

- **Natural Rights.** The traditional American understanding of natural rights was foundational for these constitutionalists. Perhaps the period's most famous such articulation was President Calvin Coolidge's sesquicentennial speech on the Declaration of Independence.[19] Leading figures such as Beck, Root, and Hill often made similar statements. Contributors to the *Review* used the logic and language of natural rights in holding that a core purpose of constitutionalism was protection of the individual from arbitrary or illegitimate authority. Likewise, they often referred to man as a created and ensouled being whose dignity and protection demanded unmoveable limits on government.[20]
- **Limited Government.** This natural rights basis for liberty accepted the old republican point that government must be limited because of the lower, appetitive, and irrational side of human nature. This idea was expressed through defense of established American conceptions of limited government and religious notions of creation and fall. For example, Hill treated American constitutionalism as a "system of voluntary renunciation of arbitrary power." The American people, as the popular sovereign, had done "what no other sovereign had ever before voluntarily done in the history of the world—they freely and formally renounced the power to impose their personal arbitrary will upon the organs of government or upon one another."[21] Others observed that "self-government, if it means anything, means the exercise of sufficient self-restraint on the part of the people to uphold their own fundamental law against every temptation to subvert it."[22] Americans were "a self governing

[19] Calvin Coolidge, "Address at the Celebration of the 150th Anniversary of the Declaration of Independence, Philadelphia, Pa., July 5, 1926," at *http://www.presidency.ucsb.edu/ws/?pid=408*.

[20] Johnathan O'Neill, "Constitutional Maintenance and Religious Sensibility in the 1920s: Rethinking the Constitutionalist Response to Progressivism," *Journal of Church and State*, Vol. 51 (2009), pp. 24, 38–40. The next two paragraphs draw on this article.

[21] Hill, *Americanism: What It Is*, pp. 29, 55.

[22] George Sutherland, "Principle or Expedient?" *Constitutional Review*, Vol. 5 (October 1921), pp. 195, 199.

people because we are a people of self imposed limitations."[23]

- **Equal Rights for All and Special Privileges for None.** Objections to "class legislation"—laws that privileged some groups of citizens over others—abounded in conservative constitutional discourse, as they did in the era's Supreme Court decision making. The NACG's statement of founding purposes emphasized this point, and *Constitutional Review* frequently defended "equal rights for all and special privileges for none."[24] Often, such statements occurred with criticisms of union violence, socialism, or Communism, the latter two being regarded as the ultimate destructive expression of class legislation. Thus, the growing conservative resistance to the collectivist notion of class emerged from and built on a key principle of America's natural rights: limited-government constitutionalism.[25]
- **Republicanism, not Democracy.** Closely related to the focus on rights, restraint, and class legislation was the often reiterated statement that America was "a republic, not a democracy." This point informed opposition to Progressivism's call for more direct and plebiscitary popular rule. Like the Founders, constitutionalists defended representative government for its ability to foster deliberation and moderation, and America's institutional arrangements because they put some distance and delay between public opinion and the creation of law. In the words of Henry Cabot Lodge, the Founders' goal was that there "should be abundant time for discussion and consideration, that the public mind should be thoroughly and well informed, and that the movements of the machinery of government should not be so rapid as to cut off due deliberation."[26]

Examples could be multiplied of how constitutional conservatism cohered around America's foundational conceptions of natural rights, limited government under the rule of law, and republicanism. Of course, individuals sometimes disagreed on particulars or supported specific reforms as consistent with their principles. The point to be emphasized here, however, is that conservatives met Progressivism with principled arguments rooted in the constitutional tradition.

Although recent scholarship has delved more deeply into the philosophical core of Progressivism than did most conservatives of the time, it is important to note that they saw its basic challenge to American constitutionalism. Hill recognized the roots of Progressivism in modern European theories of the state, despite the older trend in Western civilization toward limitations on absolutist conceptions of politics. America's natural rights, limited-government constitutionalism clearly opposed the idea that "there exists somewhere an exclusive sovereign power, whose sphere is undefined, whose operation is incessant, whose decrees are materially irresistible, and whose authority is, therefore, not to be questioned."[27] But now modern mass democracy, including Progressivism, threatened a return to absolutism.

Hill developed this argument in numerous scholarly yet politically pointed writings. Others at *Constitutional Review* routinely bemoaned the "paternalist" trend of modern statism, sometimes linking it to the "Hegelian conception of the incarnate state" and urg-

[23] Charles S. Thomas, "Federal Encroachments," *Constitutional Review*, Vol. 4 (October 1920), pp. 206, 215. For similar expressions, see William Howard Taft, *Popular Government* (New Haven, Conn.: Yale University Press, 1913), pp. 9, 67, 180–182, 184–185.

[24] Archibald Hopkins, "Labor, the Law, and the People," *Constitutional Review*, Vol. 4 (1920), pp. 161, 164.

[25] A similar point is made in Michael Les Benedict, "Laissez-Faire and Liberty: A Revaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review*, Vol. 3 (1985), pp. 293, 306–308.

[26] Leslie M. Shaw, "A Republic, Not a Democracy," *Constitutional Review*, Vol. 9 (1925), p. 140; Henry Cabot Lodge, *The Democracy of the Constitution* (Freeport, N.Y.: Books for Libraries Press, 1966 [1915]), pp. 54 (quote), 30, 52–54, 57, 80. See also O'Neill, "Constitutional Maintenance," pp. 46–47 and citations therein.

[27] Hill, *Americanism: What It Is*, p. ix; Hill, *The People's Government* (New York: Appleton, 1915), pp. 102–104, 94 (quote).

ing Americans to excise from their political science the "alchemy and astrology that Europe has interwoven into it."[28]

Reflective conservatives also recognized that the endurance of any regime required education in its principles—as well as loyalty to those principles among people not necessarily able fully or theoretically to articulate them. Beck often reiterated this point, sometimes calling on Aristotle (as in this somewhat truncated quotation): "'The best laws [, though sanctioned by every citizen of the state,] will be of no avail unless the young are trained by habit and education in the spirit of the Constitution.'" He rejected attributing to the Constitution some kind of "magical effect" whereby it could maintain itself. In reality, it "would have been a failure if there had not been a people with a sufficient genius for free government to maintain its principles." Ignorance of constitutional principles and disengagement from political life would bring the end of the republic.[29]

Charles Warren agreed, stating that "our political system will break down, only when and where the people, for whom and by whom it was intended to be carried on, shall fail to receive a sound education in its principles and in its historical development." Warren knew that this idea was central to the American Founding and restated it in that era's famous formulation: The preservation of free government required "frequent recurrence to fundamental principles."[30] Warren's large scholarly output advanced this goal, in part by amassing detailed primary source evidence to refute Progressive historians such as Charles Beard.[31]

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A major aim of the NACG and *Constitutional Review*, therefore, was to remedy the ignorance that had made citizens susceptible to radical and Progressive schemes. Preservation of constitutionalism necessitated "dissemination of knowledge regarding theories of government and their practical effects" and wider "comprehension of the distinctive principles upon which our political institutions are founded." Together, these would create a "higher type of American patriotism though loyalty to those principles."[32] The NACG and the *Review* supported state-level movements to require the teaching of constitutional principles and history in colleges and public schools, oratorical contests, and the first celebration of "Constitution Day" on September 17, 1919. The NACG also distributed some of the first pocket-sized copies of the Constitution.[33]

These efforts aided those of the American Bar Association, then still a conservative organization, which created a Committee on Citizenship to help lawyers communicate constitutional principles to popular

[28] "Important Articles in Current Magazines," *Constitutional Review*, Vol. 1 (1917), p. 49 (quote); Burton Alva Konkle, "Americanizing Americans," *Constitutional Review*, Vol. 8 (1924), pp. 97, 100 (quote). See also editorial, "The Revolt Against Paternalism," *Constitutional Review*, Vol. 7 (1923), pp. 41–45.

[29] James M. Beck, *The Changed Conception of the Constitution* (Rochester, N.Y.: University of Rochester, 1925), pp. 63–64, 13 (quote); Aristotle, *Politics* [1310a12] (Jowett translation); Beck, "A Rising or a Setting Sun?" *Constitutional Review*, Vol. 8 (1924), pp. 3, 13 (quote), 14.

[30] Charles Warren, *The Making of the Constitution* (Boston: Little, Brown, 1937 [1928]), p. 804.

[31] *Ibid.*, pp. 5, 69–95; Charles Warren, *The Trumpeters of the Constitution* (Rochester, N.Y.: University of Rochester, 1927), pp. 53–55.

[32] Editorial note, *Constitutional Review*, Vol. 1 (April 1917), p. 2 (quotes); editorial, "The National Association for Constitutional Government," *ibid.*, pp. 35–37.

[33] Samuel P. Weaver, "The Constitution in Our Public Schools," *Constitutional Review*, Vol. 11 (1927), p. 105; editorial, "Teaching Constitutional Government," *Constitutional Review*, Vol. 5 (1921), p. 120; editorial, "The Observance of Constitution Day," *Constitutional Review*, Vol. 4 (1920), p. 46; editorial, "Popularizing the Federal Constitution," *Constitutional Review*, Vol. 4 (1920), p. 235.

audiences at the local level. Leaders of the bar frequently urged lawyers to this kind of public service.[34]

Such efforts, as the people organizing them intended, not only transmitted a basic understanding of constitutional principles, but also fostered patriotic and affectionate attachment to them. Such educational efforts were sometimes dismissed by critics then and since as a boosterish "cult of the Constitution."[35] Perhaps for some it amounted only to that, but Aristotle's insight is not so easily dismissed. Amid the era's mass democracy and mass immigration, constitutionalists did not commit the error of believing that an elite or theoretical education alone was adequate to the maintenance of their regime.

CONSTITUTIONAL CONSERVATIVES RESPOND TO PROGRESSIVISM

Progressivism presented particularly sustained challenges to established understandings of federalism, the judiciary, and the presidency. Progressives wanted to diminish the power of the states in order to achieve a regulatory and redistributive regime centralized in the federal government. The new-modelled President was to be the voice of the people, who would lead them in "progress" toward this regime through his vision of the future and his command of the federal bureaucracy. When the judiciary resisted significant portions of this program, it too became a target of the Progressives.

As a result, constitutional conservatives found it necessary to come to the aid of state and local self-government, an independent judiciary bound to the rule of law and constitutional limits, and a presidency tied to and constrained by other elements of the constitutional system.

Defending Federalism

Although Progressives welcomed local initiatives that served their ends, they ultimately favored centralized power. Consequently, they attacked the established understanding of federalism with approaches that tended toward elimination of any restraints on the federal government.[36]

Federalism was the heart of many of the jurisprudential and constitutional controversies surrounding major Progressive measures: the era's four Amendments (XVI–XIX); the expansion of regulation under the Commerce and General Welfare Clauses; the growth of federal grants-in-aid and regulatory commissions (whose genesis preceded Progressivism); the regulation of child labor; and the move to create a federal department of education. Not all of the details of these issues can be addressed here, but I emphasize that when approaching them, conservatives defended federalism on principle. Partisanship was present, as always in constitutional politics, but so were considered arguments about the place of federalism in the constitutional order.

Constitutional conservatives adhered to the foundational American understanding of federalism as the division of authority and responsibility between levels of government for the sake of individual liberty and local self-rule. They condemned ongoing centralization as a grave threat. Indeed, "centralization" resounded as a pejorative throughout their constitutional commentary, as did "bureaucracy," "regimentation," "standardization," "usurpation," and "collectivism."[37]

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[34] Editorial, "American Bar Association to Promote American Ideals," *Constitutional Review*, Vol. 7 (1923), p. 55; editorial, "American Lawyers Support the Constitution," *Constitutional Review*, Vol. 10 (1926), p. 185; James A. Van Osdol, "Future Organization and Defense of the Constitution," *Constitutional Review*, Vol. 13 (1929), p. 121.

[35] Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Vintage, 1987), p. 208.

[36] Martha Derthick and John J. Dinan, "Progressivism and Federalism," in *Progressivism and the New Democracy*, eds. Sidney M. Milkis and Jerome M. Mileur (Amherst: University of Massachusetts Press, 1999), pp. 82–83.

[37] Michael Kammen, *Sovereignty and Liberty: Constitutional Discourse in American Culture* (Madison: University of Wisconsin Press, 1988), p. 172.

A major theme of anti-Prohibitionism was opposition to the federal takeover of an issue long subject only to local regulation.[38] For the same reason, Charles Warren defended judicial review against congressional attacks yet also criticized the Court's due process jurisprudence (both treated in more detail below).[39]

Federal grants-in-aid, whereby the federal government gave states money on the condition that they abide by federal policy mandates, were typically based on a broad interpretation of the General Welfare Clause and faced sustained opposition from Governor Albert C. Ritchie of Maryland and Senator James W. Wadsworth of New York. Not only did these programs financially entice states to trade their own authority for federal supervision, but they also were bad policy, inequitably redistributing wealth and resulting in maladministration by functionaries ignorant of local conditions. Critics also echoed Tocqueville's crucial point: Continued compulsion by a distant central authority "shall most certainly smother the ability of our people to govern themselves in the several states and in their home communities."[40]

Many critics also attacked centralizing Progressive initiatives as irresponsible and costly bureaucracies that tended toward socialism and perhaps Bolshevism.[41] Constitutional conservatives were part of a coalition that defeated a proposed child labor amendment. They did so by advocating local control as necessary to accommodate diverse circumstances and by emphasizing the measure's heavy-handed statist intervention into a traditionally private issue.[42] Henry Campbell Black and many others similarly regarded the proposed department of education as "the entering wedge for national centralization and standardization of education."[43] Only the continued vitality of the states could halt the drift toward a stifling yet remote government that reduced self-governing citizens to dependent subjects.

Constitutional conservatives adhered to the foundational American understanding of federalism as the division of authority and responsibility between levels of government for the sake of individual liberty and local self-rule.

Defense of federalism was no mask for inaction: Many conservatives thought that averting centralized federal control required constructive responses in the states, both individually and collectively. Elihu Root made this point in a 1906 address that was discussed and echoed by major figures throughout the period. Modern economic and technological developments created problems that ignored state lines, he said, and citizens who demanded solutions would have them one way or another. States could maintain their established governing authority only by awakening to "their own

[38] See, for example, Beck, *The Changed Conception of the Constitution*, p. 36; Frank Warren Hackett, "The Proposed Prohibition Amendment," *Constitutional Review*, Vol. 2 (1918), pp. 81, 86–89; Charles W. Pierson, *Our Changing Constitution* (Garden City, N.Y.: Doubleday, Page, 1922), pp. 43–48.

[39] Charles Warren, *Congress, the Constitution, and the Supreme Court*, rev. ed. (Boston: Little, Brown, 1935 [1925]), pp. 155–159; Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," *Harvard Law Review*, Vol. 39 (1926), pp. 431, 464–465.

[40] James W. Wadsworth, "Let's Stop This Fifty-Fifty Business," *Nation's Business*, March 1926, pp. 23–24, 24 (quote); Albert C. Ritchie, "Federal Subsidies to the States," in *Selected Articles on States Rights*, comp. Lamar T. Beman (New York: Wilson, 1926), pp. 294–311.

[41] See, generally, Lynn Dumenil, "'The Insatiable Maw of Bureaucracy': Antistatism and Education Reform in the 1920s," *Journal of American History*, Vol. 77 (1990), p. 499.

[42] Nicholas Murray Butler, *The Faith of a Liberal* (New York: Scribner's, 1924), pp. 302–305; Felix Rackemann, "Thought and Impulse in Legislation," *Constitutional Review*, Vol. 8 (1924), pp. 152, 157–158; editorial, "Proposals to Amend the Constitution," *Constitutional Review*, Vol. 8 (1924), pp. 112–113; editorial, "The Child Labor Amendment," *Constitutional Review*, Vol. 9 (1925), p. 44. See also Bill Kauffman, "The Child Labor Amendment Debate of the 1920s," *Journal of Libertarian Studies*, Vol. 10 (1992), p. 139.

[43] Editorial, "Opinions on the Towner–Sterling Bill," *Constitutional Review*, Vol. 7 (1923), pp. 109, 110 (quote). See also Henry Campbell Black, *Shall Education Be Under Local or National Control?* (New York: Tracts for Today, 1923).

duties to the country at large." A state whose laws or inaction flouted widespread calls for reform undermined "the conditions upon which alone its power can be preserved" and promoted "the movement for national control and the extinction of local control."[44]

This logic informed the movement for uniform state legislation, led initially by the American Bar Association and then by the National Civic Federation, which involved Root, Taft, and other conservatives. The movement was fundamentally conservative because it aimed to preserve the inherited federal structure from more far-reaching centralization by convincing states to cooperate in enacting model reform statutes. It had some success across a range of policy areas but ultimately was swept aside by the New Deal.[45]

Though some prominent conservatives supported individual centralizing initiatives, in general they regarded the centralizing tendency in so many policy areas at once as an unsound alteration of American constitutionalism.[46] In a speech hailed by conservatives, President Coolidge warned at length that nothing less than liberty and self-government were at stake. People who asked more of the federal government "than it was ever intended to provide" should recognize that "if we permit some one to come to support us, we cannot prevent some one coming to govern us."[47]

Defense of federalism was no mask for inaction: Many conservatives thought that averting centralized federal control required constructive responses in the states, both individually and collectively.

Conservatives repeatedly quoted a famous sentence from *Texas v. White* (1869): The Constitution looked to "an indestructible Union, composed of indestructible States."[48] When first announced, this decision brought some closure to the constitutional tumult of the Civil War, holding that the perpetuity of the Union made secession legally impossible. Yet the constitutional conservatives examined here used this passage to protest that local self-government in the states was being destroyed by federal regulation. Nicholas Murray Butler spoke for many in observing that while "states' rights" had once meant nullification and secession, it "now signifies the preservation of that just and wise balance between local self-government and central authority upon which our social order and our system of government itself have alike been built."[49]

A Proper Role for the Judiciary

Constitutional conservatives confronted attacks on the judiciary by Progressives who were dissatisfied with its resistance to some (but not all) aspects of their agenda. Progressives wanted courts to be more immediately receptive to their demands, but conservatives responded that judicial review was designed precisely to limit majorities within the bounds of the Constitution. Courts should not capitulate to whatever a majority may want at a given moment.

Crucially, conservatives made this argument in defense of judicial review without endorsing the late 20th century's unsound idea of judicial supremacy—

[44] Elihu Root, "How to Preserve the Local Self-Government of the States," in Beman, *Selected Articles on States Rights*, pp. 66, 67.

[45] Christopher J. Cyphers, *The National Civic Federation and the Making of a New Liberalism, 1900–1915* (Westport, Conn.: Praeger, 2002), pp. 153–178, which underscores the movement's principled respect for federalism. See also William Graebner, "Federalism in the Progressive Era: A Structural Interpretation of Reform," *Journal of American History*, Vol. 64 (1977), p. 331.

[46] See, for example, Richard Washburn Child, "The Doctrine of Local Obligations" *Constitutional Review*, Vol. 13 (1929), p. 85; Edward P. Buford, "Federal Encroachments Upon State Sovereignty," *Constitutional Review*, Vol. 8 (1924), p. 23; Harry Swain Todd, "Legislation by Constitutional Amendment," *Constitutional Review*, Vol. 5 (1921), p. 217; Pierson, *Our Changing Constitution*, pp. 143–149 and *passim*; Butler, *The Faith of a Liberal*, pp. 285–310.

[47] Calvin Coolidge, "Responsibilities of the States," May 30, 1925, in Beman, *Selected Articles on States Rights*, pp. 72, 76.

[48] *Texas v. White*, 74 U.S. 700, 725 (1869).

[49] Butler, *The Faith of a Liberal*, p. 295.

the claim that the Supreme Court is the only or final expositor of constitutional meaning.

Defending Judicial Review

Since the late 19th century, reformers and radicals had been alleging that judicial review—the courts' power to overturn legislation—was constitutionally illegitimate. Charles Beard's famous historical studies refuted this charge, but only by concluding that judicial review was originally intended as protection for capitalist greed from the democratic masses. This intellectual and political atmosphere encouraged several direct attacks on courts in the Progressive era.

- Theodore Roosevelt advocated recall of judicial decisions and judges in 1911–1912.
- Senator Robert L. Owen and Walter Clark of the North Carolina Supreme Court advocated varying plans to curtail judicial review, including abolition (most intensely in 1913–1917).
- In the 1920s, other Senators proposed bills to withdraw federal question and diversity jurisdiction and to prevent federal district court judges from instructing juries.
- The American Federation of Labor advocated abolishing judicial review or permitting Congress to re-enact overturned statutes.
- In 1922–1924, Senator William Borah proposed that overturning an act of Congress should require the votes of at least seven of nine members of the Court, while Senator Robert M. La Follette proposed that Congress should be able to re-enact any statue overturned by the Court and that lower federal courts should be unable to overturn them at all.[50]

Constitutional conservatives responded by defending judicial review and the Supreme Court as integral to the constitutional order. They saw recall of judges or judicial decisions especially as a threat to individual liberty and the rule of law. In the name of unfettered majoritarianism, the recall movement would abandon the republicanism, restraint, and deliberation central to constitutionalism. Leading constitutional conservatives often used a passage from Lincoln's first inaugural as a statement of their own position: "A majority held in restraint by constitutional checks and limitations and always changing easily with deliberate changes of popular opinion and sentiment is the only true sovereign of a free people. Whoever rejects it, does of necessity fly to anarchy or to despotism."[51]

On these principles, Elihu Root opposed a judicial recall provision in the proposed Arizona constitution, and in 1911, President Taft likewise vetoed the legislation admitting Arizona to the union. Taft also repeatedly denounced Roosevelt's anti-judicial position in the presidential election of 1912. In a speech accepting the nomination, Taft stated that preserving the Constitution "as it is" from attacks on the judiciary was "the supreme issue" of the campaign.[52]

Like Taft, Root and Henry Cabot Lodge argued during the 1912 campaign that recall of judges or decisions ultimately would elevate the will of majorities above the rule of law, limited government, and natural rights.[53] Both men withdrew support from

[50] William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton, N.J.: Princeton University Press, 1994).

[51] Taft, *Popular Government*, p. 95; Lodge, *The Democracy of the Constitution*, p. 139; Elihu Root, *Addresses on Government and Citizenship* (Freeport, N.Y.: Books for Libraries Press, 1969 [1916]), p. 106; Hill, *The People's Government*, p. 188 (here the judicial recall seems to be the implied target but is not directly named).

[52] Taft's veto message is reprinted in *Popular Government*, pp. 169–174. For Root's opposition to the Arizona recall, see *Addresses on Government and Citizenship*, pp. 387–404; William Howard Taft, "Speech of William Howard Taft Accepting the Republican Nomination for President of the United States," Senate Document 902, 62nd Cong., 2nd Sess., August 1, 1912, p. 11 (quote).

[53] Root, *Addresses on Government and Citizenship*, pp. 110–114; Lodge, *The Democracy of the Constitution*, pp. 76–77, 105, 115–116.

their friend Roosevelt in 1912 because of his attack on the courts—despite recognizing the increased likelihood of victory for Woodrow Wilson.

Recall proposals provoked Charles Warren to rebut the claim that the Supreme Court routinely used the Fourteenth Amendment to overturn regulatory or "social welfare" legislation passed under the states' police powers. In two influential articles examining such decisions from 1887 to 1911, Warren found only three statutes overturned. He concluded that demands for fundamental constitutional change such as the recall were not only unwise, but unnecessary: In fact, the Supreme Court was often "progressive" and a "bulwark to the state police power."[54]

Constitutional conservatives responded to Progressive attacks on the courts by defending judicial review and the Supreme Court as integral to the constitutional order.

In widely publicized writings, Warren also responded to the Borah and La Follette proposals of 1922–1924. He showed that from 1789 to 1923, the alleged scandal of five-to-four decisions overturning federal statutes, which so exercised Borah in his goal of requiring a supermajority of seven out of nine votes, actually reached a grand total of nine decisions. Other decisions that Progressives welcomed were by five-to-four margins, while still others that angered them were by larger margins, including the second child labor decision (with the votes of Holmes and Brandeis in the majority). Warren had little difficulty concluding that the five-to-four line of argument was unprincipled: mere "camouflage" for Progressive dislike of a few recent decisions. It did not justify the "radical" constitutional change represented by the proposals.[55]

Dismissing the La Follette proposal that a statute repassed by Congress after rejection by the Court should become constitutionally valid, Warren observed that "a bad statute shall become good by repetition." He then listed 25 explicit constitutional limitations, including the guarantees of the Bill of Rights, that Congress could overcome with a twice-passed statute, as well as several acts of Congress affecting individuals that the Court had held to be violations of the Constitution. Warren emphasized throughout that first principles were at stake: La Follette's proposal would be a "change in our whole system of government" and would put an end to constitutionalism: "To make Congress absolute and final judge of the extent of its own power is to give it unrestricted power."[56] Disagreement with particular decisions could not be a reason for permitting the legislature to control the judiciary.

Amid these developments, Warren published two books—one of which won a Pulitzer Prize—which aimed in part to quell attacks on the Court. They showed that Progressive proposals were merely the latest in a long line of condemnations and ill-advised nostrums motivated by dissatisfaction with particular recent decisions rather than by constitutionalist principle. Recognizing that such efforts still benefited from earlier Populist and Progressive claims that judicial review itself was illegitimate, Warren again displayed much of the countervailing evidence from the Founding era. He thus used his considerable skill and reputation as a historian to resist attacks on the judiciary.

[54] Charles Warren, "The Progressiveness of the United States Supreme Court," *Columbia Law Review*, Vol. 13 (1913), p. 294; Charles Warren, "A Bulwark to the State Police Power: The United States Supreme Court," *Columbia Law Review*, Vol. 13 (1913), p. 667.

[55] Charles Warren, "The Supreme Court: Shall a Minority of Its Justices Control Its Decisions on the Constitutionality of Federal Statutes?" Address before the Maryland State Bar Association, Atlantic City, N.J., June 29, 1923 (Annapolis, Md.: Capital Press Gazette, n.d.) pp. 28, 4.

[56] Charles Warren, *Borah and La Follette and the Supreme Court of the U.S.* (New York: National Security League, 1923), pp. 10 (quotes), 4, 12 (quote).

Other constitutional conservatives reiterated, in varying levels of detail, the historical case for the legitimacy of judicial review and the soundness of *Marbury v. Madison*.[57]

Taft became Chief Justice in 1921 and grew more circumspect in his public defense of the Court, but he still declared that "a judiciary whose judgments must be made to follow popular clamor and the inconstancy of mob opinion indicates a people lacking that conservative and conserving self-restraint without which popular government is foredoomed to failure."[58] He thought the Borah and La Follette proposals unlikely to succeed but was concerned enough privately to encourage members of the bar and journalists to resist them. He praised those who did (including Warren, who received the thanks of several other Justices).[59]

Additionally, Taft was able to use his long-pursued and largely successful program of jurisdictional, procedural, and administrative reform of the judiciary to shield the Court from attack. Culminating in the Judiciary Acts of 1922 and 1925, his efforts were both sincere and strategically intended to preserve the established constitutional order. For nearly two decades, he had been calling for reform in the name of efficiency and fairness to poorer litigants.[60] He reiterated this point before, during, and after the 1912 campaign while also arguing that reform would increase respect for the law and courts, thereby undermining movements for more radical change.

"A judiciary whose judgments must be made to follow popular clamor and the inconstancy of mob opinion indicates a people lacking that conservative and conserving self-restraint without which popular government is foredoomed to failure."

Taft aimed to take "away from the enemies of constitutional government and the institutions of civil liberty, the only real arguments they have against our judicial system."[61] In the 1920s, he also worked behind the scenes, somewhat counter to the norm of judicial neutrality, to defeat bills that he believed would have undermined judicial independence.[62]

Opposing Judicial Supremacy

Despite the Court majority's traditional self-understanding and consequent commitment to constitutional limitations and the rule of law, in the early 20th century, elements of its jurisprudence were moving toward the highly discretionary and essentially legislative form of modern judicial review and the allied idea of judicial supremacy.[63] These intellectual seeds would not come to full fruition until after the New Deal, when the Court routinely announced itself as the ultimate and final arbiter of a now highly amorphous Constitution.

Yet for the constitutional conservatives of the Progressive era, judicial supremacy as we have come to

[57] Hill, *The People's Government*, pp. 246–256; Robert von Moschzisker, *Judicial Review of Legislation* (Washington, D.C.: National Association for Constitutional Government, 1923); editorial, "Marshall Not Guilty of Usurpation," *Constitutional Review*, Vol. 9 (1925), pp. 52–53 (reprinting a letter from William Meigs); Henry Campbell Black, "In Defense of the Judiciary," *Constitutional Review*, Vol. 1 (1917), pp. 23, 24–28.

[58] "Chief Justice Taft's Address," *American Bar Association Journal*, Vol. 8 (June 1922), p. 333.

[59] Ross, *A Muted Fury*, pp. 210–211, 227, 242–245.

[60] For an early example, see William Howard Taft, "The Delays of the Law," *Yale Law Journal*, Vol. 18 (1908), pp. 28, 35, 37–38, and William Howard Taft, *The Judiciary and Progress*, Senate Document 408, 62nd Cong., 2nd Sess., March 8, 1912, p. 5. See also Justin Crowe, "The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft," *Journal of Politics*, Vol. 69 (2007), p. 73.

[61] William Howard Taft, "The Attacks on the Courts and Legal Procedure," *Kentucky Law Journal*, Vol. 5 (1916), pp. 3, 24 (quote).

[62] Robert Post, "Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft," *Journal of Supreme Court History*, Vol. 1 (1998), p. 50.

[63] Christopher Wolfe, *The Rise of Modern Judicial Review*, rev. ed. (Lanham, Md.: Rowman and Littlefield, 1994); Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989).

know it was an alien idea. This was due partly to historical studies which illustrated that the separation of powers had long been a strong limit on courts' understanding of their function and partly to the related history of non-judicial constitutional interpretation.

William Meigs, a respected attorney and conservative critic of Progressivism, argued that judicial supremacy reflected neither the original understanding nor the early practice of American constitutionalism. Rather, the judiciary had thought of itself as a coequal constitutional interpreter whose decisions bound litigants in a dispute, but not as an authority able to issue decrees that were "absolutely final, and must be accepted by all,—Departments of Government as well as individuals."[64]

Other constitutional conservatives did not hesitate to criticize the Court, sometimes directly rejecting the idea of judicial supremacy. As one contributor to *Constitutional Review* maintained, there was a "vital distinction between criticising the Supreme Court because it does not sustain Congress" and criticizing it when "it has failed to sustain the Constitution." Respect for the Court was "consistent with a lack of belief in its infallibility and with an even greater admiration and respect for the fundamental law."[65]

Conservatives frequently opposed the Court's validation of increased regulation through expansion of the Commerce Clause, while its due process jurisprudence was so vague and unpredictable that litigants were left with a mere "gambler's chance." Charles Warren warned (accurately, as it turned out) that the incorporation doctrine as used in *Gitlow v. New York* (1925) was an ominous harbinger of how the Court's vague notion of liberty might be used to eviscerate federalism. Additionally, the Court's rapid rejection of challenges to the Eighteenth Amendment meant that it could not be "looked to for redress" on other pressing federalism issues.[66]

Henry Cabot Lodge similarly defended the judiciary but rejected judicial supremacy by returning to Lincoln's response on *Dred Scott*. In one of the period's most insightful and extended engagements with Lincoln's statesmanship, Lodge defended the true constitutionalist principle by analyzing Lincoln's speeches, debates with Stephen A. Douglas, and first inaugural. While an individual Court decision resolved the litigants' particular dispute, it was not "a rule of political action for the people and all the departments of government." On the contrary, if the Court's decisions "irrevocably fixed" government policy "upon vital questions affecting the whole people," then "the people will have ceased to be their own rulers, having to that extent having practically resigned their government into the hands of that eminent tribunal." Lodge emphasized the contrast between Lincoln's "calm words, uttered under the greatest provocation, with the violent attacks now made on the courts" and concluded that Lincoln had in fact offered the "strongest arguments for an independent judiciary that can be found anywhere."[67]

Conservatives frequently opposed the Supreme Court's validation of increased regulation through expansion of the Commerce Clause, while its due process jurisprudence was so vague and unpredictable that litigants were left with a mere "gambler's chance."

[64] William Meigs, *The Relation of the Judiciary to the Constitution* (New York: Neale, 1919), p. 240. Meigs used Andrew C. McLaughlin, *The Courts, the Constitution, and the Parties* (Chicago: University of Chicago Press, 1912).

[65] Ira Jewell Williams, "Minimum Wage Laws," *Constitutional Review*, Vol. 9 (1925), pp. 195, 212.

[66] Herbert N. DeWolfe, "What Is Interstate Commerce?" *Constitutional Review*, Vol. 13 (1929), p. 143; Arthur P. Rose, "Due Process of Law," *Constitutional Review*, Vol. 10 (1926), pp. 81, 86 (quote); Warren, "The New 'Liberty' Under the Fourteenth Amendment"; William D. Guthrie, "The Federal Government and Education," *Constitutional Review*, Vol. 5 (1921), pp. 94, 97 (quote).

[67] Lodge, *The Democracy of the Constitution*, pp. 146 (quoting Lincoln's speech at Springfield, July 17, 1858), 148 (quoting Lincoln's first inaugural, March 4, 1861), pp. 144, 149.

Conservatives further held that leaving to courts all considerations of constitutionality shirked legislative duty and fostered a dangerous ignorance and apathy among both legislators and citizens. The "duty of upholding the Constitution does not devolve upon the Supreme Court alone. It rests upon all departments of government and, in the last analysis, upon the people themselves."[68]

Constitutional conservatives insisted that constitutional maintenance required education in first principles rather than uncritical acquiescence to any department of government.

This understanding of the limited authority and efficacy of the judiciary derived from the more fundamental view that maintaining the constitutional order required citizens educated in and dedicated to the principles and ethos of constitutionalism. Hence, the "battle for preservation of American political institutions must be fought out, not in the courts[,] but in the forum of public opinion."[69] Such thinking shows that the tendency toward judicial supremacy had not yet wholly displaced the older, sounder understanding of the Court's role in the constitutional system.

Constitutional conservatives respected the separation of powers and the deliberation it was intended to foster, knew that the Court often upheld intrusive regulations, and insisted that constitutional maintenance required education in first principles rather than uncritical acquiescence to any department of government. It is not too much to suggest that some of their expressions that tended toward modern judicial supremacy were compensatory overstatements in favor of a sound institution that was under attack rather than firm commitments to the doctrine as we now know it.

THE LIMITS OF PRESIDENTIAL POWER

Constitutional conservatives, led at first by Taft, confronted the beginning of the modern presidency in Theodore Roosevelt's "stewardship" theory. It held that the President legally could do "whatever the needs of the people demand, unless the Constitution or the laws explicitly forbid him to do it."[70] This view broke with the tenets of American constitutionalism by locating the source of the President's power in his own assessment of public opinion rather than in the Constitution. Roosevelt's *Autobiography* exemplified the theory's accrual of discretionary power in the executive, as in his plan to use force in the Pennsylvania coal strike of 1902 and his circumvention of Congress by means of executive orders and advisory commissions.

According to Senator James Watson's memoir, Roosevelt's views surfaced abruptly when the possible unconstitutionality of his Pennsylvania plan was raised. Roosevelt supposedly responded: "To hell with the Constitution when the people want coal!"[71] Roosevelt allied his theory with Andrew Jackson's and Lincoln's strong, statesmanlike conception of the presidency while associating Taft with James Buchanan's inaction on the eve of the Civil War. The "Buchanan–Taft" model of the presidency was weak, timidly legalistic, and too deferential to party and Congress.

Taft responded that constitutionalism required that all power be checked and limited. Roosevelt's theory was "unsafe" and "a little startling in a constitutional

[68] Editorial, "Putting It Up to the Courts," *Constitutional Review*, Vol. 7 (1923), p. 36; Pierson, *Our Changing Constitution*, p. 17 (quote); William Howard Taft, *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1916), pp. 22–23; James M. Beck, *Our Changing Constitution* (Williamsburg, Va.: College of William and Mary, 1927), pp. 28–30.

[69] Charles W. Pierson, introduction to *The Federalist*, ed. Henry Cabot Lodge (New York: Putnam, 1923), pp. xlix–l (quote); James M. Beck, "The Anniversary of the Constitution," *Constitutional Review*, Vol. 13 (1929), pp. 186, 190–191. See also Hill, *The People's Government*, pp. 198–200.

[70] Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* (New York: Macmillan, 1913), p. 504.

[71] James E. Watson, *As I Knew Them* (Indianapolis: Bobbs-Merrill, 1936), p. 64.

republic"—ultimately, it could not be regarded "as anything but lawless." The "true view of the executive functions" was that the President had no power "which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant." Contrary to Roosevelt, there was no "undefined residuum of power which he can exercise because it seems to him to be in the public interest."[72]

Taft clearly regarded the stewardship theory as dangerously anti-constitutional. Therefore, he also rejected Roosevelt's appropriation of Lincoln. Judging Lincoln's justification for the suspension of habeas corpus as "well founded" and impressed with the "great weight" of his legal arguments for emancipation, Taft pointed out that in these instances and others, Lincoln, unlike Roosevelt, "always pointed out the source of the authority which in his opinion justified his acts" and never claimed that "whatever authority in government was not expressly denied to him he could exercise." Taft thus showed that a proper understanding of Lincoln required the distinction between an energetic executive whose discretion and dispatch were exercised in emergencies—and yet on behalf of constitutionalist principle—and the Rooseveltian view in which "the Executive is charged with the responsibility for the welfare of all the people in a general way, that he is to play the part of a Universal Providence and set all things right, and that anything that in his judgement will help the people he ought to do, unless he is expressly forbidden not to do it."[73]

Supporters of the modern presidency have long endorsed Roosevelt's dismissal of Taft. However, careful analyses have shown that Taft held a broad view of the Constitution's "take care" clause,[74] which permitted ample executive discretion in the interpretation of statutes, rule-making in administrative agencies, and enforcement of treaty obligations absent congressional approval.[75] As President, he made executive agreements with foreign governments and instigated a national budgeting system in the executive branch against the wish of Congress.

What stands out in William Howard Taft's constitutionalist understanding of the presidency is a principled awareness that the office of President had limits; its occupant could not legitimately claim as much power and discretion as his temerity or guile permitted.

To be sure, Taft was not particularly charismatic or adept at public relations, but his conception of the presidency was not the timid or narrowly legalistic caricature propagated by his Progressive adversaries.[76] As Chief Justice, Taft also wrote the detailed and scholarly majority opinion in *Myers v. US* (1926), which remains one of the strongest articulations of the "unitary executive." It held that the President alone (without the consent of the Senate) could remove at will officials in the executive branch—a position Taft had long supported.

What stands out in Taft's constitutionalist understanding of the presidency, then, is not the Rooseveltian canard of weakness or immobility. Rather, it is fidelity to what was being undermined by Roosevelt (and then Wilson): a principled awareness that the office of President had limits, as did every other

[72] Taft, *Our Chief Magistrate and His Powers*, pp. 144, 146, 147, 139–140.

[73] *Ibid.*, pp. 147, 148, 144.

[74] Article III, Section 2, which stipulates that the President "shall take care that the laws be faithfully executed."

[75] L. Peter Schultz, "William Howard Taft: A Constitutionalist's View of the Presidency," *Presidential Studies Quarterly*, Vol. 9 (1979), pp. 402, 404–408. See also Donald F. Anderson, "The Legacy of William Howard Taft," *Presidential Studies Quarterly*, Vol. 12 (1982), p. 26.

[76] Michael Korzi, "Our Chief Magistrate and His Powers: A Reconsideration of William Howard Taft's 'Whig' Theory of Presidential Leadership," *Presidential Studies Quarterly*, Vol. 33 (2003), pp. 305, 307. See also Raymond Tatalovich and Thomas S. Engeman, *The Presidency and Political Science* (Baltimore: Johns Hopkins University Press, 2003), pp. 89–92.

office; its occupant could not legitimately claim as much power and discretion as his temerity or guile permitted.

Another of Roosevelt's legacies was what is now called the direct or "plebiscitary" connection between the presidency and the electorate. This shift advanced a fundamental aim of Progressivism: replacement of the locally based party system with an unmediated relationship between the individual and the modern regulatory state.

The President must be the primary voice of his party in defense of its policies and in working with Congress for their enactment, but the President also represented a program that had been deliberated and mediated by a party acting as a cohesive and integrating force in national life.

At the time, clear-sighted conservatives recognized this change.[77] Taft opposed it, and Roosevelt's part in it, based on his understanding of how parties and the presidency should serve the moderating, deliberating, and limiting functions of constitutionalism. As one study put it, Taft's "major concern [was] that parties and elections should play the role assigned the presidency by the Rooseveltian view."[78] In the 1912 campaign, Taft warned that Roosevelt so "lightly regard[ed] constitutional principles" and so "misunderstood what liberty regulated by law is" that he could not be trusted with a third presidential term—and was unlikely to stop at just one more. Americans had not given "into the hands of anyone the mandate to speak for them peculiarly as the people's representative."[79]

Taft held that parties were crucial for the safe and successful operation of constitutional government while acknowledging that corruption and bossism afflicted the two-party system and required reform. Parties integrated the diverse interests and priorities of various social strata across a vast country, cohering the electorate around shared principles and policies. "Without them, the proper interpretation of the popular will into effective governmental action becomes very difficult." Because of their integrative and deliberative function, parties tended to neutralize "class and selfish spirit" and were "more likely to be American in their view and purpose, much more likely to be considerate of the whole country, and much less likely to be narrowly moved by the ambition of a selfish faction." In short, the maintenance and discipline of parties were "essential to the carrying on of any popular government."[80]

Taft never doubted that the President must be the primary voice of his party in defense of its policies and in working with Congress for their enactment, but the President also represented a program that had been deliberated and mediated by a party acting as a cohesive and integrating force in national life. He was not the embodiment of some vague national destiny or harbinger of historical progress on behalf of "the people." The latter view, apparent to Taft in Roosevelt, tended toward the demagogy and executive usurpation that historically had ended popular government.[81]

Conservatives were not uniformly opposed to the presidency or to all of Wilson's actions after he defeated Taft in 1912, but they criticized his continued aggrandizement of the presidency as an elaboration of the statist trend that threatened constitutional government. Of course, many also were dissatisfied with the Treaty of Versailles, created through Wilson's per-

[77] Sidney M. Milkis, *Political Parties and Constitutional Government* (Baltimore: Johns Hopkins University Press, 1999), pp. 59–60, 66–67, 69–70.

[78] Korzi, "Our Chief Magistrate," p. 310.

[79] William Howard Taft, Address at Boston, April 25, 1912, Senate Document 615, 62nd Cong., 2nd Sess., 1912, pp. 19 (quote), 18; Taft, "Acceptance Speech," p. 21 (quote).

[80] William Howard Taft, *Liberty Under Law* (New Haven, Conn.: Yale University Press, 1922), pp. 33, 34, 36–37; William Howard Taft, *Four Aspects of Civic Duty* (New Haven, Conn.: Yale University Press, 1906), p. 25.

[81] Korzi, "Our Chief Magistrate," pp. 321, 309, and *passim*.

sonal negotiation without Senate input, and then his insistence that it be ratified without change to include America in the League of Nations.

Henry Cabot Lodge, David Jayne Hill, and James M. Beck saw Wilson's actions as typical of his consistent disregard for constitutional norms and his attempt to accrue power in the executive. Lodge disliked Wilson intensely, but he acted on constitutional principle in the League fight.[82] Nor should such rectitude be denied to Hill, who judged that Wilson's thought and action marked him as "a convert to the idea of the omnipotent administrative State and the uncontrolled predominance of its head."[83]

Beck made the same point in an occasionally hilarious short play that mocked Wilson's constitutional ideas, foreign policy, and imperious character. (For example: "Wilson: The solution was very simple. I converted a Newtonian form into a Darwinian, and, in the struggle for existence between the different branches of the Government, proved myself the fittest to survive.")[84] Sarcasm aside, Beck, Hill, and others were genuinely concerned that Wilson advanced "a seemingly irresistible tendency toward one-man power" apparent in mass democracy, centralized bureaucracy, and the cult of efficiency.[85]

If the drift of modernity was toward "Napoleonic" democracy and rule "not by discussion and deliberation, but by *plebiscite*," Hill asked, why not follow Wilson's apparent inclination and "place all power in the hands of the president? Of course, we could not call him 'emperor,' but we should in that case have a lawmaker who could be held 'responsible to the people.'"[86] All that was necessary was to accept Wilson's claim that the supposedly Newtonian Constitution had been superseded by a Darwinian one. But just as Darwinism had not repealed Newton's discovery of the law of gravity to which all things were subject, evolve as they might, "in like manner, we shall be compelled to return to the great principles of human justice underlying the Constitution for a defensible theory of the state."[87]

CONCLUSION

Amid the Progressive challenge, conservatives returned to first principles to explain, preserve, and adapt American constitutionalism in response to centralization of authority in the federal government, attacks on the judiciary, and increased presidential power. When the New Deal rapidly invigorated these trends, constitutional conservatives saw more of a continuation than a revolution. An embattled and dwindling group fought on, but after the Supreme Court began regularly upholding the New Deal in 1937, the Court's new version of constitutional law overcame those who remained.

It is, however, highly significant for the idea of constitutional conservatism that the New Dealers themselves experienced a "failure of nerve" in their project to overturn the Constitution. They claimed to have restored rather than abandoned constitutional orthodoxy—a claim often repeated by later scholars.[88] This assertion manifested the same imperative for maintenance or preservation that appears to be integral to the American understanding of what it means to be a constitutional regime.

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[82] Daniel D. Stid, *The President as Statesman: Woodrow Wilson and the Constitution* (Lawrence: University Press of Kansas, 1998), pp. 156–159.

[83] David Jayne Hill, *American World Policies* (New York: Doran, 1920), pp. 72–75 (quote at p. 74), 136–140, 144.

[84] James M. Beck, *The Passing of the New Freedom* (New York: Doran, 1920), pp. 32–38, 43–44 (quote), 51.

[85] Beck, *The Changed Conception of the Constitution*, p. 41.

[86] Hill, *Americanism: What It Is*, pp. 62–63; Hill, *The People's Government*, pp. 214–227 (quotes at pp. 222, 223).

[87] Hill, *Americanism: What It Is*, pp. 88, 89 (quote).

[88] Howard Gillman, "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development*, Vol. 11 (1997), pp. 191, 238 (quote); Stephen M. Griffin, "Constitutional Theory Transformed," in John Ferejohn, Jack Rakove, and Jonathan Riley, eds., *Constitutional Culture and Democratic Rule* (Cambridge: Cambridge University Press, 2001), pp. 292–313.

Just what preservation—or restoration—of American constitutionalism might entail in the era of the modern state, with its adjuncts in new forms of political science and law, would remain an important concern for the rest of the 20th century. It became increasingly clear that the Burkean, Southern Agrarian, and libertarian elements in American conservatism, despite their pre–New Deal stances, would have to establish a firmer connection to American constitutionalism or else consign themselves to permanent irrelevance as an irreconcilable remnant devoted to the principles of some other regime.

After a generation in exile following the New Deal, most conservatives have come to see more clearly that they must stand for the Constitution. Today, popular attention to the Constitution is keener than it has been in decades, as is awareness of the battering it has taken from the modern liberals who elaborated Progressivism. This circumstance makes it an opportune time for conservatives to return yet again to defense of the Constitution, and with it the principles of the Declaration of Independence, as the basis of their politics.

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