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The Origins and Revival of Constitutional Conservatism: 1912 and 2012

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Abstract

The Framers of our Constitution drew a distinction between unfettered democratic rule and the constrained republicanism of the Constitution. In the Republican convention of 1912, two candidates with diametrically opposed views of what sovereignty of the people meant were pitted against each other. On one side, incumbent President William Howard Taft defended the Founders' constitutionally limited republicanism. On the other, Theodore Roosevelt espoused a populist program of reform aimed at making the government more democratic. Between them was Elihu Root, chairman of the convention, who succeeded in denying TR the nomination. In so doing, he kept out of his hands the party's magnificent electoral machinery, which would almost certainly have returned him to office committed to a platform of radical constitutional reform.

To many observers of today's boisterously populist Tea Party movement, one of its most striking features is its apparent obsession with the U.S. Constitution. "More than any political movement in recent memory," law professor Jared Goldstein writes, "the Tea Party is

centrally focused on the meaning of the Constitution."¹ In apparent agreement, Dick Armey and Matt Kibbe maintain in *Give Us Liberty: A Tea Party Manifesto* that "First and foremost, the Tea Party movement is concerned with recovering constitutional principles in government."²

Observers are also puzzled by this populist effort to recover constitutional principles, for it seems to be fundamentally anti-populist or anti-democratic. In the past, widespread popular movements rallying around constitutional principles seemed to possess only a democratic "drive" gear. That is, according to a supportive school of thought, the "popular constitutionalists," they drove the Constitution toward ever

greater democratic inclusiveness and empowerment, as did the civil rights, women's, and gay rights movements.

But the Tea Partiers seemingly want to add a "reverse" gear to popular constitutionalism, for they seek the restoration of a Constitution that would reimpose limits on the reach of federal public policy, no matter how popular it may prove to be with American democratic majorities. Goldstein concludes that the "Tea Party movement advances a broad anti-democratic agenda that seeks to rein in democracy by preventing majorities from enacting a large array of regulatory measures that have long been understood to be available through ordinary politics."³ By seeking constitutional restoration,

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the movement “expresses strong disdain for democracy, arguing that the nation is facing catastrophe due to the excesses of democracy, in which strict limits on governmental powers have been abandoned.”⁴

A democratic movement devoted to reimposing anti-democratic constitutional limits on the popular will: Is this simply another of the necessarily incoherent, self-contradictory impulses we have come to expect from a movement that is, in historian Jill Lepore’s characterization, both deeply anti-historical and anti-intellectual?⁵

I think not. Indeed, wrestling with the problem of democracy and its relationship to the American Constitution is, I would argue, a first step toward recovering our founding document from the progressive opprobrium beneath which it has labored for over a century. As the Tea Party senses, progressivism acquired for itself an unfair advantage when it linked the notion of constitutional legitimacy to the cause of unlimited government powers in the name of democracy. There is, of course, another view of the Constitution, closer to that of the Founders, which finds no contradiction in the notion of a constitutionally limited or constrained democracy.

As it turns out, we celebrate this year the 100th anniversary of the

American presidential election in which this very conflict of constitutional visions played a central role.⁶ We may come to appreciate the coherence of a popular effort to restore limits on the popular will by revisiting the issues of the election of 1912 and, in particular, the contest for the Republican presidential nomination between William Howard Taft and Theodore Roosevelt.

ROOSEVELT EMBRACED THE FULL RANGE OF PROGRESSIVE DEVICES DESIGNED TO SUBSTITUTE DIRECT DEMOCRACY FOR INDIRECT, REPRESENTATIVE DEMOCRACY: THE INITIATIVE, THE REFERENDUM, THE RECALL (INCLUDING RECALL OF JUDGES), THE DIRECT ELECTION OF U.S. SENATORS, AND THE POPULAR RECALL OF JUDICIAL DECISIONS.

Roosevelt’s Program of Constitutional Reform

Theodore Roosevelt’s effort to reclaim in 1912 the presidential office that he had handed over just four years earlier to William Howard Taft was grounded in an effort to correct what he understood to be the democratic insufficiencies of the American Constitution. His views received their fullest expression

in a speech he delivered to the Ohio Constitutional Convention in Columbus on February 1, 1912, entitled “A Charter of Democracy.”⁷

In this speech, Roosevelt embraced the full range of progressive devices designed to substitute direct democracy for indirect, representative democracy. “I believe in pure democracy,” he affirmed, and thus endorsed “certain governmental devices which will make the representatives of the people more easily and certainly responsible to the people’s will.”⁸ These included the initiative, the referendum, the recall (including recall of judges), the direct election of U.S. Senators, and the popular recall of judicial decisions.

Most of these devices had been in political circulation since Populist times, but Roosevelt had remained skeptical as late as 1911, when he declined to join Senator Robert LaFollette’s National Progressive Republican League, a group that put progressive structural reform at the center of its platform. By early 1912, though, Roosevelt had become persuaded that the progressive *legislative* program he had championed since 1910—including the expansion of government programs like supervision of corporations, workmen’s compensation, regulation of hours of labor by children and women, and workplace safety measures—could

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1. Jared A. Goldstein, “The Tea Party Movement and the Contradictions of Popular Originalism,” *Roger Williams University Legal Studies Paper* No. 102, March 4, 2011, p. 2.
 2. Dick Armey and Matt Kibbe, *Give Us Liberty: A Tea Party Manifesto* (New York: HarperCollins, 2010), p. 66.
 3. Goldstein, “The Tea Party Movement and the Contradictions of Popular Originalism,” p. 7.
 4. *Ibid.*, pp. 7-8.
 5. See Jill Lepore, *The Whites of Their Eyes: The Tea Party’s Revolution and the Battle over American History* (Princeton, N.J.: Princeton University Press, 2010).
 6. On the role of the 1912 election, see Sidney M. Milkis, “The Transformation of American Democracy: Teddy Roosevelt, the 1912 Election, and the Progressive Party,” *Heritage Foundation First Principles Series Report* No. 43, June 11, 2012, <http://www.heritage.org/research/reports/2012/06/the-transformation-of-american-democracy-teddy-roosevelt-the-1912-election-and-the-progressive-party>.
 7. Theodore Roosevelt, “Popular Rule,” in *The Works of Theodore Roosevelt: Memorial Edition*, ed. Hermann Hagadon (New York: Charles Scribner’s Sons, 1925), pp. 163-197.
 8. *Ibid.*, pp. 163-164.

not triumph without a progressive *constitutional* program designed to overcome the structural obstacles to change that were deftly manipulated by the entrenched interests of the reactionary status quo.

Roosevelt's embrace of constitutional reform reflected a variety of intellectual currents then stirring the reading public. Among them was the growing scholarly view that the Constitution lent itself so readily to the defense of the rich minority at the expense of the poor majority because that had been precisely the intention of the Founders, themselves men of wealth living in fear of the depredations of the masses.

ROOSEVELT WAS FULLY AWARE THAT THE POWER TO RECALL JUDICIAL DECISIONS IN FACT AMOUNTED TO THE POWER OF A MAJORITY TO CHANGE THE FUNDAMENTAL MEANING OF THE CONSTITUTION, CIRCUMVENTING THE CUMBERSOME AMENDMENT PROCEDURES OF ARTICLE V.

J. Allen Smith's *The Spirit of American Government*, published in 1907, argued that minor legislative reforms were pointless because they took "for granted that our general

scheme of government was especially designed to facilitate the rule of the majority." In fact, the scheme of government had been crafted to thwart majority rule: "Democracy... was not the object which the framers of the American Constitution sought but the very thing which they wished to avoid,"⁹ and its ratification represented "the triumph of a skillfully directed reactionary movement."¹⁰ (A Smith student wrote his mentor in 1912 that Roosevelt had eagerly read his book, claiming that "it is responsible for his present attitude toward the judiciary and his vigorous support of the referendum and recall.")¹¹

Nothing illustrates Roosevelt's radical constitutional program better than his proposal for the recall of judicial decisions, a measure of which he seemed to be the foremost national champion and to which he devoted almost one-third of the "Charter" speech.¹² When a judge decides "what the people as a whole can or cannot do, the people should have the right to recall that decision if they think it wrong," Roosevelt maintained.¹³ This form of recall—applied in his initial formulation to review of state supreme court decisions—would allow the people at large to override the "monstrous perversion of the Constitution into an instrument for the perpetuation

of social and industrial wrong and for the oppression of the weak and helpless."¹⁴ Since the "power to interpret is the power to establish," if "the people are not to be allowed finally to interpret the fundamental law, ours is not a popular government," he argued.¹⁵

Roosevelt was fully aware that the power to recall judicial decisions in fact amounted to the power of a majority to change the fundamental meaning of the Constitution, circumventing the cumbersome amendment procedures of Article V. "Whether [recall of decisions] is called a referendum to the people or whether it is called a shorter and simpler way of amending the Constitution, to my mind matters nothing. The essential thing is to get the power to the people,"¹⁶ for the "people themselves must be the ultimate makers of their own Constitution."¹⁷

By the time the Progressive Party platform was drafted after Roosevelt and his allies had bolted the Republican convention in 1912, his determination to make the Constitution fully adaptable to the political demands of the majority had become even clearer. The new party pledged "to provide a more easy and expeditious method of amending the Federal Constitution."¹⁸ As Roosevelt put it, "We propose to make the

9. J. Allen Smith, *The Spirit of American Government* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1965), pp. 29-30.

10. *Ibid.*, p. 39.

11. Eric Goldman, "J. Allen Smith," *Pacific Northwest Quarterly*, Vol. 35 (July 1944), p. 207.

12. Roosevelt, "Popular Rule," pp. 186-196.

13. *Ibid.*, p. 186.

14. *Ibid.*, p. 193.

15. *Ibid.*, p. 190.

16. Theodore Roosevelt, "Do You Believe in the Rule of the People?" *Outlook*, March 9, 1912, p. 527.

17. Roosevelt, "Popular Rule," p. 368.

18. "Progressive Platform of 1912," TeachingAmericanHistory.org, <http://teachingamericanhistory.org/library/index.asp?document=607> (accessed August 25, 2011).

process of constitutional amendment far easier, speedier, and simpler than at present.”¹⁹

What precisely the Progressives had in mind was not spelled out, but Senator LaFollette’s proposal may be close to it: Constitutional amendments could be proposed by a majority of both houses of Congress (and not two-thirds of both houses) or by one-fourth of the states and ratified by a simple majority of voters distributed across a majority of the states (and not three-quarters of the states).²⁰

Shortly after the “Charter” speech, Roosevelt would note that a great fuss had been made about it. In his view, however, the issue was “perfectly simple:” “Do you believe in the rule of the people? If you do, you are with us. If you do not, you are against us.”²¹

The Columbus speech did indeed send shock waves through the Republican Party. Some of its most powerful and influential leaders, who had otherwise hoped that Roosevelt would pluck the faltering party standard from Taft’s unpopular and uncertain hands, decided on the evidence of the speech to stick with Taft instead. Roosevelt biographer George Mowry would describe the speech as “at once perhaps the most sincere and most disastrous of all Roosevelt’s public addresses.”²² Among the Republican leaders driven into Taft’s arms were Senators Elihu Root of New York and Henry Cabot Lodge of Massachusetts.

Root’s Legislative Progressivism and Constitutional Conservatism

Senator Root’s decision to break with Roosevelt did not come easily, for he had in fact been a long-time ally of Roosevelt’s in his battle for a progressive legislative agenda. In Root’s view, nothing in Roosevelt’s domestic program (the “Square Deal”) had been inconsistent with the principles of the nation’s founding, the understanding of natural rights expressed in the Declaration of Independence and secured through the Constitution.

Root understood that the new era of industrialization and urbanization had introduced massive new institutions—corporations in particular—that required the counterweight of a far more active federal government, acting to protect individual rights from corporate abuse. His expansive view of federal power followed from his profession that he was “a convinced and uncompromising nationalist of the school of Alexander Hamilton.”²³ While the Democratic Party, he argued in 1909, would “confine the National Government within the narrowest possible limits,” the Republican Party would “find in the Constitution all the powers that any nation can have except as they are expressly limited by the terms of the Constitution.”²⁴

Small wonder, then, that Root, who had served Roosevelt as both Secretary of War and Secretary of

State, was his first choice to succeed him as President in 1908. Root, he believed, “is really for the public programme that boys call the ‘Roosevelt policies.’ If he were to succeed me there would be no question about their being carried out.”²⁵

But once Roosevelt stepped beyond his progressive *legislative* program in the “Charter of Democracy” speech and arrived at a radical progressive *constitutional* program, Root had no choice but to separate himself from the “Roosevelt policies.” Whereas the distinction surely made sense at the time and helped stem the Progressive tide of reforms, it is an open question whether legislative progressivism does not lead to an erosion of federalism in the long run by bringing all issues under the purview of the national government.

IT IS AN OPEN QUESTION WHETHER LEGISLATIVE PROGRESSIVISM DOES NOT LEAD TO AN EROSION OF FEDERALISM IN THE LONG RUN BY BRINGING ALL ISSUES UNDER THE PURVIEW OF THE NATIONAL GOVERNMENT.

Although democratic government was the best means for securing rights, in Root’s understanding, it was nonetheless capable of foolish, and even tyrannical, measures that violated rather than secured rights.

19. Theodore Roosevelt, “Democratic Ideals,” in *The Works of Theodore Roosevelt: Memorial Edition*, p. 595.

20. Theodore Roosevelt, “Nationalism and Progress,” in *The Works of Theodore Roosevelt: Memorial Edition*, p. 576.

21. Roosevelt, “Do You Believe in the Rule of the People?” p. 526.

22. George E. Mowry, *Roosevelt and the Progressive Movement*, reprint edition (New York: Hill and Wang, 1960), pp. 213 and 217.

23. Elihu Root, “Government and Citizenship,” in *Addresses on Government and Citizenship*, ed. Robert Bacon and James Brown Scott, reprint ed. (Freeport, N.Y.: Books for Libraries Press, 1969), p. 251.

24. *Ibid.*, p. 28.

25. Quoted in Philip C. Jessup, *Elihu Root*, 2 vols. (New York: Dodd, Mead & Co, 1938), Vol. 2, p. 125.

The keystone of successful government in America, Root argued, had been the Constitution, because it had helped to tame or moderate democratic tendencies toward such measures while at the same time remaining itself fully democratic. Roosevelt's plans to make the people masters of their Constitution would remove the moderating restraints on popular will and unleash the foolishness and tyranny that the Constitution had hitherto restrained.

Root's views on constitutional democracy were laid out most succinctly in his Stafford Little Lectures, delivered at Princeton University in April 1913 and published as *Experiments in Government and the Essentials of the Constitution*.

In his remarks, Root argued that democracy was a problematic form of government because it most faithfully reflects human nature, and human nature was "weak, prone to error, subject to fall into temptation, and to be led astray by impulse."²⁶ In light of human fallibility, Root believed, democracy had been a bold gamble because it was a departure from the old view that autocratic government was necessary to suppress the weakness of human character. Popular government rested on rejection of the "theory that government must

come from above, that the selfishness and cruelty and lust of mankind [can] be controlled only by a class of superior men ... bred to power." Instead, it entertained the idea that "the great masses of men, who had always been subject to repression, control, and direction, could be trusted to govern themselves."²⁷

All forms of government had weaknesses peculiar to themselves, though, and in Root's view, the "weakness of democratic government was its liability to change with the impulse and enthusiasm of the moment, and, through continual change, to vary from extreme democracy ... to oligarchy and dictatorship."²⁸ Small wonder, then, that the American experiment had been greeted by "many of the wisest and best of mankind with the most gloomy forebodings."²⁹

**THE FOUNDERS REJECTED
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Happily for America, however, the Founders were men of great practical wisdom who applied to their task

a "knowledge of the material with which government has to deal, that is to say, human nature with its multitudes of feelings and impulses and passions and weaknesses."³⁰ They believed that "self-restraint is the supreme necessity and supreme virtue of a democracy" and that the way to nurture that virtue is for democracy "to establish for its own control the restraining and guiding influence of declared principles of action." Indeed, "the supreme test of capacity for popular government," according to Root, was the "possession of that power of self-restraint through which a people can subject its own conduct to the control of declared principles of action."³¹

Hence, the Founders rejected democracy and favored instead what they called republicanism; that is, popular government "in which the scheme of representation takes place."³² As Hamilton had written in *Federalist* No. 71:

The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient

26. Root, "Government and Citizenship," in *Addresses on Government and Citizenship*, p. 406.

27. *Ibid.*, p. 7.

28. *Ibid.*, 260.

29. *Ibid.*, p. 7.

30. Elihu Root, *Men and Policies: Addresses by Elihu Root*, ed. Robert Bacon and James Brown Scott (Cambridge, Mass.: Harvard University Press, 1924), p. 125.

31. Root, "Government and Citizenship," in *Addresses on Government and Citizenship*, p. 117.

32. *Federalist* No. 10, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter, intro. and notes Charles Kesler (New York: Signet Classic, 2003), p. 76. Subsequent references to *The Federalist* cite essay number and page(s) in this edition. Earlier in *Federalist* 10, Madison had written: "a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths." *Ibid.*

impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.³³

According to Root, America had passed that test because it had agreed at its Founding to bind itself to certain principles of right and justice, or “rules of right conduct;” “for that imposition of rules of conduct that formerly came from a monarch, our fathers substituted the imposition of rules of right conduct by the people, upon themselves.”³⁴ The Constitution embodied those rules.

In our Constitution we have embodied the eternal principles of justice; we have set up a barrier against ourselves. As Ulysses required his followers to bind him to the mast that he might not yield to the song of the siren as he sailed by, so the American democracy has bound itself to the great rules of right which ... make it impossible that the impulse, the prejudice, the excitement, the frenzy of the moment shall carry our democracy into those excesses which have wrecked all our prototypes in history.³⁵

For Root, the Declaration of Independence and the Constitution were inseparably linked. To “the end that individual liberty might be preserved ... our Declaration of Independence was followed by

those great rules of right conduct which we call the limitations of the Constitution.” The Constitution “imposed its limitations upon the sovereign people and all their officers and agents,” forbidding them to do things “which destroy or impair the declared inalienable right of the individual.”³⁶

Given that democracy needed constitutional restraint for survival, small wonder that Root was appalled at Roosevelt’s program of constitutional reform, which would have struck directly at the heart of such restraints. The initiative and referendum, for instance, sought to short-circuit the principle of representation, but representation was “the only method by which intelligent legislation can be reached” because it “is the method of full discussion, comparison of views, modification and amendment of proposed legislation in the light of discussion and the contribution of many minds.”³⁷

THE RECALL OF JUDGES AND JUDICIAL DECISIONS, IN ROOT’S VIEW, WOULD BE DRAMATIC BLOWS TO THE PROTECTION OF INDIVIDUAL RIGHTS AGAINST INFLAMED MAJORITIES.

In Root’s view, the crown jewel of America’s representative system was the United States Senate, and that institution was threatened by another progressive measure, the direct election of Senators. Root opposed (as did Lodge, among a meager

band of critics) the Seventeenth Amendment because the Framers had realized that “the weakness of democracy is the liability to continual change; they realized that there needs to be some guardian of the sober second thought; and so they created the Senate” with longer terms and indirect election.

As the limitations of the Constitution were set up by the American democracy to protect them against themselves in every impulse to violate the fundamental rules of justice, so the Senate was established by the Constitution to protect the American democracy against itself in the legislation which was required under the Constitution.³⁸

A Senate directly elected by the people, Root argued, would “do away with the benefits of discussion and comparison of views and mutual concessions, and that fair and open-minded yielding to the argument of our fellows, which is the essential of good legislation,” and offer up Senators more likely to posture and preen for the public.³⁹

The recall of judges and judicial decisions, in Root’s view, would be dramatic blows to the protection of individual rights against inflamed majorities. Since “no mere paper rules will restrain the powerful and common forces of human nature,” Root believed, the Founders had

33. *Federalist* No. 71, pp. 430–431.

34. Root, *Men and Policies*, p. 407.

35. *Ibid.*, pp. 260–261.

36. *Ibid.*, p. 100.

37. *Ibid.*, p. 95.

38. *Ibid.*, p. 274.

39. *Ibid.*, p. 277.

wisely added an independent judiciary to our system of government to enforce the “observance of constitutional limitations.”⁴⁰ “For the maintenance of those rules of justice,” Root argued, “our fathers provided that the government which may seek, under the interest of the passion of the moment to override them, shall be withheld by the judgment of a body of public officers separated from the interests and the passions of the hour.”⁴¹

However, recall of judges would nullify the willingness of a magistrate to defend, for instance, the rights of a despised minority, because he “knows that if he decides against public feeling, immediately a recall petition will be signed and filed.”⁴² “Instead of independent and courageous judges we shall have timid and time-serving judges.”⁴³

Recall of judicial decisions, even more gravely, would “strike at the very foundation of our government.” For if the majority was to decide in each instance whether or not to be bound by constitutional principles and restraints as enunciated by judges, then it made little sense to speak of principles and constraints at all. All that is left is majority will. “In every case the question whether the majority shall be bound by those general principles of action which the people have prescribed for themselves will be determined in that case by the will of the majority.” Therefore,

“in no case will the majority be bound except by its own will at that time.”⁴⁴

Taken together, Root believed, Roosevelt’s proposals for radical constitutional revision posed the danger of undermining popular confidence in the institutions of government.

LODGE AGREED WITH ROOT THAT THE PROGRESSIVES’ CONSTITUTIONAL REFORMS WOULD “REMOVE ALL BARRIERS WHICH THE MAKERS OF THE INSTRUMENT ESTABLISHED IN ORDER TO PREVENT RASH, HASTY, AND PASSIONATE ACTION AND TO SECURE DELIBERATION, CONSIDERATION, AND DUE PROTECTION TO THE RIGHTS OF MINORITIES, AND OF INDIVIDUALS.”

As Root noted in his argument against the Seventeenth Amendment, it is not wise to “contract the habit of amending the Constitution,” because “reverence for that great instrument, the belief of mankind in its perpetuity, the unwillingness of our people to tamper with it or change it, [and] the sentiments that are gathered around it” all constitute the “basis of stability in our government”; they are the “most valuable of all the possessions of the nation.”⁴⁵ No wise legislator should ever seek to weaken “the traditions of respect, the

conformity to custom, and the habit of obedience” that arises among people “towards their own, though perhaps illogical, institutions.”⁴⁶

Constitutional Conservatives in the Republican Contest of 1912

The defense of the constitutional system of constrained democracy required Root, above all, to oppose Roosevelt’s bid for another presidential term in 1912 and to side with Taft even though, as he put it to a friend in 1912, “I care more for one button on Theodore Roosevelt’s waistcoat than for Taft’s whole body” (no mean statement in light of Taft’s 320-pound bulk).⁴⁷

Other public figures who had been close to Roosevelt for years—George Meyer, Henry Stimson, even his own son-in-law Nicholas Longworth—had to follow Root into the Taft camp as well. But perhaps no split with Roosevelt was more wrenching than the one made by Henry Cabot Lodge, the Senator from Massachusetts and Roosevelt’s lifelong friend. (Lodge would later publish a two-volume selection of their correspondence, which began in May 1884 and ended only with TR’s death in December 1918.)

Lodge, like Root, was a devoted partisan of constitutionally constrained democracy. In his 1911 speech “The Constitution and Its Makers,” Lodge defended the

40. *Ibid.*, p. 107.

41. *Ibid.*, p. 400.

42. *Ibid.*, p. 394.

43. *Ibid.*, p. 111.

44. *Ibid.*, pp. 111-112.

45. *Ibid.*, pp. 165-166.

46. *Ibid.*, pp. 206-261.

47. Philip C. Jessup, *Elihu Root*, 2 vols., reprint ed. (New York: Archon Books, 1964), Vol. 2, p. 202.

Constitution against the progressive critique that it was undemocratic and must be made democratic through the initiative, referendum, recall, and other such devices.

The Founders, Lodge argued, had intended the Constitution to establish, not to thwart, democracy: “the makers of the Constitution not only knew that the will of the people must be supreme, but they meant to make it so.” But they “aimed ... to make sure that it was the real will of the people which ruled and not their momentary impulse, their well-considered desire and determination and not the passion of the hour.” So they built into the Constitution various safeguards “to make it certain that there should be abundant time for discussion and consideration, and 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.”⁴⁸

In short, Lodge agreed with Root about the need for constitutional constraints to tame the propensities of democracy, and he also agreed that the progressives’ constitutional reforms would “remove all barriers which the makers of the instrument established in order to prevent rash, hasty, and passionate action and to secure deliberation, consideration, and due protection to the rights of minorities, and of individuals.”⁴⁹

Lodge believed that “beside the question of the maintenance or destruction of the Constitution of the United States all other questions of law and policies sink into utter insignificance.”⁵⁰ And questions of friendship as well, he might

have added, for when Lodge read the Columbus speech, he made the agonizing decision to break with Roosevelt. Although he took no part personally in the campaign, over a million copies of “The Constitution and Its Makers” were distributed as tracts for Taft’s candidacy.

Root was equally reluctant to take up political arms against TR and declined to campaign in any primaries or make any speeches on Taft’s behalf that would compel him to make invidious comparisons between the two Presidents whom he had served and befriended. That did not keep him, however, from keeping his pledge to stand as Taft’s candidate for permanent chairman of the Republican convention of 1912, held in Chicago.

Chairman Root and the 1912 Republican Convention

This was to be a task that was particularly ill-suited for a man who loathed making public speeches. The convention was deeply and almost evenly divided between the Taft and Roosevelt forces (with a handful of LaFollette delegates), and emotions ran extremely high. Illinois Governor Charles Deneen was prepared to call out the National Guard if necessary to quell the riotous and fiercely antagonistic political crowds that seemed to have filled Chicago’s streets. A thousand policemen were detailed to stroll the aisles of the convention, and strands of barbed wire lay concealed beneath the bunting on the speaker’s platform to discourage assaults by disgruntled delegates.

Into this seething cauldron of political emotion, Root’s name was

placed in nomination for convention chairman on June 18, 1912. In the first major vote of the convention—and the one that would accurately predict all that would follow—Root defeated Roosevelt’s candidate, Wisconsin Governor Frances McGovern, by the slim margin of 558 to 502. The Roosevelt delegates shook the hall with outrage, believing with some justification that their loss had been foreordained by an unfair allocation of contested delegates by the Republican National Committee.

ROOT’S KEYNOTE ADDRESS AIMED TO REMIND THE REPUBLICAN PARTY THAT, HOWEVER OTHERWISE PROGRESSIVE IT MIGHT BECOME, IT MUST NEVER ABANDON ITS HERITAGE AS THE PARTY OF CONSTITUTIONALLY CONSTRAINED DEMOCRACY.

The howls of protest only intensified during Root’s keynote address as newly elected convention chairman. Unlike the typically bland convention keynotes designed to smooth feathers ruffled by the nominating contest and unite the party for the main event in November, Root’s address aimed to remind the Republican Party that, however otherwise progressive it might become, it must never abandon its heritage as the party of constitutionally constrained democracy.

Root insisted that “throughout the wide field in which the conditions of modern industrial life require that government shall intervene

48. Henry Cabot Lodge, *The Democracy of the Constitution and Other Addresses and Essays* (New York: Charles Scribner’s Sons, 1915), pp. 54–55.

49. *Ibid.*, p. 57.

50. Henry Cabot Lodge, ed., *Selections from Correspondence of Theodore Roosevelt and Henry Cabot Lodge, 1884–1918* (New York: Charles Scribner’s Sons, 1925), Vol. 2, p. 423.

in the name of social justice...the Republican national administrations...have done their full, enlightened, and progressive duty to the limit of the national power under the Constitution.”⁵¹ But his progressivism did not carry over into questioning the fundamental political institutions of the American regime.

“We shall not apologize for American institutions,” Root shot at the Roosevelt delegates. “We cherish with gratitude and reverence the memory of the great men who devised the American constitutional system...their deep insight into the strengths and weaknesses of human nature, their wise avoidance of dangers which had wrecked all preceding attempts at popular government.”⁵² Root pledged the party to “make and vigorously enforce laws for the promotion of public interests,” but it would at the same time “observe those great rules of right conduct which our fathers embodied in the limitations of the Constitution.” This was “the solemn covenant that between the weak individual and all the power of the people ... shall forever stand the eternal principles of justice declared, defined, and made practically effective by ... the limitations of the Constitution.”⁵³

The Republican Party in particular, Root argued, was obliged to defend the Constitution, since it had been “born in protest against the extension of a system of human slavery approved and maintained by majorities.” The Republican Party must remain the party of Abraham

Lincoln, who had declared in his First Inaugural Address that “a majority held in restraint by constitutional checks and limitations ... is the only true sovereign of a free people.” Our duty, Root concluded, was not to reform the constitutional system, but to “humbly and reverently seek for strength and wisdom to abide by the principles of the Constitution against the days of our temptation and weakness.”⁵⁴

“WE SHALL NOT APOLOGIZE FOR AMERICAN INSTITUTIONS,” ROOT SHOT AT THE ROOSEVELT DELEGATES. “WE CHERISH WITH GRATITUDE AND REVERENCE THE MEMORY OF THE GREAT MEN WHO DEvised THE AMERICAN CONSTITUTIONAL SYSTEM” AND “THEIR WISE AVOIDANCE OF DANGERS WHICH HAD WRECKED ALL PRECEDING ATTEMPTS AT POPULAR GOVERNMENT.”

For the next several days, Root calmly and patiently presided over a convention that was in a constant uproar. Even Roosevelt’s allies had to credit him with being the strong, dominant, persistent force that kept the convention going. William Roscoe Thayer, TR’s biographer, wrote that “At no other convention in American history did a chairman keep his head and his temper so admirably as did Mr. Root on this occasion. His intellect, burning

with a cold white light, illumined every point but betrayed no heat of passion.”⁵⁵

Root’s performance is all the more extraordinary, given his strong aversion to public speaking and considering that his only elected national office would be one term in that legislative chamber whose members were still to be regarded (in Root’s view) as lofty, venerable, wise statesmen. It might be said that Root in that moment embodied precisely the constraint and reserve that democracy itself required against its moments of heated passion.

However successful the Taft forces were in renominating their candidate, they understood full well that the chances of his success in November were very slim, since TR and his allies bolted the convention and began to lay plans for the new Progressive Party. Nonetheless, they firmly believed that they had accomplished the one thing needful in 1912 by preventing TR from winning the Republican nomination. They thereby had kept out of his hands the party’s magnificent electoral machinery, which would almost certainly have returned him to office committed to a platform of radical constitutional reform.

As Taft put it just after the Chicago convention, he had “accomplished that which to me and to the country was the most important thing, to wit, the defeat of Theodore Roosevelt.” In so doing, he had retained “the regular organization of the party as a nucleus about which

51. Elihu Root, “Political Addresses,” in *Miscellaneous Addresses*, ed. Robert Bacon and James Brown Scott (Cambridge, Mass.: Harvard University Press, 1917), p. 285.

52. *Ibid.*, p. 290.

53. *Ibid.*, pp. 292-293.

54. *Ibid.*, pp. 293-295.

55. William Roscoe Thayer, *Theodore Roosevelt: An Intimate Biography* (Boston: Houghton Mifflin Co., 1919), p. 366.

the conservative people who are in favor of maintaining constitutional government can gather.”⁵⁶ Taft maintained that “the Chicago Convention is in itself the end of a pre-convention campaign presenting a crisis more threatening and issues more important than those of the election which is to follow between the two great national parties.”⁵⁷

Root agreed: “I think Taft was right in his statement ... that the result of the Convention was more important than the question of the election” because it settled the critical question of 1912—“whether the Republican Party should be seized and carried over to populism.”⁵⁸ Root “assumed, of course, that the Roosevelt disaffection would probably beat the Republican candidate. This has not seemed to me to make any difference in our duty to hold the Republican Party firmly to the support of our constitutional system. Worse things can happen to a party than to be defeated.”⁵⁹

The party *was* beaten, of course, by Democrat Woodrow Wilson in November 1912. Even though Wilson was a progressive and tepidly supported the initiative and referendum, however, he had staunchly refused to endorse the court reforms that were so important to Roosevelt progressives.

Indeed, the *New York World*, a conservative Democrat paper, had endorsed Wilson because, though he regrettably backed the initiative and referendum, he nonetheless “has

proved himself sound on the independence of the judiciary. He has proved himself sound on the fundamental principles of constitutional government.”⁶⁰ However much of Roosevelt’s progressivism Wilson would go on to purloin, he showed no interest in the overt and explicit reform of constitutional institutions that commanded so much attention at the Progressive convention.

Winning the Convention, Losing History’s Verdict?

What Taft, Root, Lodge, and others could not have known, but certainly must have hoped, was that the tide of progressive constitutional reform had in fact crested in 1912 and would begin to fall almost immediately. It would never again in American history rise to such levels of popular political support or come so close to capturing the apparatus of the predominant political party.

Even in the depths of the Great Depression and faced with a Supreme Court that wielded the Constitution freely against his programs, Franklin D. Roosevelt refrained from suggesting that massive, explicit constitutional reform was necessary. The one time he tried to tinker with the constitutional system through his “court-packing” scheme, he was dealt a sharp setback by Congress and later by the people in the ensuing mid-term elections. As historian George Mowry noted, the 1912 Progressive platform’s “content of political reform outweighed

those proposed by either the later Roosevelt or Truman”⁶¹

The importance of denying TR the nomination can be understood by considering how different things would have been had he won the presidency and driven through Congress and the states just one piece of his reform platform: that relating to an easier and more efficacious method of amending the Constitution. Today’s Constitution would no doubt be almost unrecognizable, running to hundreds of pages and filled with each succeeding generation’s peculiar notions of what seemed on the spur of the moment to rise to constitutional status, but which would surely have been turned aside by the demanding Article V process after cooler heads had prevailed.

HOWEVER MUCH OF ROOSEVELT’S PROGRESSIVISM WILSON WOULD GO ON TO PURLOIN, HE SHOWED NO INTEREST IN THE OVERT AND EXPLICIT REFORM OF CONSTITUTIONAL INSTITUTIONS THAT COMMANDED SO MUCH ATTENTION AT THE PROGRESSIVE CONVENTION.

It is easy to overlook the significance of this decision to stick with the document largely as it emerged from the Convention of 1787. After all, the Taft forces may have won that particular political contest, but

56. William Howard Taft to William Worthington, May 29, 1912, William Howard Taft Papers, Manuscript Division, Library of Congress.

57. Thomas J. McInerney, “The Election of 1912 in New York State,” PhD dissertation, University of Denver, 1977, p. 216.

58. Norman Wilensky, *Conservatives in the Progressive Era: The Taft Republicans of 1912* (Gainesville: University of Florida Press, 1965), p. 72.

59. Elihu Root to Myron Herrick, August 24, 1912, Root Papers, Manuscript Division, Library of Congress.

60. McInerney, “The Election of 1912 in New York State,” p. 262.

61. George E. Mowry, “Election of 1912,” in *The History of American Presidential Elections*, ed. Arthur M. Schlesinger, Jr., and Fred L. Israel, 4 vols. (New York: Chelsea House, 1971), p. 2160.

they and their beloved Constitution almost immediately began to lose the struggle for the verdict of history.

For decades afterward, professional historians faithfully reflected Roosevelt's assessment that the Taft conservatives were laissez-faire reactionaries who "distrust popular government altogether, and, when they must accept it, accept it with reluctance, and hedge it around with every species of restriction and checks and balances, so as to make the power of the people as limited and ineffective as possible."⁶² Immediately after the election of 1912, historian Charles Beard's *An Economic Interpretation of the Constitution* (1913) would reinforce J. Allen Smith's earlier view that the government's protection of the interests of the wealthy few against the rights of the people could be traced directly to the Constitution itself.

While the high opinion that progressives initially enjoyed among historians has eroded over the decades, the conservatives have remained exactly as they appeared to Roosevelt: hopeless reactionaries committed to a doctrine of laissez-faire that stymied even the most rudimentary of government functions.

- This, in the face of every piece of historical evidence that Taft, Root, and Lodge understood full well that the argument for laissez-faire individualism, so popular at the time, was not compatible with 20th century industrialism and that a vigorous, Hamiltonian national government was now essential.

- This, in the face of their insistence that their central objection to Roosevelt's progressivism was by no means the aggressive federal legislative program that they had all supported faithfully, but rather a recklessly radical constitutional program that threatened all they held dear.

- This, in the face of their oft-repeated claim that they (and the Founders) were genuine democrats who believed constitutional constraints would insure the survival of democracy rather than frustrate it.

If Roosevelt failed to win the hearts of Republicans in 1912, it seems that he has nonetheless won the hearts of professors ever since.

The Revival of Constitutional Conservatism

But not all professors. Since the 1950s, a new generation of scholars has arisen that seeks to seriously re-examine the principles of the Declaration of Independence and the Constitution. Martin Diamond, Harry Jaffa, Herbert Storing, Walter Berns, Robert Goldwin, and several generations of their students have begun to restore the notion that our founding principles are worthy of study because they reflect a deep understanding both of human nature and of the republican form of government in which its strengths and weaknesses are most readily exhibited. Defying the academic profession's Smith-Beard orthodoxy, they have begun to restore the Founders' notion that democracy can work only insofar as its passions are tempered

and tamed by various constitutional devices that slow down the impetuosity of popular majorities and safeguard the Declaration's self-evident truths.

This new work is of considerably more than merely antiquarian interest precisely because the Constitution remains our central governing charter. It remains our central governing charter because the Taft Republicans prevented it from being consigned to the ash heap of history. As this scholarly work proceeds, one can only hope that the words and deeds of Root, Taft, and Lodge as well will begin to command some of the respectful attention now directed toward those whose Constitution they defended and preserved at such a high cost.

We are now in a better position to assess the contemporary Tea Party's stance toward the American Constitution and popular government. The critics maintain that its effort to restore constitutional limitations on government is fundamentally undemocratic and presents us with the self-contradictory notion of an anti-populist populist movement. But this is a valid critique only insofar as one accepts the original progressive view that any constitutional restraint on majority will is fundamentally undemocratic and illegitimate.

We have now seen—in the political labors of Elihu Root and his allies and in the scholarly labors of Diamond and others—an altogether different understanding of democracy. In this view, which reflects the ideas of the Founders themselves, constitutional limitations on democratic majorities are fully consonant

62. Theodore Roosevelt, "The Right of the People," in *The Works of Theodore Roosevelt: Memorial Edition*, p. 618.

with popular government—indeed, they are essential for the preservation of republicanism and the alleviation of democracy’s tendencies toward the violation of those rights that, the Declaration tells us, are the true ends of legitimate government.

In spite of the scorn the Tea Party has drawn for its alleged anti-intellectualism and ahistoricism, its understanding of a Constitution that can limit democracy while at the same time being fully democratic in fact reflects an intellectually respectable and historically grounded view of the American founding.

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