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## The Lost Promise of Progressive Formalism

Andrea Scoseria Katz

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# The Lost Promise of Progressive Formalism

Andrea Scoseria Katz\*

*Today, any number of troubling government pathologies—a lawless presidency, a bloated and unaccountable administrative state, the growth of an activist bench—are associated with the emergence of a judicial philosophy that disregards the “plain meaning” of the Constitution for a loose, unprincipled “living constitutionalism.” Many trace its origins to the Progressive Era (1890–1920), a time when Americans turned en masse to government as the solution to emerging problems of economic modernity—financial panics, industrial concentration, worsening workplace conditions, and skyrocketing unemployment and inequality—and, the argument goes, concocted a flexible, new constitutional philosophy to allow the federal government to take on vast, new regulatory powers.*

*As this Article argues, this account is misleading. The Progressive Era did witness an outpouring of criticism towards the century-old Constitution, which many viewed as outdated, exclusionary, and countermajoritarian. Yet the idea of interpreting the text to make it evolve to fit “the spirit of the age,” as Woodrow Wilson called for, was anathema to millions of progressive Democrats who turned to the formal channels of Article V to update the Constitution. Far from a progressive innovation, reformers saw flexible constitutional construction as the tool of conservative interests and courts dangerously “usurping” the legislative power by reading into the law—especially the Fourteenth Amendment—unwritten principles of contract and property belonging to a bygone era. Instead, a vigorous reaction against the “unwritten constitution” of the *Lochner* era led to a burst of democratic mobilization around the idea of using the amendment power to make the People, not courts, the ultimate constitutional authority. Besides the four amendments that were ratified during the Progressive Era, over 1,700 amendment proposals were floated in Congress, many of them targeting countermajoritarian features of American democracy like the indirect election of Senators, the Electoral College, and lifetime judicial tenure. Some even proposed to override Supreme Court decisions by popular vote and to amend Article V itself.*

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\* Associate Professor of Law, Washington University in St. Louis. For helpful conversations and comments at various stages, I am grateful to Bruce Ackerman, Susan Appleton, Chris Beauchamp, Richard Bernstein, Dan Epps, Harold Forsythe, Bernard Freamon, Dan Hulsebosch, Karin Leovy, Mina Khalil, Paul Kahn, Pauline Kim, Ron Levin, Jonathan Masur, James Minnis, Rory Minnis, Bill Nelson, Nicholas Parrillo, Rick Pildes, Aziz Rana, Noah Rosenblum, Carmen Scoseria, Frank Stewart, Steve Skowronek, Brian Tamanaha, and participants in the NYU Legal History Colloquium. My grateful thanks, in particular, go to the able and hardworking editors of Volume 99 of the *Texas Law Review*, for their many thoughtful suggestions and improvements.

*After a string of successes, this formalist strand of progressive constitutionalism faded in the early decades of the twentieth century, a victim of postwar pessimism and fatigue, and most importantly, fissures between Progressives who continued to fight for formal revision and those who, just decades after Lochnerism faded from the bench, turned their energies to developing a different slate of unwritten constitutional rights deemed “essential to the concept of ordered liberty.” Today, distant though we are from the progressive formalists’ hopes to channel ambitious political reform through routine, democratic, and formal constitutional change, revisiting this Era serves several purposes. First, it puts into context the text’s relative immobility in the last hundred years. Second, it illuminates the fact that many of our current constitutional dilemmas are the result of a living constitutionalism practiced by interpreters on the left and right alike. Finally, it may also help us envision what a return to truly democratic constitutional politics would look like.*

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*[N]o society can make a perpetual constitution, or even a perpetual law. . . . The constitution and the laws of their predecessors [are] extinguished . . . in their natural course, with those who gave them being. . . . Every constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right.*

—Letter from Thomas Jefferson to James Madison (Sept. 6, 1789)

*If, in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for . . . it is the customary weapon by which free governments are destroyed.*

—George Washington, *Farewell Address* (Sept. 19, 1796)

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

—GIUSEPPE DI LAMPEDUSA, *THE LEOPARD* (Guido Waldman trans., 2007) (1966)

#### Introduction: An Unamendable Text?

On January 3, 1916, a fifty-nine-year-old Louis Brandeis stood before the Chicago Bar Association. The purpose of his address: to explain how the law could survive in swiftly changing times. Attacks on the rule of law, Brandeis pointed out, often coincided with periods of rapid societal transformation: In war-torn ancient Athens, the poet Euripides complained of “trammelings of law which are not of the right.”<sup>1</sup> During the Reformation, German jurist Ulrich Zasius declared, “All sciences have put off their dirty clothes, only jurisprudence remains in its rags.”<sup>2</sup> Goethe’s *Faust*, written after the French Revolution, described law satirically as an “heirloom dread” that spread “from race to race,” resistant to evolution and living well past its time.<sup>3</sup>

Brandeis demanded of the attorneys seated before him:

Is not Goethe’s diagnosis applicable to the twentieth century challenge of the law in the United States? Has not the recent dissatisfaction with our law as administered been due, in large measure, to the fact that it had not kept pace with the rapid development of our political, economic and social ideals? In other words, is not the challenge of legal justice due to its failure to conform to contemporary conceptions of social justice?<sup>4</sup>

A century later, Brandeis’s questions sound surprisingly fresh, as a new generation experiences its own “collective revulsion against the privileges of great wealth allied with great power.”<sup>5</sup> Today’s pressing political concerns bear more than a passing resemblance to those of that era. Stories of price-

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1. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 431 (2009).

2. Louis Brandeis, *The Living Law*, 10 *ILL. L. REV.* 461, 462 (1916).

3. JOHANN WOLFGANG VON GOETHE, *FAUST: A TRAGEDY* 81 (Hurst & Co. 1882).

4. Brandeis, *supra* note 2, at 462–63; *see also* UROFSKY, *supra* note 1, at 431–32 (2009) (elaborating on Louis Brandeis’s critique of the failure of courts to consider demands for social justice).

5. Paul Starr, *How Gilded Ages End*, *AM. PROSPECT* (Apr. 29, 2015), <https://prospect.org/economy/gilded-ages-end/> [<https://perma.cc/2Q7P-VZRX>]. The term “Gilded Age” was coined by Mark Twain for the late nineteenth-century period, when a veneer of refinement covered the brutal realities of industrial capitalism. *Id.* Many scholarly and public policy works make the connection between the Gilded Age and the present day, including LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2d ed. 2016); JACOB S. HACKER & PAUL PIERSON, *LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY* (2020); LAWRENCE LESSIG, *AMERICA, COMPROMISED* (2018); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014); K. SABEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017); and GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* (2017).

gouging in the pharmaceutical industry find an ancestor in Ida Tarbell's muckraking exposé of the "ruthless methods" of Standard Oil in 1902.<sup>6</sup> Senator Elizabeth Warren's admonitions about the need for consumer protection against banks and loan servicers echo the stormy Senate floor speeches of Wisconsin's "Fighting Bob" La Follette, calling for regulation and oversight of the railroads in 1906.<sup>7</sup> Present-day concern over the consolidation and political strength of "Big Tech" parallels the great debate on the "trusts" staged by Theodore Roosevelt and Woodrow Wilson on the 1912 campaign trail.<sup>8</sup>

Just as in Brandeis's time, economic discontent has stretched the boundaries of the political imagination. For the first time in decades, American democracy itself is under sustained critique; the idea gaining currency is that the problem is not a few "bad political 'apples'" but a "bad political orchard."<sup>9</sup> Scholars diagnose a pronounced democratic "malaise" as politicians on the left and the right hammer home the point that the system is "rigged."<sup>10</sup> Institutional tinkering is creeping back onto the radar, with popular and scholarly proposals targeting American government's purportedly more undemocratic features: the Electoral College, judicial lifetime tenure, Washington, D.C. and Puerto Rico's lack of representation

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6. See Ida M. Tarbell, *On the Methods of the Standard Oil Company*, in *THE PROGRESSIVE MOVEMENT: 1900–1915*, at 20 (Richard Hofstadter ed., 1963) (chronicling Standard Oil's expansion strategy).

7. See F.E. Haynes, *La Follette and La Folletism*, *ATLANTIC* (Oct. 1924), <https://www.theatlantic.com/magazine/archive/1924/10/la-follette-and-la-folletism/306030/> [<https://perma.cc/DV9Z-UHE8>] (describing how Robert La Follette advocated for the regulation and taxation of railroads, taking a prominent part in the Senate debates on the Railroad Rate Bill in 1906).

8. See JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* 37–38 (2019) (chronicling the 1912 presidential candidates' debates surrounding policy toward competition and markets); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 *YALE L.J.* 710, 766–67 (2017) (discussing concerns about the consolidation of publishers resulting from Amazon's pricing tactics, as well as the increasing political risk associated with Amazon's market dominance).

9. JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA* 342 (2016).

10. See Jack M. Balkin, *Constitutional Crisis and Constitution Rot*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 13, 24–27 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018) (asserting that President Trump has exacerbated Americans' distrust of the government by using tactics that violate democratic norms); LAWRENCE LESSIG, *REPUBLIC, LOST 1* (2011) (suggesting that Americans have fallen into a state of "malaise" due to lack of faith in the government); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS*, at XII (2012) (describing the American public's "undifferentiated disgust with Congress, Washington, and 'the government' in general"). Politicians denouncing a "rigged system" include Donald J. Trump, Remarks at the Republican National Convention (July 22, 2016), <https://www.nytimes.com/2016/07/22/us/politics/trump-transcript-rnc-address.html> [<https://perma.cc/5TGV-8DWT>]; Elizabeth Warren, Speech at Lawrence, Massachusetts Rally (Feb. 9, 2019), <http://transcripts.cnn.com/TRANSCRIPTS/1902/09/cnr.03.html> [<https://perma.cc/ECZ9-ALSB>]; and Bernie Sanders (@BernieSanders), TWITTER (June 6, 2019, 5:57 PM), <https://twitter.com/berniesanders/status/1136754053369778176?lang=en> [<https://perma.cc/UQP4-AYFR>].

in Congress, and the unholy alliance of money and politics spawned by the Court's 2010 *Citizens United v. FEC*<sup>11</sup> decision.<sup>12</sup>

History imitates itself, but it does not repeat. Compared to Brandeis's Progressive Era, today's calls for reform and proposals are appreciably limited in scope. After all, even the swell of popular anger that carried Donald Trump and his pledge to "Drain the swamp!" to the White House in 2016 effectively conceded that, with a new cast of characters, the problems would self-correct. Almost a century-and-a-half ago, popular discontent spurred calls to radically reimagine the whole of American government, even the Constitution itself. The massively popular *An Economic Interpretation of the Constitution*, penned by economic historian Charles Beard in 1913, depicted the Constitution as inherently anti-democratic, its scheme of checks and balances an elaborate machinery set up by wealthy aristocrats of the Founding generation to shield property from popular majorities' grasp.<sup>13</sup> Progressives saw Beard's critique, and others like it, not as anti-American or exceptionally radical, but as harkening back to an older, verifiably American tradition of Jeffersonian and Hamiltonian thought—Hamiltonian in calling for a strong, unified government; Jeffersonian in the hope of freeing Americans from "Constitution worship" so that they could exercise mastery over the higher law.<sup>14</sup> Progressives agreed that some departure from the text of 1787 was necessary; the question was, a departure of *what kind*?

While historians have established the diversity of progressive thought on philosophy, politics, and the social sciences, progressive legal thought has not been paid the same courtesy.<sup>15</sup> Most often it is associated with the views

11. *Citizens United v. FEC*, 558 U.S. 310 (2010).

12. See, e.g., Democracy for All Amendment, H.R. Res. 2, 116th Cong. (2019) (proposing an amendment to the Constitution relating to contributions and expenditures intended to affect elections); JESSE WEGMAN, LET THE PEOPLE ELECT THE PRESIDENT (2020); NATIONAL POPULAR VOTE, <http://www.nationalpopularvote.com> [<https://perma.cc/SB2V-MSN2>] (advocating for a bill that "would guarantee the Presidency to the candidate who receives the most popular votes"); CAMPAIGN FOR SCOTUS TERM LIMITS, <https://scotustermlimits.org> [<https://perma.cc/Y8G5-W6ZG>] (campaigning for Supreme Court term limits).

13. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 44–51 (1913) [hereinafter BEARD, ECONOMIC INTERPRETATION]; CHARLES BEARD, AMERICAN GOVERNMENT AND POLITICS 47–49 (1921).

14. See HERBERT CROLY, PROGRESSIVE DEMOCRACY 22, 54–55 (1914) (contextualizing Hamilton's and Jefferson's early constitutional thought).

15. On progressive ideas on the State and society, see generally DANIEL RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998) and MARC STEARS, PROGRESSIVES, PLURALISTS, AND THE PROBLEMS OF THE STATE (2002). On Progressives and the social sciences, see generally DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991). On social or political reform in the Progressive Era, see generally PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2008); ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917 (1999); NELL IRVIN PAINTER, STANDING AT ARMAGEDDON (2008); SALLY ROESCH WAGNER, THE WOMEN'S SUFFRAGE MOVEMENT (2019); and THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA (2016). On

of Supreme Court Justice and early Progressive hero Oliver Wendell Holmes, who scoffed at the idea that the Constitution's provisions were "mathematical formulas" whose meaning could be "gathered . . . simply by taking the words and a dictionary." Like all other "organic living institutions," Holmes wrote in 1914, the Constitution's meaning evolved in time.<sup>16</sup> Many legal scholars still accept this view of the period's main historical legacy: a "revolt against formalism" that replaced a nineteenth-century jurisprudence of eternal values, inalienable rights, and deducible "right" answers with a shadowy landscape of moral relativism, textual indeterminacy, evolving and balanceable rights, and a new sociological jurisprudence where pragmatically minded judges applied the tools of social science to "make policy" in a very literal sense.<sup>17</sup> This account is the dominant view of Progressive Era legal theory, which it treats as the predecessor of the twentieth-century schools of legal realism, legal process theory, critical legal studies, popular constitutionalism, and the theory of the living constitution. What unifies these schools of thought is the realist's insight that the act of judging involves an unavoidable amount of subjectivity and discretion.<sup>18</sup>

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Progressivism as a "divided faith," see generally Arthur S. Link, *What Happened to the Progressive Movement in the 1920s?*, 64 AM. HIST. REV. 833, 836 (1959); JAMES R. HURTGEN, *THE DIVIDED MIND OF AMERICAN LIBERALISM* (2002); Peter G. Filene, *An Obituary for "The Progressive Movement,"* 22 AM. Q. 20 (1970); and Daniel T. Rodgers, *In Search of Progressivism*, 10 REV. AM. HIST. 113 (1982).

16. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

17. For scholarly discussion of constitutional evolution, see generally MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1976); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1860–1960* (1992); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993); and EDWARD A. PURCELL JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973).

18. For conservative accounts of the Progressive Era as a forerunner of today's living constitutionalism, see generally RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006); KEN KERSCH, *CONSERVATIVES AND THE CONSTITUTION* (2019); and Stephen M. Teles, *How the Progressives Became the Tea Party's Mortal Enemy: Networks, Movements, and the Political Currency of Ideas*, in *THE PROGRESSIVES' CENTURY* 453 (Stephen Skowronek, Stephen M. Engle & Bruce Ackerman eds., 2016). On the Progressives' ties to modern-day theories of popular constitutionalism, see generally Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959 (2004); and LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 249–53 (2004). Cf. William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Self-Rule*, 81 CHI.-KENT L. REV. 967, 968 (2006) (critiquing Larry D. Kramer's account of popular constitutionalism); Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644 (2014) (identifying issues with, and raising questions about, Bruce Ackerman's embrace of popular sovereignty in American constitutionalism); Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 349–50 (2013) (arguing that Supreme Court Justices, not just elected officials, can be popular constitutionalists by practicing judicial restraint).

The realist account of the Progressive “revolt against formalism” has been the source of many important scholarly contributions, but it also suffers from several limitations. First and most obviously, it is a strikingly poor framework for explaining one of the single most productive periods of constitutional amendment in American history. Had Progressives actually embraced the idea of channeling reform through an activist bench and a “living constitution,” they hardly would have bothered with the onerous process of formally amending the Constitution. Yet “constitution tinkering” (a then-popular phrase, especially among critics) was rampant in the Progressive Era, especially at the state level, with conservatives increasingly sounding the alarm about the possibility that Americans were starting to feel they had “outgrown the Constitution.”<sup>19</sup> Between 1897 and 1929, a remarkable 1,370 amendment proposals were floated in Congress.<sup>20</sup> By 1912, thirty-one of the forty-eight states had signed onto a plan to call a new constitutional convention, something never attempted since Philadelphia.<sup>21</sup> During the 1912 elections, three of four major political parties—the Democrats, the Progressives, and the Socialists—included constitutional amendment in their national platforms.<sup>22</sup> And of course, there are the four amendments actually ratified in the seven-year span from 1913 to 1920, on some of the most contentious issues of the day: taxation, the direct election of senators, Prohibition, and women’s suffrage.<sup>23</sup>

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19. Robert E. Lee Saner, “Has America Outgrown the Constitution?,” Address at the Annual Meeting of the Alabama State Bar Association (July 2, 1925), in *ALA. ST. B. ASS’N, REPORT OF PROCEEDINGS OF THE ANNUAL MEETING* 94, 100 (1940).

20. JOHN R. VILE, *1 ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002*, at xx (2d ed. 2003) [hereinafter *VILE, CONSTITUTIONAL AMENDMENTS*] (providing a complete list of proposed amendments to the U.S. Constitution over the course of its history); see JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 147 (1992) [hereinafter *VILE, CONSTITUTIONAL AMENDING PROCESS*] (“Some eighteen proposals were introduced from 1911 to 1929, most with the intention of liberalizing the [amendment] process.”).

21. DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 213 (1996).

22. NATIONAL PARTY OFFICERS AND PLATFORMS: THE PROGRESSIVE (1912), reprinted in *SMULL’S LEGISLATIVE HANDBOOK AND MANUAL OF THE STATE OF PENNSYLVANIA* 568 (Herman P. Miller & W. Harry Baker eds., 1914); *1912 Democratic Party Platform*, AM. PRESIDENCY PROJECT (June 25, 1912), <https://www.presidency.ucsb.edu/documents/1912-democratic-party-platform> [<https://perma.cc/VP6W-BMX3>]; see Aziz Rana, *Progressivism and the Disenchanted Constitution*, in *THE PROGRESSIVES’ CENTURY* 41, 44 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016) (discussing the Socialist platform).

23. Richard Albert, *The Progressive Era of Constitutional Amendment*, in *EFICIÊNCIA E ÉTICA NA ADMINISTRAÇÃO PÚBLICA* 197, 205 (Luiz Alberto Blanchet, Daniel Wunder Hachem & Ana Claudia Santano eds., 2015). Another, an amendment to ban child labor, passed both Houses of Congress in 1924 but fell eight short of the number of states necessary for ratification. Julie Novkov, *Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor*, 44 *AM. J. LEGAL HIST.* 369, 374, 395 (2000).



By exaggerating unity in Progressive ranks, the realist account also obscures a vibrant, wide-ranging debate taking place at the turn of the century over the fate of the Constitution. Many Progressives *were* critical of America's founding document. Yet the key question remained: did a break with the Constitution demand "a formal act of wholesale textual revision" or not?<sup>24</sup> Lining up one side were the realists, thinkers like Holmes, Beard, Brandeis, and Woodrow Wilson, who reasoned that constitutional text was sufficiently elastic (particularly in phrases like "due process" or "the law of the land") that changing its meaning simply took creative rereading.<sup>25</sup> Others took the opposite view. In the words of editor Allan Benson, who ran for president on the Socialist Party ticket in 1916, "We need a new constitution. We cannot govern ourselves with the one we have. We have never governed ourselves with the one we have. A few have always governed us that they might the more easily prey upon us."<sup>26</sup> If the Constitution was, at its core, dead-set against majority rule (a fact that, ironically, Beard's own origin story seemed to imply), then no amount of creative interpretation could make it democratic.

Perhaps the most far-reaching consequence of the realist account of progressive legal theory has been to calcify an imagined link between legal realism and the political left.<sup>27</sup> Revisiting the Progressive Era, however, illustrates how contingent this association really is. For one thing, even in Holmes's day, the idea that judging consisted of decisions unpolluted by subjectivity and "worked out like mathematics from some general axioms of conduct" was a caricature.<sup>28</sup> Nineteenth-century judges were well aware that

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24. See Rana, *supra* note 22, at 44 ("[I]nternal critics came to argue that one could simply reinterpret the text to mean whatever democratically mobilized social movements commanded . . . . [E]xternal critics . . . remained suspicious of whether such transformative change was possible without a conscious break in the public's identification with the Constitution . . ."). Rana's distinction between "internal" and "external" constitutional critics corresponds to what I call here the formalist–realist (or pragmatist) divide. Internal critics believed the text could be salvaged; external critics took it as settled that the Constitution could not survive into the twentieth century without major revision.

25. See *Gompers v. United States*, 233 U.S. 604, 610 (1904) (explaining that "the provisions of the Constitution are not mathematical formulas . . . . [T]hey are organic living institutions . . ."); Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 30 (1936) (explaining that the "words and phrases cannot rise out of the constitution and interpret themselves. Some human being . . . must undertake the task of giving them meaning in subsidiary laws and practices."); Brandeis, *supra* note 2, at 461, 471 (describing how the ideals of the law have evolved with the times); WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 60 (1908) (praising the "practical" nature of a flexible constitutional text).

26. ALLAN L. BENSON, OUR DISHONEST CONSTITUTION 90 (1914).

27. See *supra* note 18.

28. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897). For critiques of the "deductive-formalist bogeyman" that Holmes left behind, see BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 13 (2009) and Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996).

general laws could not cover every situation in advance, leaving gaps that judges had to fill; the common law tradition itself (which nineteenth-century lawyers were steeped in), is stamped through and through with “judge-made law.”<sup>29</sup> More to the point, during the Progressive Era it was often *conservatives* who applauded judges’ ability to adapt the Constitution to new situations—particularly if the alternative was radical change by amendment.<sup>30</sup> Supreme Court opinions attributing Fourteenth Amendment rights to corporations as “persons” or asserting the existence of an unwritten “federal common law” to repel early regulatory assaults on property perfectly illustrate a conservative bench imbuing the Constitution with extra-textual moral or social values—a conservative “living constitution,” if you will.<sup>31</sup>

For this reason, not all Progressives believed that the law *could* and *should* evolve by interpretation at the hands of judges. Against Louis Brandeis and the legal realists, many reformers called for *strict construction* of the law as a check on an emboldened federal bench, and insisted that, if laws were to change, it would have to be through *textual revision* by legislatures or popular assemblies (after all, the people, not judges, should have final say as to what the law meant).<sup>32</sup> Unlike the conservative quarters in which legal formalism tended to flourish, however, Progressives also believed that the law lost its force and legitimacy if it was not frequently revisited and revised. Therefore, textual change had to be made achievable and regular—in the case of the U.S. Constitution, by lowering the Article V threshold for formal amendment—and, so that citizens could better spell out their commands, the “tools” of direct democracy, as blacksmith-turned-reformer William S. U’Ren viewed it, should be put into popular hands: the *initiative*, allowing voters to put bills before Congress for consideration; the *referendum*, which placed questions on the ballot for voters to resolve; and the *recall*, whereby voters could overturn unpopular judicial decisions or even remove judges from office.<sup>33</sup> As crusading journalist William Allen White put it, reformers had “first to get the gun” before they could “hit something with it.”<sup>34</sup>

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29. TAMANAHA, *supra* note 28, at 18–19.

30. See *infra* note 143 and accompanying text.

31. See, e.g., *Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (treating a corporation as a person for purposes of the Fourteenth Amendment); *Swift v. Tyson*, 41 U.S. 1, 18–19 (1842) (holding that federal courts were not bound to apply state laws in matters regarding general commercial law).

32. See *infra* notes 171–75.

33. See ROBERT D. JOHNSTON, *THE RADICAL MIDDLE CLASS: POPULIST DEMOCRACY AND THE QUESTION OF CAPITALISM IN PROGRESSIVE ERA PORTLAND, OREGON* 131 (William Chafe, Gary Gerstle, Linda Gordon & Julian Zelizer eds., 2003); see also *infra* text accompanying note 217.

34. William Allen White, *The Insurgence of Insurgency*, 71 AM. MAG. 170, 171 (1910).

In this Article, I refer to this school of thought as *progressive formalism*.<sup>35</sup> With its emphasis on strict construction and literal understanding of popular sovereignty over higher law, it directly resembles the constitutional thought of Thomas Jefferson, the American founding father well-known for his radical democratic tenets and his belief that a constitutional convention should be held every nineteen years, the length of time he believed it took a generation to reach political maturity.<sup>36</sup> Perhaps it is no coincidence, then, that Progressives like Herbert Croly often invoked Jefferson as an inspiration for the national democratic community they hoped to achieve.

In turn-of-the-century America, this strand of thinking cropped up in quarters as diverse as the urban business-minded Republican Party, increasingly torn between its conservative and insurgent wings; the Democrats, still the party of the South but nurturing a growing rural discontent toward the monied classes; and reformist circles as diverse as trade unions, anarchists, feminists, and evangelicals. Beyond the basic ground rules (a distrust of judicial discretion and an impatient desire to see American law updated and modernized), progressive formalism, like the umbrella movement of progressivism itself, housed a diversity of philosophical beliefs and political commitments. At times, what united these groups was little more than a vaguely defined, if “fierce discontent”<sup>37</sup> with the status quo, and when it came to the *purpose* and *aims* of strict construction and textual revision, at least three diverse schools of thought existed.

For one group of progressive formalists, slippage in legal language represented a blank-check grant of authority to elites and officeholders,

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35. According to the classic definition of formalism, judging involves a syllogistic deduction: the judge applies the legal rule to the particular case, yielding a precise result. This model of rule-bound adjudication is precisely what Holmes and future legal realists “exposed” as a legitimating fiction of the bench, but the Progressives discussed here maintained a faith in “rule-bound decisionmaking,” that is, the idea that an unfavorable judicial outcome could be corrected by rewriting faulty or underspecified constitutional rules. For further explanation of “rule-based decisionmaking” and its limitations, see Frederick Schauer, *Rules, The Rule of Law, and the Constitution*, 6 CONST. COMMENT. 69, 69–74 (1989). This pattern explains the Sixteenth Amendment (proposing to override the Supreme Court’s 1895 *Pollock* decision), see *infra* note 39 and accompanying text; the Nineteenth Amendment, see *Bradwell v. Illinois*, 83 U.S. 130, 139, 141 (1873); *Minor v. Happersett*, 88 U.S. 162, 170, 178 (1875); as well as the failed Child Labor Amendment (proposing to override *Hammer v. Dagenhart*, 247 U.S. 251 (1918) and *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923)). Again, the common element was a belief in the possibility of text to bind the judge.

36. JEREMY BAILEY, JAMES MADISON AND THE PROBLEM OF CONSTITUTIONAL IMPERFECTION 1–2 (2015) (describing Jeffersonian constitutionalism); James R. Zink & Christopher T. Dawes, *The Dead Hand of the Past? Toward an Understanding of “Constitutional Veneration,”* 38 POL. BEHAV. 535, 538 (2016) (describing Jefferson’s “famous[.]” criticism of unchangeable constitutions); see also *infra* notes 208–11 and accompanying text.

37. See generally MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF PROGRESSIVISM, 1870–1920* (2003).

especially the judiciary, with its formidable powers of judicial review. For these Progressives, clear language and periodic textual revision were intended to give clear commands to officeholders and avoid abuses of power. For instance, during the legislative debates over the Sixteenth Amendment, designed to overturn an 1895 Supreme Court decision invalidating the national income tax,<sup>38</sup> Senator Norris Brown of Nebraska explained that the purpose of the amendment was to “give the Court a Constitution that can not be interpreted two ways.”<sup>39</sup> Other formalists feared the effects of loose construction, not in the hands of the judiciary but the President; Connecticut’s Democratic Governor Simeon E. Baldwin fretted in 1912 that “the future unfolding” of presidential power might leave “the perpetuity of our government” in doubt.<sup>40</sup>

Progressive formalism also appealed to a distinct brand of intellectual trying to square the period’s commitment to scientific progress with the static nature of written law. In the latter half of the nineteenth century, many American writers, influenced by accounts of the easy adaptability of the British “unwritten constitution,” grew concerned that American government was being held back from incorporating new scientific advances in economics, political science, public administration, and so forth by the Constitution’s rigidity. In a series of speeches and lectures, the populist North Carolina Judge Walter Clark likened the century-old Constitution to “the clothing of boyhood worn by the nearly mature man, which galls and binds his massive limbs and interferes with his development.”<sup>41</sup> Progressives feared that what public intellectual Herbert Croly called “the monarchy of the Constitution” was locked in, not just by the daunting supermajorities Article V required for amendment, but also by Americans’ spirit of legal and cultural conservatism.<sup>42</sup> The year 1914 saw both the brilliant Walter Lippmann call for replacing *drift* (complacency, superstition, conservatism) in public affairs with a spirit of *mastery* (science, planning, and progress) while Judge Clark asked wryly, “When is it that we shall cease to invoke the spirits of departed fools?”<sup>43</sup>

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38. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), *aff’d on reh’g*, 158 U.S. 601 (1895).

39. Norris Brown, Cong. Rec., 61st Cong., 1st Sess. (Apr. 21, 1909), in Arthur A. Ekirch, Jr., *The Sixteenth Amendment: The Historical Background*, 1 CATO J. 161, 173 (Spring 1981).

40. Simeon E. Baldwin, *The Progressive Unfolding of the Powers of the United States*, 6 AM. POL. SCI. REV. 1, 15 (1912); see *infra* notes 203–06.

41. Walter Clark, C.J. Sup. Ct. of N.C., Revision of the Constitution of the United States, Address Before the Bar Association of Tennessee (July 30, 1897), in PROCEEDINGS OF THE SIXTEENTH ANNUAL MEETINGS OF THE BAR ASSOCIATION OF TENNESSEE, July 1897, at 145.

42. CROLY, *supra* note 14, at 148–49.

43. Walter Clark, *Some Myths of the Law*, 13 MICH. L. REV. 3, 5 (1914). See generally WALTER LIPPMANN, *DRIFT AND MASTERY* (1914) (arguing that rational, scientific governing can overcome society’s lack of intentionality and discipline).

A third defense of amendment came out of the forty-eight states, especially the West, where a particularly pure form of popular democracy thrived and where regular constitutional amendment was a matter of principle. State reformers in Oregon, Washington, California, Arizona, New Mexico, and Oklahoma wrote up new constitutions at stark variance with the Framers' Constitution: they were longer, with detailed lists of rights, governing bodies, and procedures; they were easier to amend, often by simple majority vote; and they placed the tools of direct higher lawmaking in citizens' hands.<sup>44</sup> These ideas trickled up to the national level: in 1911, Senator Jonathan Bourne of Oregon helped draft the charter of "Fighting Bob" La Follette's National Progressive Republican League (NPRL), an insurgent wing of the Republican Party that called for direct primaries, direct election of senators, and amending state constitutions to give voters the initiative, referendum, and recall.<sup>45</sup> A year later, the Progressive Party vied for the presidency on a platform scripted off the NPRL charter. Their champion, former President Teddy Roosevelt, told voters on the campaign trail that he believed in a "pure democracy" where the people could "readily . . . amend" the Constitution "if at any point it works injustice" and could settle by popular vote "what the proper construction of any constitutional point is."<sup>46</sup>

Heady and exciting as amendment fervor was at its peak, by the end of World War I progressive formalism was largely spent. Several factors played a role. Progressivism in general suffered a decline after World War I as the excesses of the Woodrow Wilson Administration soured Americans on a top-down, bureaucratic vision of governance.<sup>47</sup> The four Progressive-Era amendments sapped the public's appetite for further revisions; Prohibition in particular seemed to embody the evils of direct democracy and the futility of trying to legislate public morality.<sup>48</sup> Perhaps the most critical factor, however, was progressivism's failure to bridge its formalist-pragmatist divide. After 1918, when the national Progressive Party dissolved, most of its members were folded into the Republican Party, notwithstanding the fact that under

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44. Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 15–16 (1997); see also AMY BRIDGES, *DEMOCRATIC BEGINNINGS* 3 (2015) (describing the constitution-writers in the new states as working on changed understandings of "citizenship in a democratic republic").

45. William B. Murphy, *The National Progressive Republican League and the Elusive Quest for Progressive Unity*, 8 J. GILDED AGE & PROGRESSIVE ERA 515, 521, 527 (2009).

46. Theodore Roosevelt, *A Charter of Democracy: Address of Hon. Theodore Roosevelt, Ex-President of the United States, Before the Ohio Constitutional Convention (February 21, 1912)*, in S. Doc. No. 34, at 3–4 (1912).

47. See Link, *supra* note 15, at 838–39 (describing the disintegration of Woodrow Wilson's political coalition due to unpopular government actions after World War I).

48. KYVIG, *supra* note 21, at 241–49.

Democratic president Woodrow Wilson much of the Progressives' 1912 policy prescriptions had already been achieved: banking reform, labor protection, environmental conservation, tariff reduction, antitrust law, farm subsidies, and the broadening of national regulatory power over the economy. Progressivism was "scooped" by Wilson at the constitutional level, too; his activist presidency and famous theory of the Constitution as a "vehicle of life" able to evolve to fit "the spirit of the age" seemed to teach constitutional discontents that even "hard wired" structures need not be immovable given a President capable of molding popular opinion through powerful public leadership.<sup>49</sup> As President, Wilson pressed the limits of constitutional structure, proving that watershed political change did not require a constitutional amendment—a lesson his progressive successor, Franklin D. Roosevelt, also took to heart.<sup>50</sup> Over the long run, the Progressives' radical institutional experimentation gave way to the living constitution, legal realism, and eventually, New Deal technocratic paternalism.<sup>51</sup> Lawyers and judges, among the earliest proponents of progressive constitutional reforms, turned away from direct democracy after the war and towards litigation as the solution to the public's problems.<sup>52</sup> Others found that the same path led them to social science.<sup>53</sup> By 1924, the crusades of Senator La Follette, who revived the Progressive Party for one last try at the presidency, complete with calls for a wide variety of constitutional amendments, had come to seem a

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49. WILSON, *supra* note 25, at 69. Taking the opposite view is the present-day constitutional scholar Sanford Levinson. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 6 (2006) (on the "many structural provisions of the Constitution that place almost insurmountable barriers in the way of any acceptable notion of democracy").

50. On Wilson as an innovator along these lines, see generally JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987); PERI E. ARNOLD, *REMAKING THE PRESIDENCY: ROOSEVELT, TAFT, AND WILSON, 1901–1916* (2009); and Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 *FORDHAM L. REV.* 1837, 1843 (2009). On Wilson's effect on FDR, particularly his thought on constitutional reform, see KYVIG, *supra* note 21, at 293–94.

51. Had Progressives read Italian sociologist Robert Michels's 1911 *Political Parties*, they might have been dismayed by its "iron law" whereby democratic movements unavoidably evolve into top-heavy, oligarchic structures. ROBERT MICHELS, *POLITICAL PARTIES* 401 (Eden Paul & Cedar Paul trans., 1915).

52. At the state level, however, constitutional reformism continued to thrive well into the 1920s and 1930s and even into the present day. See, e.g., John L. Shover, *The California Progressives and the 1924 Campaign*, 51 *CAL. HIST. Q.* 59, 59 (1972) (arguing that the progressive movement in California was able to generate major political dissent in the twenties that continued into the Depression period). John Dinan thoroughly catalogues these practices in, especially in Chapter 1, JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* (2018).

53. On latter-day progressives and social science, see generally ROSS, *supra* note 15; JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); and MARK C. SMITH, *SOCIAL SCIENCE IN THE CRUCIBLE: THE AMERICAN DEBATE OVER OBJECTIVITY AND PURPOSE, 1918–1941* (1994).

“pie-in-the-sky” remnant of an earlier age.<sup>54</sup> FDR’s Brain Trust marked perhaps the perfect symbol of Progressivism’s abandonment of pure democratic faith for a rule by experts.

When it comes to constitutional change today, America is still thoroughly in the grip of realism: as constitutional scholar Bruce Ackerman puts it, “We have lost our ability to write.”<sup>55</sup> As years pass with no amendments, more and more of our “operational” constitutional canon lies outside the four corners of the text.<sup>56</sup> Some consider this a normal state of affairs under a short, written constitution like ours.<sup>57</sup> However, our brief look back at Progressive Era critiques of judicial interpretation in a legislative vacuum shows that this was not always so. More to the point, the Progressives clearly saw that such a state of affairs gives elites pride of place in defining the Constitution’s meaning. Today, we might think of boutique appellate litigation firms, Supreme Court “super-precedents,” or theories from the academy providing glosses on America’s “unwritten constitution” to see that the situation has not really changed.<sup>58</sup> And while this state of affairs is hardly new (Alexis de Tocqueville called the legal profession in America an “aristocratic element”<sup>59</sup>), the Progressives’ rise suggests that at a certain point, it hits an intolerable limit. The more formal change to the law is blocked off, the more society depends on textual interpretation to adapt the Constitution to broader political values. Yet where major questions of politics become judicial, predictably constitutionalism becomes unacceptably political. It is ironic that today, the Supreme Court’s very preeminence may threaten the legitimacy of the constitutional project itself.

Although this Article seeks to recover a tradition of Progressive constitutional politics, my purpose is not to suggest that formal amendment is the *only* legitimate mode of constitutional change. Some modern-day

54. BRAD SNYDER, *THE HOUSE OF TRUTH* 349 (2017). The 1924 Progressive Party platform called for a constitutional amendment to allow Congress to override Supreme Court decisions; for the election of all federal judges; for direct election of the President; and for a national initiative and referendum, including and especially voting “for or against war.” *Progressive Party Platform of 1924*, AM. PRESIDENCY PROJECT (Nov. 4, 1924), <https://www.presidency.ucsb.edu/documents/progressive-party-platform-1924> [https://perma.cc/Z4M9-2RGS].

55. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741 (2007).

56. *See id.* at 1752 (identifying “judicial superprecedents” as part of the constitutional canon).

57. *See* Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 22 (1934) (“[A]mendment occurs typically . . . without alteration of the language of the Document.” (emphasis omitted)); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1267–68 (2001) (arguing that the Constitution’s brevity, age, and onerous amendment provision necessitate its updating through “dynamic judicial interpretation”); Ernest Young, *The Constitution Outside of the Constitution*, 117 YALE L.J. 408, 455 (2007) (posing the question of how a “rigid, nonadaptive written constitution” can coexist with dramatic constitutional change); *infra* note 60 and accompanying text.

58. *See infra* note 340.

59. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 281 (Henry Reeve trans., 1835).

originalists do make this argument, but as a practical matter, a “two-track model” where formal and informal change supplement each other seems the only plausible account of how constitutional change *actually* takes place.<sup>60</sup> Progressive formalism may have died out for specific historical reasons, but it is also worth keeping in mind that the theory itself has undeniable structural disadvantages. State constitutions, a near-perfect representation of the theory, tend to be long, bulky, and frequently revised; a contemporary critic of the 1907 Oklahoma constitution, then the longest ever written, fretted that it “destroy[s] . . . the distinction between it and a statute.”<sup>61</sup> In Latin America, a region where, like the fifty states, constitutional amendment is relatively easy, too-frequent amendment is thought to have led to perverse consequences, including weak courts and legal instability.<sup>62</sup> Formalism adapted to reformist ends rejects the possibility of easy, gradual, common law-style adaptation of law to current needs; keeping law current requires constant revision by legislatures or popular assemblies. The parallel with Thomas Jefferson’s nineteen-year cycles of constitutional amendment is hardly coincidental; as alluring as Jefferson’s ideal of popular sovereignty has remained for generations of Americans, his idea of a cyclical refounding is burdened with impracticality, demanding so much, as it does, of the private citizen.

Formalism—of any stripe—also suffers from a deeper problem. Can there be a constitution (or any legal language) that is perfectly unambiguous and self-executing? Charles Beard seemed on the cutting edge of sophistication in his day when he exposed the “fiction that the legislator or the judge is a puppet moved inexorably in the right and only possible direction by an unseen force called ‘law.’”<sup>63</sup> In some ways, not much has changed. A 2017 Harvard Law symposium on the formalism of its one-time dean, Christopher Columbus Langdell, announced: “There is no proposition to which virtually all members of the Harvard Law Faculty would assent, except perhaps one: The exception is the idea that, in law, the rejection of formalism is the beginning of all wisdom.”<sup>64</sup> The notion that words can have

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60. Bruce Ackerman’s *We the People* trilogy might be read in this way. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014). Along the same lines are the popular constitutionalists. See *supra* note 18 and *infra* note 342.

61. John Bell Sanborn, *The Oklahoma Constitution*, 42 AM. L. REV. 362, 366 (1908).

62. JAVIER CORRALES, *FIXING DEMOCRACY: WHY CONSTITUTIONAL CHANGE OFTEN FAILS TO ENHANCE DEMOCRACY IN LATIN AMERICA* 5, 7–10 (2018); Aníbal Pérez-Liñán & Andrea Castagnola, *Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America*, 46 BRIT. J. POL. SCI. 395, 395 (2016).

63. Beard, *supra* note 25, at 29.

64. John Goldberg, Henry Smith, Brian Leiter, Anthony Sebok & Catharine Wells, *Who’s Afraid of Christopher Columbus Langdell (or What Is Formalism and Why Must We Hate It)?*,



a fixed meaning has something inescapably hokey about it. Yet we still believe in comparatively *more* or *less* ambiguous commands: the term “due process,” for instance, is vague enough that a young Felix Frankfurter supported a constitutional amendment to scrub it from the text,<sup>65</sup> while at the other end of the spectrum are seemingly “inescapable” commands that erect “hard wired” structures and rules: judicial life tenure, bicameralism and presentment in lawmaking, or the design of the Electoral College.<sup>66</sup> Besides, however unattainable formalism may be in practice, the Progressives’ suspicion of governing elites, their critique of “judicial usurpation,” and their yearning for direct, communal democracy are not easily dismissed, even today.<sup>67</sup> This may be because a hundred years after the end of progressive formalism, we are still in search of the same end: submitting political power to legible democratic controls.

### I. The Progressive Crisis of Law and Democracy

As the nineteenth century drew to a close, Americans across the nation took a look around and found much to be displeased with. The citizenry had been lulled into complacency by a series of “blowsy romanticisms,” wrote the historian Vernon Parrington—the independent farmer, Jeffersonian democracy, frontier life, and universal male suffrage—and now American democracy had fallen into the wrong hands.<sup>68</sup> A cadre of newly moneyed elites was exploiting America’s “lawless and unregulated individualism” to turn the federal government into a “mouthpiece and agent of property interests.”<sup>69</sup> Party machines, with their deep pockets and tight-knit, bottom-up structure, hand-selected candidates (including for President), set legislative priorities, and staffed the public bureaucracy. In its role as protector of individual rights against state action, the Supreme Court had proven a disappointment, dismantling, under the aegis of the Fourteenth Amendment, the state and federal governments’ best efforts to protect workers under law.<sup>70</sup> Collectively, it made for an American government

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HARV. L. SCH. BICENTENNIAL (Oct. 27, 2017), <https://200.hls.harvard.edu/events/hls-in-the-world/reconsidering-first-year-law-school-classic-cases/> [<https://perma.cc/8PXS-FSL9>].

65. SNYDER, *supra* note 54, at 345.

66. Admitting that certain “inescapable” commands did exist, see Beard, *supra* note 25, at 29. For what it’s worth, not even Charles Beard was a pure relativist: He agreed that words like the “legislative power” or the “general welfare” had “some core of reality and practice on which a general consensus can be reached,” even if around that core was “a huge shadow in which the good and wise can wander indefinitely without ever coming to any agreement respecting the command made by the ‘law.’” *Id.* at 30.

67. JAMES MORONE, *THE DEMOCRATIC WISH* 1–9 (1998).

68. Vernon Louis Parrington, *Introduction to J. ALLEN SMITH, THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT*, at ix–xi (1930).

69. *Id.*

70. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 197–98* (1988) (describing a Fourteenth Amendment jurisprudence in this

uniquely unresponsive to the popular will: party politics were shot through with bribery and corruption; the federal bureaucracy was a morass of patronage and incompetence; Congress was prone to immobilism and capture by wealthy elites; and the President was a weakling beholden to his party.<sup>71</sup>

The Progressives saw hope on the horizon, however. A series of events had shaken the nation's faith in its institutions, making it a propitious time for reform: the Whiskey Ring and Crédit Mobilier scandals of the Grant Administration; widespread discontent at Reconstruction and Jim Crow alike; the growing strength of the women's suffrage movement; the protracted agrarian and labor unrest that culminated in the 1886 Haymarket bombings, the nationwide Pullman strike, and the 1896 presidential campaign of William Jennings Bryan; disputes over the tariff and the gold standard; and the constant thrum of "muck-raking" exposés of political corruption, urban squalor, and rampant price-gouging among the "trusts." "The Age of Innocence," concluded Parrington, was "past, and a mood of honest realism was putting away the naive myths that passed for history and substituting homely authentic fact."<sup>72</sup>

The swelling discontent that percolated into the Progressive movement took shape in the late 1870s.<sup>73</sup> In cities like Detroit, Cleveland, Jersey City, and New York, a coalition of middle-class voters, intellectuals, and urban reformers began to contest and win municipal elections. As they wrested back control over local government from the political bosses, the new Progressives launched a series of reforms to make government "less unbusinesslike" (that is, more effective, efficient, and less corrupt): civil service reform, the introduction of scientific methods into government, and the forging of closer ties with universities.<sup>74</sup> Around the same time, progressive ideas started to win adherents in the South and West as struggling farmers bolted from small-government Bourbon Democrats like Samuel Tilden and Grover Cleveland and toward reformers like "The Great Commoner" William Jennings Bryan, whose 1896 presidential campaign platform called for stronger antitrust laws, regulation of the railroads, monetary inflation, a protective tariff, and an income tax, all of which, unusually for the party of the South, demanded

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period attempting to restrain the postwar South from discriminating against Blacks and Northerners while refraining from radically altering the powers of the federal government).

71. See, e.g., STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 3 (1982) (describing the state-building problem and "apparent statelessness of early America").

72. Parrington, *supra* note 68, at x.

73. See RICHARD HOFSTADTER, *THE PROGRESSIVE MOVEMENT 1900–1915*, at 5–10 (Richard Hofstadter ed., 1963) (outlining the late nineteenth-century origins of the movement); RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 132–35 (1955) (discussing the fusion of agrarian Populism and urban Progressivism after 1900).

74. See, e.g., Woodrow Wilson, *The Study of Administration*, 2 *POL. S. Q.* 197, 201 (1887) (arguing for the application of scientific methods to public administration).

expanding governmental powers at the national level.<sup>75</sup> After an 1885 article in the *Nation* by British jurist A.V. Dicey praised the Swiss referendum as a worthy tool for “the most democratic population of Europe,”<sup>76</sup> direct democracy took off at the grassroots level. The Democratic Party endorsed the national initiative and recall in 1896. In 1898, South Dakota became the first state to enact these into law. Fourteen more states did so by 1914.<sup>77</sup>

But the heady swell of progress soon hit a wall. Radical constitutional experimentation by the states survived scrutiny by the Supreme Court, but economic regulation proved a bridge too far.<sup>78</sup> In 1877, the Court had delivered reformers a victory with its holding in *Munn v. Illinois*<sup>79</sup> that states could regulate any business “affected with a public interest,” including common carriers like railroads and grain elevators, which allowed farmers to access national markets.<sup>80</sup> Justice Stephen Field vociferously dissented,

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75. It was in this period that the Democratic Party shed its laissez-faire and small government roots and began to become the party of reform, with the election of 1912 being a major turning point. See SANDERS, *supra* note 15, at 4–9 (discussing the Democratic Party’s historical shift into a progressive reform party); John Milton Cooper, *From Promoting to Ending Big Government: 1912 and the Progressives’ Century*, in THE PROGRESSIVES’ CENTURY 157, 165 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016) (describing Woodrow Wilson, the Democratic Party’s 1912 presidential nominee, as a “big government liberal”); JOHN D. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS’ ALLIANCE AND THE PEOPLE’S PARTY 404–23 (1931) (detailing the populist agenda as an embrace of active government intervention). See generally DAVID SARASOHN, THE PARTY OF REFORM: DEMOCRATS IN THE PROGRESSIVE ERA (1989) (surveying the Democratic Party’s adoption of reform measures during the Progressive Era).

76. A.V. Dicey, *The United States and the Swiss Confederation*, NATION, Oct. 8, 1885, at 297.

77. *Initiative and Referendum Processes*, NAT’L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx> [https://perma.cc/M2WM-XL7E].

78. How different might American constitutionalism have been had the Supreme Court given the “republican form of government clause” the same weight as the Due Process Clause? U.S. CONST. art. IV, § 4. Though state constitutional experiments faced many challenges in this period, all survived Court scrutiny. Before 1912, the Court’s policy was to proceed to the merits of these challenges, but without exception it upheld state experiments. See Attorney Gen. of Mich. *ex rel. Kies v. Lowrey*, 199 U.S. 233, 239 (1905) (upholding alteration of school districts); Forsyth v. City of Hammond, 166 U.S. 506, 519 (1897) (delegating power to courts to set municipal boundaries); *Minor v. Happersett*, 88 U.S. 162, 175–176 (1875) (denying women’s suffrage). After 1912, the Court would treat all such cases as nonjusticiable “political questions.” *Pac. States Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (considering a challenge to a citizen initiative on tax policy); *Kiernan v. City of Portland*, 223 U.S. 151 (1912) (considering the initiative and referendum); *Marshall v. Dye*, 231 U.S. 250 (1913) (considering state constitutional amendment procedure); *O’Neill v. Leamer*, 239 U.S. 244 (1915) (delegating authority to a court to form drainage districts); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (upholding the submission of legislation to referendum); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (upholding state’s workmen’s compensation program); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74 (1930) (upholding the state’s choice to require the concurrence of all but one justice of the state high court in order to invalidate a statute); *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937) (upholding the delegation of legislative powers).

79. 94 U.S. 113 (1877).

80. *Id.* at 126.

arguing that business's essentially private character fell outside the government's regulatory powers:

A tailor's or a shoemaker's shop would still retain its private character, even though the assembled wisdom of the State should declare, by organic act or legislative ordinance, that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors, by giving them a new designation.<sup>81</sup>

Ensuing decades proved Justice Field farsighted and *Munn* an aberration. Time and again, unwritten "higher principles" of law were invoked by the Court to invalidate democratic creations that threatened the power of business.<sup>82</sup> In its 1895 *Pollock v. Farmers' Loan and Trust Co.*<sup>83</sup> decision, the Court struck down a federal income tax applying to just the top two percent of earners on a cramped reading of Congress's taxation power based, according to the dissent, on "[economic] theories" and not "its meaning in the Constitution."<sup>84</sup> In 1898, a unanimous Court invalidated, on due process grounds, a Nebraska statute that fixed railroad rates at a level the Court considered "unreasonably low."<sup>85</sup> In the 1905 case that gave the period its name, *Lochner v. New York*,<sup>86</sup> the Court held that a New York law setting a weekly maximum on workhours for bakers violated the Fourteenth Amendment's protection of "liberty of contract as well as of person."<sup>87</sup> These liberties featured again in a pair of cases striking down laws outlawing "yellow-dog" contracts, which forbade workers from joining a union.<sup>88</sup> Concerns of federalism loomed large for the Court when it ruled that a business conglomerate in control of 98% of the nation's sugar refining capacity was beyond the 1890 Sherman Antitrust Act's reach because the Constitution gave Congress power only to regulate "commerce," whereas

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81. *Id.* at 138 (Field, J., dissenting).

82. See Logan Sawyer III, *Revising Constitutional History*, in *A COMPANION TO THE GILDED AGE AND PROGRESSIVE ERA* 351 (Christopher McKnight Nichols ed., 2017) (discussing how the Gilded and Progressive Era judiciary manipulated legal categories in order to advance a Darwinian, laissez-faire economic order).

83. 157 U.S. 429 (1895).

84. *Id.* at 637 (White, J., dissenting).

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

86. 198 U.S. 45 (1905).

87. *Id.* at 61.

88. *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); see Sawyer, *supra* note 82, at 351 (discussing "yellow-dog" contracts).

sugar refining was “manufacture” and thus under the purview of the states.<sup>89</sup> Similar federalism concerns motivated the Court’s invalidation of congressional attempts to prohibit child labor.<sup>90</sup> These same doctrines did not appear to trouble the Court when it approved use of the Sherman Act to break up labor unions and strikes.<sup>91</sup>

Disappointed Progressives lashed out against the courts.<sup>92</sup> “Why should social legislation for the twentieth century be limited by judicial norms propounded in the eighteenth century?” demanded Clyde King, a political scientist.<sup>93</sup> After *Pollock* came down, appeals court Judge Seymour Thompson thundered, “Our judicial annals do not afford an instance of a more unpatriotic subserviency to the demands of the rich and powerful classes.”<sup>94</sup> Princeton Professor Edward Corwin argued that the very idea of due process was “not a legal concept at all; it comprises nothing more or less than a roving commission to judges to sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency.”<sup>95</sup> Theodore Schroeder, co-founder of the ACLU precursor Free Speech League who defended the anarchist Emma Goldman at trial, held forth in the *Yale Law Journal*:

So long as our judicial opinions are formed by the mental processes of the intellectual bankrupts these will only be crude justifications of predispositions acquired through personal or class interests and sympathy, “moral” superstitions, or whim and caprice.<sup>96</sup>

Harvard Law Professor Roscoe Pound sympathized with the public frustration but concluded benignly that it was foolish to blame judges for a “want of sympathy with social legislation” when such views merely reflected

89. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1898). Morton Horwitz sees this decision as emblematic of the Court’s unreconstructed formalism. HORWITZ, *supra* note 17, at 84–85. In later decades, the Court would uphold some antitrust prosecutions, including against J.P. Morgan’s Northern Securities Company, American Tobacco, and Standard Oil. But it deprived the Sherman Act of substantial bite by narrowing its focus to not bigness per se, but rather “unreasonable” restraints of trade, defined as the use of “unfair methods” or “illegitimate means” to set prices or eliminate competitors. *See Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911) (establishing the “rule of reason” in antitrust prosecutions); MARTIN J. SKLAR, *CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916*, at 153–54 (1998).

90. *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

91. *E.g.*, *Loewe v. Lawlor*, 208 U.S. 274 (1908); *cf. In re Debs*, 158 U.S. 564 (1894).

92. *See generally* WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* (1993); STEPHEN M. ENGEL, *AMERICAN POLITICIANS CONFRONT THE COURT* 225–84 (2011).

93. Clyde Landon King, Book Review, 42 ANN. AM. ACAD. POL. & SOC. SCI. 372 (1912) (reviewing FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* (1911)).

94. Seymour D. Thompson, *Government by Lawyers*, 30 AM. L. REV. 672, 685 (1896).

95. Edward S. Corwin, Book Review, 6 AM. POL. SCI. REV. 270, 271 (1912) (reviewing FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* (1911)).

96. Theodore Schroeder, *Social Justice and the Courts*, YALE L.J. 19, 26–27 (1912).

what they had been taught as young lawyers.<sup>97</sup> “I do not criticize these decisions,” Pound wrote: “As the law stands, I do not doubt they were rightly determined.”<sup>98</sup> It was true, Pound admitted, that the law *tended* towards conservatism.<sup>99</sup> The longevity of institutions, judges’ adherence to precedent, and the high hurdles placed on the passage of legislation and constitutional amendments were all stabilizing forces, making the law a frequent drag on political change.<sup>100</sup> But this was not necessarily so. The problem, Pound concluded, lay in “our legal thinking and legal teaching.”<sup>101</sup> The “individualist spirit” that animated the common law “agree[d] ill with a collectivist age.”<sup>102</sup> The modern-day sociologist and economist understood that “the isolated individual” was no longer “the center of the universe.”<sup>103</sup> Yet the theories of property and freedom of contract still taught at law schools remained stubbornly indifferent to modern circumstances.<sup>104</sup> Louis Brandeis agreed. The social sciences had adapted to the changes of the late nineteenth century—a revolution, wrote Brandeis, “which affected the life of the people more fundamentally than any political revolution known to history.”<sup>105</sup> But “legal science” remained “largely deaf and blind” to these changes.<sup>106</sup> Something had to give way.

How could the federal bar be coaxed into the modern age? The first step was to do away with sentimental old fictions that kept lawyers from seeing things clearly. In 1881, Brandeis’s hero, Oliver Wendell Holmes, had revolutionized American jurisprudence with *The Common Law*, a hard-boiled critique of nineteenth-century formalism, with its mawkish faith in

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97. Roscoe Pound, *Social Justice and Legal Justice*, 75 CENT. L.J. 455, 462 (1912).

98. Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 345 (1905).

99. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 446 (1906) (“Law is often in very truth a government of the living by the dead.”).

100. *See id.* (recognizing that the “law does not respond quickly to new conditions”). The law’s conservative tendencies also resulted from judicial life tenure and the federal bar’s excessive coziness with the private sector. *See* Walter Clark, *Some Defects of the Constitution of the United States*, Address to the Law Department of the University of Pennsylvania 10, 15 (Apr. 27, 1906); Louis Brandeis, *The Opportunity in the Law*, Address Before the Harvard Ethical Society (May 4, 1905), in 39 AM. L. REV. 555, 559 (1905).

101. Pound, *supra* note 97, at 462.

102. Pound, *supra* note 99, at 447.

103. Pound, *supra* note 98, at 346 (stating that “the isolated individual is no longer taken for the center of the universe. We see now that he is an abstraction, and has never had a concrete existence,” and recognizing “that society is in some wise [sic] a co-worker with each in what he is and in what he does, and what he does is quite as much wrought through him by society as wrought by himself alone”).

104. *See* Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 610, 612–13 (1907) (noting that several law schools still used textbooks teaching old theories of property and freedom of contract that were not in step with modern legislation).

105. Brandeis, *supra* note 2, at 463.

106. *Id.* at 464.

logical syllogisms and eternal, pre-political values.<sup>107</sup> For Holmes, such pretensions to objectivity merely masked the subjective decisions judges were actually making: law was not some “brooding omnipresence in the sky,”<sup>108</sup> as he later wrote, but rather the product of “prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men.”<sup>109</sup> *These* were the factors that influenced judges’ thinking and that defined the rules under which men and women lived.<sup>110</sup> If true, then the solution to errors on the bench was to make the study of law more “rational” and scientific by infusing judicial decision-making with the teachings of history and economics. As Holmes stated in his widely circulated 1897 speech “The Path of the Law”:

[History] is a part of the rational study [of law], because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>111</sup>

In the years that followed, Holmes would get his wish, as reformers like Louis Brandeis helped inspire a generation of young lawyers to become literate in statistics and economics. As counsel for the State of Oregon in *Muller v. Oregon*,<sup>112</sup> Brandeis submitted to the Supreme Court a 100-page brief studded with medical data, survey results, and theories about the unhealthy effects of excess work on female laborers.<sup>113</sup> At the same time, by the time of Holmes’s celebrated quip in *Lochner*—“[t]he 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics”—his broadside against formalism had led a new generation to doubt whether the law itself had any determinate content to it whatsoever.<sup>114</sup> By the middle third of the century, a

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107. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1–2, 18 (1881).

108. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

109. HOLMES, *supra* note 107, at 1.

110. *Id.*

111. Holmes, *supra* note 28, at 469.

112. 208 U.S. 412 (1908).

113. *Id.* at 419.

114. SNYDER, *supra* note 54, at 316. Ironically, after *Lochner* came out, the newspapers quoted, not Holmes but the dissenting opinion of Justice John Harlan. It was not until 1909 that Roscoe

plethora of theories would step in to fill the void left by Holmes's attack on formalism, including legal realism, positivism, and legal process theory.<sup>115</sup> In the short term, though, the result was to sever law's form from its content, delivering legal reformers a way to make the law quickly "evolve" and rescue the legitimacy of a tarnished bench. Now, Progressive lawyers could defuse criticism of the law's supposed inherent conservatism with an easy reply: the problem lay, not with the law itself or the institutions it erected, but with misguided judges imbuing the law with the wrong set of values. These, after all, could be re-educated, or simply replaced.

## II. Two Strands of Progressive Constitutionalism

The same debate was going on in parallel with regard to constitutional law. Building upon the fierce discontent of muckrakers, laborers, and other early discontents,<sup>116</sup> a generation of reformers would recast early critiques of the bench into a full-fledged indictment of the constitutional system.<sup>117</sup> On this account, the social injustice and economic inequality plaguing the country were the fault of a constitutional system that, while useful in its own time, could no longer serve the interests of a modern, industrial society. Common-law historicism loomed large in these critiques, just as it had in Holmes's attack on nineteenth-century formalism.

Progressives' charges against the Constitution included its protection of property, its limitation of federal power, and the anti-majoritarian nature of checks and balances. When Frank Goodnow, a Columbia University political scientist and pioneer in administrative law, wrote that theories of the social compact and natural rights formed the "basis of the American constitutional system," he meant to connote superstition and unreason, the legal equivalent of pre-Darwinian creationism.<sup>118</sup> Charles Beard, then Goodnow's junior colleague at Columbia, had equally little patience for theories that viewed the law as "made out of some abstract stuff known as 'justice.'"<sup>119</sup> It was hardly a coincidence that by the time of *Lochner*, critics and supporters alike associated such uncoded "higher" principles with the Lockean trinity of "life, liberty, and property" and with the increasingly problematic conclusion that, whatever the economic dislocations of the industrial age, government

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Pound argued that Holmes's dissent contained "a few sentences that deserve to become classical." *Id.* Even then, the public mostly ignored it. *Id.*

115. Edward Purcell Jr. has exhaustively tracked these different strands: realism, positivism, social justice reform (Brandeisism), and legal process theory, among others, into which early legal realism would later evolve. PURCELL, *supra* note 17, at 153–54.

116. See MCGERR, *supra* note 37 (describing the progressive movement as arising from fierce discontent, resulting in a broad and radical agenda of proposed reforms).

117. See ROSS, *supra* note 92 (describing a new surge of public criticism of the judiciary).

118. See GOODNOW, *supra* note 93, at 3–4 (explaining that most lawyers view these theories to be inapplicable as legal principles).

119. BEARD, ECONOMIC INTERPRETATION, *supra* note 13, at 8.



could not interfere with the citizen's right to acquire property.<sup>120</sup> Insofar as it was built upon such premises, the Constitution was stuck in Jefferson's America—an egalitarian, agrarian preindustrial oasis that the Industrial Revolution had buried and to which the United States would never return.<sup>121</sup>

Another serious defect of the Constitution was the weak central government it established. With Congress's authority limited to a short list of "enumerated powers" and refracted through a needlessly complicated scheme—staggered elections, the presidential veto, and authority shared with the states—an enormous regulatory vacuum had been created. Not only were the several states stuck futilely trying to regulate corporations operating across state borders with their limited tools, but the *Lochner* Court had already compounded Congress's disadvantage by considerably narrowing the meaning of "interstate commerce."<sup>122</sup>

These and other "discovered faults" of the text were being "perpetuated," wrote one constitutional historian borrowing the words of James Madison in *The Federalist*, by a demanding amendment process that insulated the Constitution against change.<sup>123</sup> After all, as the political scientist Munroe Smith pointed out, the purpose of a written constitution was "not to enable a minority to thwart persistently and successfully the matured and deliberate will of a clear majority, but to insure the formation, on the part of the majority, of a purpose that is matured and deliberate."<sup>124</sup> Article V required two-thirds of both houses of Congress to propose an amendment, and even then, it took three-fourths of the states to make it law.<sup>125</sup> Smith

120. Justice Field's *Munn* dissent, with its neo-Lockean rhetoric and commitment to shield property from the government, usefully illustrates this view. *See supra* notes 80–82; *see also* Everett P. Wheeler, *Constitutional Law of the United States as Moulded by Daniel Webster*, 13 YALE L.J. 366, 374 (1904) (arguing that in America, popular sovereignty "is a limited monarchy," and economic regulatory legislation is appropriately limited by the courts' "unique power of enforcing the mandate of the Constitution, and saying to the representatives of the people, whether in the Executive chair, or in the Legislature: 'Thus far shalt thou go and no farther'").

121. *See* BEARD, *ECONOMIC INTERPRETATION*, *supra* note 13, at 12–13 (highlighting that property relations among persons become more complex as a society becomes more industrialized).

122. *See* GOODNOW, *supra* note 95, at 12–15, 250 (explaining the country's general dissatisfaction with state governments and describing the *Lochner* decision).

123. HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 303–04 (1897) (quoting *THE FEDERALIST*, NO. 43 (James Madison)).

124. Munroe Smith, *Shall We Make Our Constitution Flexible?*, 672 N. AM. REV. 657, 666 (1911).

125. Article V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

found this ridiculous: “In what other nation, possessing representative institutions, would a measure supported by so large a majority of the people fail of effect?” The three-fourths threshold might have made sense under “the social, economic, and political conditions of the thirteen original states,” but the population was larger, more diverse, more divided in its interests now.<sup>126</sup> Political scientist Frank Goodnow agreed. Surveying recent constitutions in Canada (1867), the German Empire (1871), and Australia (1900), which concentrated regulatory power in the national legislature and were comparatively easy to amend, Goodnow concluded it was safe to assume “that, if the American people were called upon at the present time to frame a scheme of federal government, they would adopt one which departed in a number of respects from the one under which we now live.”<sup>127</sup>

A flurry of accounts began to reexamine the Constitution’s origins with the aim of exposing its ostensible faults.<sup>128</sup> Most important by far was Charles Beard’s 1913 *An Economic Interpretation of the Constitution*, which depicted the Constitution as the handiwork of a cadre of self-interested elites contriving to protect their property from “the reach of popular majorities.”<sup>129</sup> Beard’s story was echoed by scores of writers. Journalist Walter Weyl, seizing on the anti-monopolist sentiment of the time, provocatively described the Constitution as “a political trust.”<sup>130</sup> Herbert Croly’s 1914 *Progressive Democracy*, one of the most important books of the period, described checks and balances as the pure manifestation of the Framers’ “profound suspicion of human nature,” an “organization of obstacles and precautions” that

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U.S. CONST. art. V.

126. See Smith, *supra* note 124, at 657–58 (explaining that “there were increasing divergences of a more permanent character” beginning in the early nineteenth century).

127. GOODNOW, *supra* note 95, at 12–13.

128. See, e.g., ALLAN BENSON, OUR DISHONEST CONSTITUTION 2 (1914) (“The Constitution of 1787, under which we still live, was made by a small class to further the interests of that class.”); LOUIS BOUDIN, GOVERNMENT BY JUDICIARY 114–15 (1932) (concluding that the judicial power that the Framers had in mind was very different from the Judiciary we know today); GUSTAVUS MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 92–93, 133–34 (1912) (arguing that the Framers diverted attention away from the courts to representation in Congress and in doing so, were able to bestow a tremendous amount of potential power on the Supreme Court); GILBERT ROE, OUR JUDICIAL OLIGARCHY 17–19, 21 (1912) (“[T]he Constitution was clearly framed with a view of preventing the exercise of [self-governance] powers by the masses.”); J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT 37–39 (1907) (“[T]he conclusion is irresistible that [the Framers] sought to establish a form of government which would effectually curb and restrain democracy.”); SMITH, *supra* note 68, at 12–13 (pointing to the law of nature as the guiding principle in determining the character of constitutional development in the United States).

129. BEARD, ECONOMIC INTERPRETATION, *supra* note 13, at 324–25. Beard based this claim on a discussion of Madison’s Federalist No. 10, and although modern historians reject Beard’s materialist lens, it is often to him that the modern relevance of *Federalist* No. 10 is credited. See, e.g., Douglass Adair, *The Tenth Federalist Revisited*, 8 WM. & MARY Q. 48, 48–49 (1951) (“Beard was led to argue persuasively, but falsely, that Madison’s *Federalist* theory expounded the doctrine that theories are unimportant in politics.”).

130. WALTER WEYL, THE NEW DEMOCRACY 107, 118 (1912).

cemented in place a government “divided against itself” and so incapable of concerted, deliberate action as to be “deliberately and effectively weakened.”<sup>131</sup> A young Woodrow Wilson, while not a devotee of Beardian skepticism, nonetheless seemed to agree that it would be difficult to find “a constitution upon record more complicated with balances than ours.”<sup>132</sup> Historian J. Allen Smith blasted the familiar metaphor of the Constitution as a “sacred compact” signed by a “sovereign people”: “Nothing,” he wrote, “was farther from the minds” of the Framers than creating a popular body “distinct from, and entirely outside of, the government, which would control the Constitution and through it all officials who exercised political power.”<sup>133</sup> Franklin Pierce, a New York lawyer and antitariff and antitrust reformer, called the Constitution, with more than a touch of hyperbole, “the most undemocratic instrument to be found in any country in the world [today].”<sup>134</sup> Whatever the truth, it was clear, to Progressives at least, that the Constitution neither served the people nor had it ever been intended to do so.

The question was: What to do about it?

#### A. *The Revolt Against Formalism*

Some Progressives saw in Oliver Wendell Holmes’s ostensible revolution in legal theory the Trojan horse that could infiltrate the citadel of the Constitution. Since being appointed to the bench in 1902, Justice Holmes had been busily applying his historicist lens to the Constitution. In a well-known opinion heavy with Darwinian metaphor, Holmes explained that, in the Constitution, the Founders had “called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”<sup>135</sup> Over the years, the Constitution had so grown and changed that to do it justice, interpreters had to consider it “in the light of our whole experience and not merely in that of what was said a hundred years ago.”<sup>136</sup> Unlike his conservative brethren, Holmes believed that no “higher law” dictated the Constitution’s meaning but what humankind required as a matter of social necessity. On this view, if the Constitution was, as Charles Beard felt, just a compendium of “vague words” and “ambiguous expressions,” then in practice, it represented no obstacle to extensive reform.<sup>137</sup> The Constitution “could be reconstructed to mean whatever social movements wanted the text

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131. CROLY, *supra* note 14, at 40.

132. See WOODROW WILSON, CONGRESSIONAL GOVERNMENT 12 (1885) (quoting John Adams to describe the complexity of our system of checks and balances).

133. SMITH, *supra* note 68, at 157. For another critique of social compact theory, see GOODNOW, *supra* note 95, at 1–4.

134. FRANKLIN PIERCE, FEDERAL USURPATION 389 (1908).

135. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

136. *Id.*

137. Beard, *supra* note 25, at 30.

to mean. By rereading the document to serve popular ends, citizens could empty it of any troubling symbolic power.”<sup>138</sup>

It was a quintessentially pragmatist point of view and one well-suited to the many Progressives who came from the ranks of the social sciences.<sup>139</sup> While a professor at Princeton University in 1908, Woodrow Wilson wrote in his magnum opus, *Constitutional Government*: “The Constitution contains no theories. It is as practical a document as Magna Carta.”<sup>140</sup> After devoting nearly the whole of his 1911 *Social Reform and the Constitution* to the question whether the Constitution was “an adequate vehicle of a modern state,” Frank Goodnow concluded that if the answer was no, then the fault lay not

with the instrument itself, nor with its framers, nor yet with those who first interpreted it, *but with its official guardians today*, who, to say the least, have a fair choice between principles that will adapt that instrument, in the words of Marshall, “to the various crises in human affairs” “for ages to come” and between more restrictive concepts a really straightforward application of which would have throttled the national life long before this.<sup>141</sup>

From these meditations on the law’s “flexibility” came a hopeful conclusion: Whatever ailed American democracy, it could be cured by reading. As a result, these critics saw no reason to call for extensive formal revisions since the document had little fixed content.

One obvious problem with realism, however, was that it was unavoidably judge-centric and status quoist. There was something that rankled about Progressives raging against the “guardianship of the robe” only to replace its members and leave it intact.<sup>142</sup> It was typically conservatives who praised the judiciary for wisely dispensing a body of judge-made law that allowed the Constitution to naturally adapt to “the ever-increasing wants of a rapidly swelling population.”<sup>143</sup> Yet this position scarcely differed from Brandeis’s in his 1916 speech: “What we need is not to displace the courts,

138. Rana, *supra* note 22, at 44.

139. *Id.* at 56; LOUIS MENAND, *THE METAPHYSICAL CLUB* 422 (2001). Another leading pragmatist of the period, the educational reformer John Dewey, wrote: “[S]ocial arrangements, laws, institutions are made for man, rather than that man is made for them.” DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 191 (1920).

140. WILSON, *supra* note 25, at 60.

141. Corwin, *supra* note 95, at 276 (1912) (reviewing FRANK GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* (1911)) (emphasis added).

142. CROLY, *supra* note 14, at 232.

143. HANNIS TAYLOR, *THE ELASTICITY OF WRITTEN CONSTITUTIONS* 213 (1906). Taylor’s piece remains an important artifact of a conservatively minded jurisprudence that saw “loose construction” by the Supreme Court as crucial in the effort to stop more radical or revolutionary change.

but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task.”<sup>144</sup> Stripped of the formalists’ professed belief in the unchanging nature of the Constitution, it was telling that progressive realists now coincided with their enemies on the question of judicial supremacy.

Another problem with realism was that it left Progressives exposed to the charge that theirs was a government, not of laws, but of men. Reformers insisted that the law had *always* been made by judges applying “their [own] sense of justice or public policy” to open-ended language.<sup>145</sup> But they faced a hard time convincing their political opponents to admit as much. The Supreme Court, insisted one conservative, was a devoted servant of the law and would always refuse “to admit the argument from convenience to overthrow the plain letter of the constitution.”<sup>146</sup> Supreme Court Justice Horace Lurton fulminated: “Neither a Constitution nor a statute is to be treated by either the executive or the judiciary as if it were a ‘nose of wax,’ to be twisted and moulded according to the fancy of the occasion.”<sup>147</sup> “If our Constitution is too rigid,” Lurton challenged critics, “let us amend [it].”<sup>148</sup> Justice Lurton’s challenge may have been rhetorical, but many in his time were willing to take him at his word.

#### B. *Progressive Formalism: Why Write?*

In 1925, a speaker at the Alabama State Bar Association’s annual meeting warned his audience that they were living in an “Age of Constitutional Amendments.”<sup>149</sup> With criticism of the Constitution at an alarming high, “Constitution tinkering” was fast becoming “the leading outdoor sport” of “political quacks” who ran for office on the idea of adding one or more amendments to the Constitution—not to improve the text, but for the cynical purpose of “momentarily riding into office through this unpatriotic appeal made to these elements of discontent.”<sup>150</sup>

Easy as it is from a present-day vantage point to see amending the Constitution as a fringe idea, in the Progressive Era calls for its amendment

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144. Brandeis, *supra* note 2, at 468.

145. Morris R. Cohen, *Legal Theories and Social Science*, 25 INT’L J. ETHICS 469, 484 (1915); see also Frank J. Goodnow, *Judicial Interpretation of Constitutional Provisions*, 3 PRO. ACAD. POL. SCI. CITY N.Y. 46, 57 (1913) (arguing that if reformers were to apply new understandings to old text, it would not be the first time “that our constitution has been made by past judicial interpretation to take on a meaning which is not necessarily the only meaning which may be given to it”).

146. F. Charles Hume, *The Supreme Court of the United States*, 33 AM. L. REV. 641, 649 (1899).

147. Horace H. Lurton, *A Government of Law or a Government of Men?*, 193 N. AM. REV. 9, 24 (1911).

148. *Id.*

149. Saner, *supra* note 19, at 98.

150. See *id.* at 98–100 (lambasting ambitious politicians for proposing constitutional amendments solely as a means of appealing to discontented voters).

were popular, intense, and sustained. In 1897, constitutional historian Herman Ames counted 1,736 amendment proposals initiated on the floor of Congress since the Founding. Not thirty years later, a follow-up study counted an additional 1,370.<sup>151</sup> Just sixteen years after Ames concluded that “insurmountable” obstacles lay in the way of formal amendment came the ratification of the first of four constitutional amendments passed in a decade: the Sixteenth established the income tax (passed by Congress in 1909 and ratified by the states in 1913); the Seventeenth authorized the direct election of senators (passed 1912, ratified 1913); the Eighteenth banned the transport and sale of alcohol (passed 1917, ratified 1919); and the Nineteenth gave women the right to vote (passed 1919, ratified 1920).<sup>152</sup> Real political pressure also existed in favor of an idea not attempted since the Founding: a national convention to draft a new constitution entirely.<sup>153</sup> Between 1893 and 1911, thirty-one states passed seventy-three petitions demanding a constitutional convention.<sup>154</sup> One such petition, signed by twenty-three states calling for a convention authorized to vote on five specific amendments, helped nudge a reluctant Senate to vote to send the Seventeenth Amendment to the states for ratification in 1909.

For those behind these amendments, constitutional reform-by-interpretation was plainly not enough. But why not? Broadly, these arguments fell into three categories. The first was preservationist in its instincts, motivated by the fear that ambiguity in the text was enabling institutional aggrandizement, especially in the judiciary. Tapping into popular frustration with “judicial usurpation,” it weaponized the idea of clever judges and lawyers molding words to obtain the results they desired. Many also feared an activist presidency turning open-ended language to the same ends. A second group, more technocratic, focused on amendment as a means, not to rights protection or direct democracy, but rather to efficient governance. Amending a “rigid” old Constitution would open up American democracy to new currents of thought, especially best practices of economics, public administration, and constitutional design coming from abroad in Europe, and of course, would allow the “best men” possible to serve in government. Third and finally were the popular democrats, insurgents in the Republican and Democratic parties, left-wing radicals, cultural critics of the Constitution, and reformers in the states. The most genuinely aspirational of the three groups, they had a constitutional philosophy patterned on

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151. VILE, *CONSTITUTIONAL AMENDMENTS*, *supra* note 20, at xix–xx.

152. AMES, *supra* note 123, at 301; VILE, *CONSTITUTIONAL AMENDMENTS*, *supra* note 20, at xxix.

153. See Rana, *supra* note 22, at 50–53, 59 (recounting the Progressive Era’s “radical political climate of constitutional critique” and the Socialist Party’s serious commitment to “wholesale textual revision” of the Constitution).

154. *Id.* at 50.

Jeffersonian democracy, which viewed continued lawmaking as a way to guarantee the People's authorship over the government and mastery of their own democracy.

*1. The Legalists: Strict Construction as Institutional Maintenance.*—Although the Progressives dreamed of forging a new American democracy, their experimentation with new political institutions—municipal boards, labor unions, a professionalized civil service—was often rooted in nostalgia, a search for a way to bring things back to the way they were. There is no better example than Herbert Croly's call for "Hamiltonian means to achieve Jeffersonian ends."<sup>155</sup> Capturing the zeitgeist of uplift and inquiry, Croly's 1909 *The Promise of American Life* so delighted former President Theodore Roosevelt when he read it that he went on to hire Croly as an advisor for his 1912 presidential campaign.<sup>156</sup> Croly praised Americans' "old sense of a glorious national destiny" under the ideals of Jefferson. But he was convinced that, under new economic conditions, Jefferson's egalitarian society could not be achieved by "an essentially individualistic machinery."<sup>157</sup> To become viable again, Jefferson's ideal had to be transformed with "the aid of the Hamiltonian nationalistic organization and principle" into "a democracy devoted to the welfare of the whole people."<sup>158</sup>

The same way that modernity had spoiled the Jeffersonian ideal by wrenching apart liberty and equality, so too the Constitution had become an unreliable guide through the years, though its words had hardly changed. The nation's descent into civil war produced the first sustained period of constitutional disenchantment. The architect of Southern secession John C. Calhoun argued that to avoid crisis the Constitution should be amended to devolve power over commerce to the states, divide the presidency into two branches to represent Northern and Southern constituencies, and create a new body ("the concurrent majority") with power to veto federal legislation.<sup>159</sup> In 1861, in a desperate bid to avoid war, Congress endorsed an amendment that offered the South eternal perpetuation of slavery without federal government interference.<sup>160</sup> A handful of states ratified the so-called Corwin Amendment, but the process was interrupted by the outbreak of war. At the height of the

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155. Franklin Foer, *Foreword* to HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE*, at xv, xxv (2014).

156. SNYDER, *supra* note 54, at 93.

157. CROLY, *supra* note 155, at 53.

158. *Id.* at 263.

159. JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* 28, 35 (1851). Other constitutional scholars of the period grew concerned about the constitutional convention mechanism in light of Southern secession. See VILE, *CONSTITUTIONAL AMENDING PROCESS*, *supra* note 20, at 102–03 (noting scholars' fears that constitutional conventions could prove destructive).

160. KYVIG, *supra* note 21, at 150–51.

fighting, Sidney George Fisher blamed Article V's rigidity for failing to prevent war: "The safety-valve did not work, and the boiler has burst."<sup>161</sup>

To Fisher and a long line of comparatively minded scholars that followed, next to its counterpart in Britain, the U.S. Constitution suffered from a serious defect: it was immensely difficult to amend.<sup>162</sup> While Britain's "flexible" constitution could be amended as easily as modifying or repealing a statute, amending America's "rigid" Constitution required summoning an imaginary sovereign "body" of three-fourths of the state legislatures acting in concert.<sup>163</sup> Invoking Hobbes's metaphor of the People as a sleeping sovereign, British constitutional theorist A.V. Dicey called America's sovereign "a monarch who slumbers and sleeps":

[He] has been roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.<sup>164</sup>

So long as the sovereign slept, constitutional change would take one of two paths: customary growth that altered its workings without changing its language, or cycles of discontent and revolution, such as had been France's tragic fate since the Revolution.<sup>165</sup> In an 1849 essay, John Stuart Mill had

161. SIDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* 27 (1862).

162. *See, e.g.*, WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 268 (1867) (discussing the complexity of amendments to the American Constitution); JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 192 (1888) (noting the "troublesome" American amendment process); A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 66 (1885) (comparing how much the American and English constitutions changed over their lifetimes); J. David Thompson, *The Amendment of the Federal Constitution*, 3 *PROC. ACAD. POL. SCI. CITY N.Y.* 65, 71–73 (Henry R. Mussey ed., 1913) (comparing the American Constitution with its counterpart in Australia). On the influence of British ideas on the thought of the American Progressives, see JAMES KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920*, at 370 (1986); RODGERS, *ATLANTIC CROSSINGS*, *supra* note 15, at 57; and STEARS, *supra* note 15, at 4.

163. James Bryce, *Essay III: Flexible and Rigid Constitution*, in 1 *STUDIES IN HISTORY AND JURISPRUDENCE*, 124, 132, 179–80 (1901).

164. DICEY, *supra* note 162, at 140. For Hobbes's metaphor of the sleeping sovereign, see THOMAS HOBBS, *ON THE CITIZEN* § 16, at 99–100 (Richard Tuck & Michael Silverthorne eds. & trans., 1998). For the idea of the modern referendum as an emanation of Rousseau's thought on sovereignty (as distinct from government), see RICHARD TUCK, *THE SLEEPING SOVEREIGN*, at xi, 5–6, 254 (2016). Although Tuck sees the U.S. Constitution as instantiating the *government/sovereign* distinction, he views the American President as a kind of plebiscitary organ that somewhat blurs this line. *Id.* at 247.

165. DICEY, *supra* note 162, at 120–21; *see also* BRYCE, *THE AMERICAN COMMONWEALTH* 373 (1914) (arguing that the "solidity" of the U.S. Constitution necessitates "some other way" of amending the text in practice). "The ingenuity of lawyers has discovered one method in interpretation, while the dexterity of politicians has invented a variety of devices whereby legislation



described how the Revolution of 1848 had been provoked by the oppressive monarch Louis Philippe and his nearly amendment-proof Charter of 1830.<sup>166</sup> Rigidity ultimately proved fatal to the regime's survival, Mill explained, for when institutions "seem to oppose an unyielding barrier to the progress of improvement, the advancing tide heaps itself up behind them till it bears them down."<sup>167</sup> No government could be permanent, Mill concluded, "unless it guarantees progress as well as order."<sup>168</sup>

Across the Atlantic, some scholarly voices were starting to fear that Article V was sending America barreling down the same explosive path. In 1867, John A. Jameson, a professor and judge with pronounced anti-majoritarian convictions, described amendment procedures as "safety-valves": they should be neither adjustable "with too great facility, lest they become the ordinary escape-pipes of party passion," nor so stiff "that the force needed to induce action is sufficient to explode the machine."<sup>169</sup> Columbia University's John Burgess, no Progressive himself, warned in 1890 that "revolution and violence" could be the result where rigid amendment mechanisms allowed "the well-matured, long and deliberately formed will of the undoubted majority . . . [to] be persistently and successfully thwarted."<sup>170</sup> Certainly, wrote the political scientist Munroe Smith, when the Framers designed a mechanism to "escape from the restraints" of the even more rigid Articles of Confederation, they had not meant "to make the new Constitution unchangeable except by another *coup d'état* or revolution!"<sup>171</sup> Smith and others advocated easier Article V amendment to allow for regular—not revolutionary—change.<sup>172</sup>

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may extend, or usage may modify, the express provisions of the apparently immovable and inflexible instrument." *Id.*

166. JOHN STUART MILL, VINDICATION OF THE FRENCH REVOLUTION OF FEBRUARY 1848 (1849), reprinted in *ESSAYS ON FRENCH HISTORY AND HISTORIANS* 317, 324–27 (John M. Robson ed., 1985).

167. *Id.* at 325.

168. *Id.*

169. JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 549 (4th ed. 1887). The image of the amendment article as a safety valve is believed to be the idea of Justice Joseph Story. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 687 (1st ed. 1833) ("[The Framers] believed, that the power of amendment was, if one may so say, the safety valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction.").

170. JOHN W. BURGESS, SOVEREIGNTY AND LIBERTY 152 (1893).

171. Smith, *supra* note 124, at 658.

172. See *id.* at 673 ("[T]he first article in any sincerely intended progressive programme must be the amendment of the amending clause of the Federal Constitution."); BURGESS, *supra* note 170, at 152 (proposing an alternative amendment process); PIERCE, *supra* note 134, at 6 (calling for a "supreme struggle" to change the amendment process); Thompson, *supra* note 162, at 28–29 (discussing such a proposal introduced by Robert La Follette to the Senate in 1912); Walter K. Tuller, *A Convention to Amend the Constitution—Why Needed—How It May Be Obtained*, 193 N.

Even if one agreed with the viewpoint, often held by conservatives, that judge-made law served a crucial function in adapting the Constitution to “the ever-increasing wants of a rapidly swelling population,” the question naturally arose whether judges were not, in fact, creating some sort of shadow Constitution supplanting the one the Framers had written.<sup>173</sup> In his 1907 *Christianity and the Social Crisis*, Progressive theologian Walter Rauschenbusch summed up these worries: “We are witnessing to-day, beyond question, the decay—perhaps not permanent, but at any rate the decay—of republican institutions. No man in his right mind can deny it.”<sup>174</sup>

We have, in fact, one kind of constitution on paper, and another system of government in fact. That is usually the way when a slow revolution is taking place in the distribution of political and economic power. The old structure apparently remains intact, but actually the seat of power has changed.<sup>175</sup>

Scholarly and mainstream political proposals, including the 1912 and 1924 platforms of the Progressive Party, started to call for a constitutional amendment to eliminate or limit the power of judicial review.<sup>176</sup> One such advocate was Walter Clark, a state supreme court judge who detested the power of federal judges.<sup>177</sup> It had been a grievous error, Clark insisted, to give federal judges life tenure, but it was all the worse since the judiciary had given itself the power to declare laws unconstitutional, a power found nowhere in the text and which no other nation granted (at the time).<sup>178</sup> Now, the judiciary’s expansive construction of the Fourteenth Amendment to invalidate any legislation conceivably affecting the “due process of law” was sucking “the whole body of reserved rights of the States into the maelstrom of the Federal Courts.”<sup>179</sup> “Nothing can save us from this centripetal force but the speedy repeal of the Fourteenth Amendment or a recasting of its language

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AM. REV. 369, 385 (1911) (arguing that the number of states required to call a constitutional convention should be reduced to half of them); *infra* note 234. For a list of modern proposals, see VILE, CONSTITUTIONAL AMENDMENTS, *supra* note 20, at 25–26.

173. TAYLOR, *supra* note 143, at 213.

174. WALTER RAUSCHENBUSCH, *CHRISTIANITY AND THE SOCIAL CRISIS* 262 (1908).

175. *Id.*; see also A.N. CHRISTENSEN & E.M. KIRKPATRICK, *THE PEOPLE, POLITICS, AND THE POLITICIAN* 161 (1941) (“By reason of the fact that the government controls the interpretation and enforcement of the fundamental law, it has the power in no small degree to remove, evade, or ignore the restraints by which its authority is supposed to be limited.”).

176. See, e.g., Yandell Henderson, *The Progressive Movement and Constitutional Reform*, 3 YALE REV. 78, 78–79 (1913). For other proposals to limit judicial review, see VILE, CONSTITUTIONAL AMENDING PROCESS, *supra* note 20, at 94.

177. William G. Ross, *Walter Clark of North Carolina: Antagonist of the Federal Judiciary*, 3 J. S. LEGAL HIST. 1, 1 (1994).

178. Walter Clark, *The Next Constitutional Convention of the United States*, 16 YALE L.J. 65, 75–76 (1906).

179. *Id.* at 77.

in that no future court can misinterpret it,” plus an amendment to make federal judges popularly elected for fixed terms.<sup>180</sup>

A related concern lay among those who desired a strong government to face the challenges of a corporate industrial economy but wanted to make sure state power lay on proper legal footing. They, too, saw amendments as a way to ensure precise limits on the powers of government and to prevent the stretching of the rule of law. Many were concerned about the President in light of new powers exercised by strong executives, like William McKinley, Theodore Roosevelt, and Woodrow Wilson, over legislative matters such as labor relations, foreign policy, and war.<sup>181</sup> Contemporaries who viewed the President as an “elected king” included Rhode Island politician William B. Lawrence and New York lawyer Henry C. Lockwood, both of whom called for resituating executive power into a plural executive body modeled on Switzerland’s seven-member council and appointed for short terms by Congress.<sup>182</sup> New York lawyer Franklin Pierce, a Progressive who criticized President Roosevelt’s expansive use of powers, proposed a long slate of amendments in his 1908 *Federal Usurpation* to correct the constitutional imbalance and stop the text’s growth “by construction or usurpation.”<sup>183</sup> One of Pierce’s ideas was to assist Congress by streamlining the legislative process—the House of Representatives would be made “supreme in lawmaking” with the Senate allowed just a veto—and expanding the list of Congress’s regulatory powers. Pierce also suggested limiting the President’s term to seven years with no reelection.<sup>184</sup> These same ideas were espoused by William Howard Taft, a man widely criticized in his own time as a reactionary, yet who often found common cause with Progressives on policy. Taft himself detested the degrading practice of presidential campaigning, and he thought that limiting the President to a single term would give him “greater courage and independence in the discharge of his duties.”<sup>185</sup> He also believed that the constitutional Framers should have brought “the executive a little closer in touch with Congress” in drafting and debating legislation, especially budgets, though he feared that even such a sensible change would open the

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180. *Id.* at 78.

181. On the Progressive Era presidents’ drastic changes to the office, see generally ARNOLD, *supra* note 50.

182. *E.g.*, William B. Lawrence, *The Monarchical Principle in Our Constitution*, 131 N. AM. REV. 385 (Nov. 1880); *cf.* HENRY C. LOCKWOOD, *THE ABOLITION OF THE PRESIDENCY* 226 (1884) (noting that while the Swiss system would be a vast improvement over our then-present system, it was still inadequate because it lacked “the Cabinet feature of the British Constitution”).

183. PIERCE, *supra* note 134, at ix.

184. *Id.* at 397. Pierce’s list of proper domains for federal legislative regulation included: taxation, war, treaties, foreign and interstate commerce, postal service, bankruptcy, copyrights, patent rights, naturalization, and coinage.

185. WILLIAM HOWARD TAFT, *THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS* 4 (1916).

door to “radical changes in the Constitution subversive of the great benefits that it has secured to the American people.”<sup>186</sup> At the same time, as president, Taft did help steer a constitutional amendment through Congress in 1909. Taft, always attuned to economy and efficiency in government, was concerned that the Court’s 1895 *Pollock* decision was leaving the government cash-strapped. He felt that an income tax was good policy but believed that it had to come via a constitutional amendment because simply ignoring *Pollock* and reviving the income tax law would not “strengthen popular confidence in the stability of judicial construction of the Constitution. It is much wiser policy to accept the decision and remedy the defect by amendment in due and regular course.”<sup>187</sup>

Although progressively minded legalists shared the conservatives’ distrust of concentrated power and vague grants of political authority, they supported stronger government to meet new conditions—provided that power was exercised strictly in accordance with the rule of law. Constitutional change was, for them, a way to keep things within limits. Their credo may be best embodied by the modern maxim, “If we want things to stay as they are, things will have to change.”<sup>188</sup>

2. *The “Best Men”: Bringing the Constitution in Line with the Times.*—Less reverential in their attitude toward the law, and vastly less sentimental toward the Constitution, was a group that hailed mostly from the ranks of the elite and the academy. The true pragmatists of the period, they had a faith in progress and the ability of science to improve government and society. They published copiously in popular magazines like *McClure’s Magazine*, the *North American Review*, *Outlook*, *The Nation*, and *The New Republic*, and they also used new professional journals cropping up in the fields of economics, law, sociology, and political science to make their viewpoints known. Their commitment was, not to law’s integrity, but to law as a means to better ends. To that effect, they viewed the Constitution, not as a vital symbol of the nation, but as an unfinished draft.

An 1886 article in the *North American Review* captured well the spirit of inquiry and fervor: “Before the Civil War the Constitution was our national fetich. To doubt the wisdom of its founders was heresy.”<sup>189</sup> But the war had changed everything: “The North rose from its knees among the grave-stones, and it no longer tried to decipher their moss-grown records. We ceased to ask what the dead Fathers had said, and cared only to know what the living sons

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186. *Id.* at 4–5.

187. William Howard Taft, Message from the President of the United States, Referred to the Senate Committee on Finance (July 16, 1909), in 44 CONG. REC. 3344 (1909).

188. GIUSEPPE DI LAMPEDUSA, *THE LEOPARD* 31 (Archibald Colquhoun trans., 1960).

189. *Our “House of Lords.”*, 142 N. AM. REV. 454, 454 (1886).

should do.”<sup>190</sup> The Framers had feared democracy; a new generation realized that a large electorate was a defense against corruption. The Framers feared centralized tyranny; it had been the states, not the federal government, that had brought the nation to the brink of ruin. The Framers feared the radicalism of the “popular branch”; it was the Senate that now threatened to destroy federalism through its insidious combinations with wealthy corporations that eluded the law.<sup>191</sup>

In 1897, constitutional historian Herman Ames concluded that the difficulty of amendment meant an increasing inability to apply new advances in the “science of government” to American institutions.<sup>192</sup> The amateurishness of Congress was a main cause of the problem, argued editor E.L. Godkin in 1870:

What with ignorance, haste, want of training, and the distractions of an infinite variety of details and of multifarious conflicting interests, legislation is becoming in every legislative body in the world often rather a positive hindrance than a help to healthy progress, and a sapper rather than strengthener of public morals.<sup>193</sup>

What was needed was “reform in the legislative machinery,” some way to give “prompt, but also scientific expression to the popular will.”<sup>194</sup>

It was a new theory of the separation of powers. Congress should not legislate alone; the complexity of the modern world demanded expert advice to guide lawmaking.<sup>195</sup> From a hiding place for the President’s friends and cronies, the federal bureaucracy had to become a professionalized service recruiting the best young minds of its generation. Cooperation, not separation, was the order of the day. Ames, who had catalogued amendment proposals since the Founding, was impressed with the coherence, comprehensiveness, and daring of those coming out of the late nineteenth century. These proposals were ambitious and meliorist; they dared to reconsider the fundamentals of the Framers’ design. The Senate, grounded upon a fear of democracy, was “out of joint with our times” and should be filled by direct election.<sup>196</sup> The Electoral College was malfunctioning; it was time to “brush away rubbish, and bring the election of the President to the people.”<sup>197</sup> Congress, gridlocked and beholden to the private sector, was a

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190. *Id.* at 455.

191. *Id.*

192. AMES, *supra* note 123, at 303–04.

193. E.L. Godkin, *The Prospects of the Political Art*, 110 N. AM. REV. 398, 416–417 (1870).

194. *Id.* at 417.

195. See Gamaliel Bradford, *Congressional Reform*, 111 N. AM. REV. 330, 334 (1870) (arguing that the Executive Branch should have a direct role in shaping legislation because of the high level of technicality present in the issues before Congress).

196. *Our “House of Lords.”*, *supra* note 189, at 458, 465.

197. Oliver P. Morton, *The American Constitution*, 125 N. AM. REV. 68, 72 (1877).

weaking; why not replace it with a unicameral legislature subject to fewer procedural hurdles?<sup>198</sup> Abolishing the presidential veto was another way to make sure good laws saw the light of day.<sup>199</sup> Why not, following the British parliamentary system, partly fuse the Executive and Legislative Branches so that agency heads could lend their expertise to the lawmaking process?<sup>200</sup> Or why not, along those lines, give the President's Cabinet members the authority to propose legislation?<sup>201</sup> Why not, for that matter, adopt a pure parliamentary system in America?<sup>202</sup> Congress's powers should be extended, too, to cover marriage, taxation, education, wills, real estate, and debt collection.<sup>203</sup> The Vice President was a relic and should be replaced by a system of Cabinet officers that might provide the President with better advice.<sup>204</sup> Judicial review was regressive; allowing the people a "recall" of judicial decisions would allow better judgment to prevail.<sup>205</sup> Article V, too, was unnecessarily demanding; it should be amended to permit ratification of amendments by just half the states.<sup>206</sup>

Some historians call these reformers the "Best Men," a term conveying their high status as men of "breeding and intelligence, of taste and substance," as well as a certain smugness and consequent distrust of the "people," whose encroachment into politics they feared.<sup>207</sup>

Still, Progressive groups were far from hermetic, however, and many educated liberal reformers had strongly populist convictions. As a wave of

198. Charles O'Connor, Address by Charles O'Connor Delivered Before the New York Historical Society at the Academy of Music (May 8, 1877), in *THE MAKING OF MODERN LAW: LEGAL TREATISES, 1800-1926*, at 34 (2010).

199. ALBERT STICKNEY, *A TRUE REPUBLIC* 224 (1879) [hereinafter *STICKNEY, REPUBLIC*]; ALBERT STICKNEY, *DEMOCRATIC GOVERNMENT: A STUDY OF POLITICS 70-72* (1885) [hereinafter *STICKNEY, DEMOCRATIC*].

200. Isaac L. Rice, *Work for a Constitutional Convention*, 28 *CENTURY MAG.* 534, 540 (1884).

201. Goldwin Smith, *Is the Constitution Outworn?*, 166 *N. AM. REV.* 257, 262 (1898).

202. WILLIAM MACDONALD, *A NEW CONSTITUTION FOR A NEW AMERICA* 31 (1921). MacDonald proposed a cabinet government drawn from the legislature and headed by a popularly elected President serving as a de jure head of state. Representatives and senators would both serve four-year terms, and proportional representation in Congress would represent party, profession, and population. *Id.* at 62-68, 133.

203. C.T. Hopkins, *Thoughts Towards Revising the Federal Constitution*, 6 *OVERLAND MONTHLY*, July 1885, at 388, 388. Hopkins, a wealthy California businessman, also proposed restricting Senate membership to those making \$100,000 or more and to restrict the vote to natural-born citizens only. *Id.* at 389.

204. *STICKNEY, REPUBLIC*, *supra* note 199, at 229-30.

205. Henderson, *supra* note 176, at 78.

206. Walter K. Tuller, *A Convention to Amend the Constitution—Why Needed—How It May Be Obtained*, 193 *N. AM. REV.* 369, 385 (1911); see *infra* note 234 and accompanying text.

207. JOHN G. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE 7 (1968). Sproat includes in this group liberal reformers like Henry Adams, Carl Schurz, Lyman Trumbull, Samuel Tilden, Rutherford Hayes, Grover Cleveland, Theodore Roosevelt, a young Henry Cabot Lodge, Charles Eliot Norton, E.L. Godkin, Samuel Bowles, Wendell Garrison, and many others. *Id.* at 7-8.

state constitutions adopted tools of direct democracy in the late nineteenth century, some intellectuals celebrated the prospect of popular government breaking away from “the old classification of governmental functions into legislative, executive, and judicial” and towards a democracy that recognized the lawmaking power of “the electorate as an organic part of the government.”<sup>208</sup>

Many Progressives agreed that a new, purer form of democracy was in the making. For this, they turned to America’s “laboratories of democracy,” the states.

3. *The Popular Democrats: State Reformers, Radicals, and Popular Sovereignty.*—It is a curious fact that, despite America’s prevailing constitutional conservatism, for much of the nation’s history Americans have fixated on the Jeffersonian ideal of popular sovereignty.<sup>209</sup> Jefferson himself held a deep contempt for those who looked at constitutions “with sanctimonious reverence and deem[ed] them like the ark of the covenant, too sacred to be touched,” and he famously proposed a constitution for the Commonwealth of Virginia that would expire every nineteen years, automatically triggering a constitutional convention.<sup>210</sup> “[N]o society can make a perpetual constitution, or even a perpetual law,” Jefferson wrote to his friend James Madison in 1789.<sup>211</sup>

From August 5th to August 7th, 1912, Progressives of different stripes convened in Chicago to enunciate a declaration of principles under which to make a run for the presidency.<sup>212</sup> That Declaration began as follows:

We hold with Thomas Jefferson and Abraham Lincoln that the people are the masters of their Constitution, to fulfill its purposes and to safeguard it from those who, by perversion of its intent, would convert it into an instrument of injustice. In accordance with the needs of each

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208. FREDERICK A. CLEVELAND, ORGANIZED DEMOCRACY: AN INTRODUCTION TO THE STUDY OF AMERICAN POLITICS 273–74 (1913).

209. CHRISTIAN FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 3–4 (2008). Fritz argues that a purer Jeffersonianism was prevalent before the war. Many Americans believed that one generation could not bind another, even in matters of fundamental law. The real debate was whether the American people, acting collectively as sovereigns, could change their constitutional charters *at will* rather than follow the process of amendment and ratification. On a strictly *democratic* view, a majority of the people could not be bound even by a fundamental law of their own making. A *procedural* view insisted, on the other hand, that Article V governed all lawful attempts at change. As is clear, the procedural view prevailed.

210. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in AMES, *supra* note 123, at 303 n.3; Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), <https://jeffersonpapers.princeton.edu/selected-documents/thomas-jefferson-james-madison> [<https://perma.cc/2M29-PYR7>].

211. Letter from Thomas Jefferson to James Madison, *supra* note 210.

212. NATIONAL PARTY OFFICERS AND PLATFORMS: THE PROGRESSIVE, *supra* note 22, at 568.

generation the people must use their sovereign powers to establish and maintain equal opportunity and industrial justice, to secure which this Government was founded and without which no republic can endure.<sup>213</sup>

Strict constructionism, distrust of the judiciary, the invocation of the “needs of every generation,” the call for regular constitutional change to maintain citizen equality—it was vintage Jefferson, minus the part about “industrial justice.”<sup>214</sup> From today’s perspective, it seems terribly radical, terribly old-fashioned, or possibly both. Yet during the Progressive Era, when constitutional criticism was pervasive and faith in a “pure” American democracy was at a peak, Jefferson’s constitutionalism seemed a desirable—and achievable—ideal. One additional factor helped open the door for its resurgence: foreign borrowing.

The idea of the popular referendum had surfaced among the several states during the antimonopoly campaigns of the 1870s and 1880s as a way for the people to snatch back power from corporations and courts. But it was not until 1885, when A.V. Dicey published an article in the *Nation* advocating the Swiss referendum as a golden mean between American constitutional rigidity and British flexibility, that direct democracy became a fixation of reformers.<sup>215</sup> Dicey’s article inspired a wave of American students who traveled to Europe in search of constitutional insights. Especially important were William McCracken, who published a series of articles in the 1890s extolling the Swiss model, and James W. Sullivan, whose 1892 book, *Direct Legislation by the Citizenship Through the Initiative and Referendum*, sold a “staggering” fifteen thousand copies.<sup>216</sup> One of these was picked up by a bedridden William Simon U’Ren, a blacksmith-turned-miner, newspaper editor, lawyer, and Republican Party worker who was convalescing from a severe asthma attack. After reading Sullivan’s book, the former blacksmith decided to make it his life’s work to spread the “tools” of democracy—the initiative, recall, and referendum—in his home state of Oregon and elsewhere.<sup>217</sup>

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213. *Id.*

214. BAILEY, *supra* note 36, at 2, 11 (contrasting Jefferson’s constitutional views with those of Hamilton and Madison).

215. A.V. Dicey, *The United States and the Swiss Confederation*, NATION (London), Oct. 8, 1885, at 297. For a discussion of anti-monopolist sentiment and the adoption of Swiss-style democratic institutions in this period, see JEREMY D. BAILEY, THE IDEA OF PRESIDENTIAL REPRESENTATION 85 (Wilson Carey McWilliams & Lance Banning eds., 2019); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 44–46, 48 (1989); and THOMAS GOEBEL, A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890–1940, at 23–24, 30 (2002).

216. BAILEY, *supra* note 36, at 85.

217. In a later interview about his encounter with Sullivan’s book, U’Ren recalled lamenting the dearth of tools available for governing compared with the plethora available for blacksmiths and other trades: “[I]n government, *the common trade of all men* and the basis of all social life, men



In 1914, the economist Frederick A. Cleveland joyously proclaimed that “[a] wave of organized democracy” was sweeping America “based on a broader intelligence and a more enlightened view of civic responsibility than ha[d] ever before obtained.”<sup>218</sup> Not *all* the experimentations in constitution writing were so lofty: in much of the South, Reconstruction was quietly being dismantled by turn-of-the-century constitutional assemblies incorporating Jim Crow into their state charters. Many did so explicitly: in South Carolina, for instance, delegates announced the establishment of “white supremacy” as their main purpose in coming together to write.<sup>219</sup> Similar motives led many other states to embrace constitutional amendments mandating literacy tests or property thresholds for voting: ten states did so between 1892 and 1914, including Connecticut, Maine, California, and New Hampshire.

Yet undeniably the states pioneered a form of democratic constitutionalism all their own.<sup>220</sup> The Founders, conscious of the Articles of Confederation’s failure, had been anxious to establish a blueprint for government that would last well into the future. The authors of progressive state constitutions had a different view. They felt constitution writing for the twentieth century should apply “institutional knowledge and experience that was unavailable to the eighteenth-century founders,” and *their* highest ideals of constitutionalism were experimentation, adaptation, and continuous learning.<sup>221</sup> As a delegate to the 1906 Oklahoma founding convention explained:

Time . . . impairs constitutions as it does all things and if they be not amended and repaired to meet changed conditions, new questions, and the ever-altering situations of an enterprising and progressive people, there is an end to good government. . . . This and every other

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worked still with old tools, with old laws, with constitutions and charters which hindered more than they helped. . . . Why had we no tool makers for democracy?” JOHNSTON, *supra* note 33 (quoting William Simon U’Ren).

218. CLEVELAND, *supra* note 208, at 438.

219. MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908, at 100, 104 (2001). For a discussion on Southern progressivism in general, see DEWEY W. GRANTHAM, SOUTHERN PROGRESSIVISM: THE RECONCILIATION OF PROGRESS AND TRADITION (1983).

220. *See generally* WALTER FAIRLEIGH DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS (1910) (examining the proceedings of early constitutional conventions and the procedures for framing state constitutions and submitting them to the people for approval). For a general treatment of alternate traditions of constitutionalism within the fifty states, see DINAN, *supra* note 52; John Dinan, *State Constitutionalism*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 863 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015); John Dinan, “The Earth Belongs Always to the Living Generation”: *The Development of State Constitutional Amendment and Revision Procedures*, 62 REV. POL. 645 (2000); John Dinan, *Framing a “People’s Government”*: *State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933 (1999); and Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641 (2014).

221. BRIDGES, *supra* note 44, at 2.

generation of a free people has its own peculiar problems to face in Constitution making. . . . We would be unworthy sons of worthy sires if we fail to meet and courageously solve the problems now pressing upon our people for solution.<sup>222</sup>

Between 1867, when Maryland rewrote its constitution to expunge the vestiges of slavery, and 1912, when Arizona drafted a constitution so radical that President Taft vetoed the first draft, a total of twenty-five state constitutions were substantially revised or written from scratch.<sup>223</sup> Some established new institutions like mine inspectors, departments of labor and agriculture, and regulatory commissions.<sup>224</sup> Many featured long bills of new social and economic rights and sweeping powers for states to enforce them.<sup>225</sup> A growing percentage were adopted by simple majority vote, and many were changed with frequency.<sup>226</sup> The average lifespan of these constitutions was around twenty years and reformers tended to make alteration easier as the decades passed by measures like a bicameral legislative authorization followed by a majority of the popular vote, for instance.<sup>227</sup>

These texts also favored a dizzying array of devices to make government more responsive to the popular will. By 1896, presidential candidate William Jennings Bryan had pushed the Democrats into endorsing the initiative and the recall, and in 1898, South Dakota became the first state to enact them into law. Oregon followed shortly after, in 1899.<sup>228</sup> By 1914, some fifteen state constitutions had adopted the initiative, the referendum, or the recall. Other tools included direct election of representatives and senators, primary elections, proportional representation in the legislature, public hearings and open legislative sessions, greater oversight of administrative agencies, judicial election, and the recall of officers and judges, as well as of particular laws or judicial decisions.<sup>229</sup>

Popular democracy gradually trickled up to the national political arena, as state reformers like Robert La Follette, Jonathan Bourne, and Albert Beveridge seized seats in Congress and began to popularize innovations from back home like the “Oregon System.”<sup>230</sup> In 1911, these reformers formed the breakaway National Progressive Republican League (NPRL) with an agenda

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222. *Id.* at 3.

223. See CLEVELAND, *supra* note 208, at 277–79 (compiling constitutional amendments).

224. BRIDGES, *supra* note 44, at 1.

225. *Id.*

226. CLEVELAND, *supra* note 208, at 277–79.

227. *Id.* at 288, 362.

228. STEVEN L. PIOTT, GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA 1–15, 16, 39 (2003); see also CRONIN, *supra* note 215, at 48–50 (discussing the inspiration and push for direct democracy in Oregon); GOEBEL, *supra* note 215, at 32–45 (discussing development of American enthusiasm for direct democracy in the 1890s).

229. Cleveland, *supra* note 208, at 277–79, 362.

230. Murphy, *supra* note 45, at 520–22.

modeled on Oregon's popular democracy. Oregonians William S. U'Ren and Senator Jonathan Bourne had helped draft the group's charter, which called for direct national primaries, direct senatorial elections, and the amendment of all state constitutions to give voters the initiative, referendum, and the recall.<sup>231</sup> A year later, when the Progressive Party was formed out of a coalition of disgruntled Republican and Democratic politicians, as well as reformers from urban, religious, feminist, and academic circles, it was on a platform scripted off the NPRL charter. The Progressive Party platform advocated "such alterations in the fundamental law of the several States and of the United States as shall insure the representative character of the Government."<sup>232</sup> This included the national initiative, referendum, and recall; primaries for legislative and presidential elections; the direct election of senators; and the extension of Congress's power over labor, economics, and public health "[u]p to the limit of the Constitution, and later by amendment of the Constitution, i[f] found necessary."<sup>233</sup> The Progressives also called for revision of Article V in orthodox Jeffersonian terms: "[B]elieving that a free people should have the power from time to time to amend their fundamental law so as to adapt it progressively to the changing needs of the people, [the Progressive Party] pledges itself to provide a more easy and expeditious method of amending the Federal Constitution."<sup>234</sup>

But if the constitutionalism of Jefferson carried the states, it was Madison's constitution that would win out at the federal level. Since the late 1800s, many have described the Framers' creation as "a machine that would go of itself," a blueprint for government that, like the watch set in motion by its omnipotent creator, would run long into the future essentially unchanged.<sup>235</sup> And, save for a few minor fixes during the twentieth century, essentially unchanged is what the Constitution has been, a fact often invoked

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231. *Id.* at 515–16, 518–19.

232. *1912 Progressive Party Platform*, AM. PRESIDENCY PROJECT (June 25, 1912), <https://www.presidency.ucsb.edu/documents/progressive-party-platform-1912> [<https://perma.cc/H7UD-PYMH>].

233. *Id.*

234. *Id.* These ideas also found a voice on the radical left, among writers like Chicago journalist and activist Algie Martin Simons and Crystal and Max Eastman, as well as politicians Eugene Debs, Victor Berger, and Allan Benson. A rising Socialist Party seized on discontent with what it called "wage slavery" to fashion a direct indictment of the Constitution and a program calling for amending its most counter-majoritarian features to bring about a cooperative popular democracy. Their commitment to constitutional reform was sustained from their first national campaign in 1900 through the 1930s. Among the Socialists' most sought-after reforms were the abolition of the "obstructive and useless" Senate, as Representative Victor Berger put it, national proportional representation in the House, abolishing the presidential veto and the Electoral College, abolishing judicial review and granting the People power to overturn laws, the election of federal judges, women's suffrage, congressional representation for the District of Columbia, and revising the Article V threshold down to a majority of voters in a majority of the States. They also advocated a new drafting convention. Rana, *supra* note 22, at 51–52.

235. BRIDGES, *supra* note 44, at 2.

to prove the Framers' genius.<sup>236</sup> In just a few short years, Americans would lose faith in the tenets of progressive formalism's three varieties—faith in scientific truth to better mankind's behavior, faith in the clarity of the word, and faith in the People to govern without mediation. We turn to that story here.

### III. The Eclipse of Progressive Formalism

On the night of June 15, 1912, an incensed Theodore Roosevelt hopped off a train and headed to Chicago's Orchestra Hall to address a frenzied crowd of 5,000. It was the night before the 1912 Republican National Convention, and rumors were going around that Republican bigwigs were planning to steal the nomination from Roosevelt. Since the days of Jacksonian democracy, presidential selection had been in the hands of string-pulling party bosses, but recently, states had begun experimenting with primary elections in an effort to give control to popular majorities. The year 1912 was the first in which these played any significant role: Roosevelt, who had all but swept the early state primaries between April and June 1912, came into the Republican National Convention the clear people's choice. Knowing that the party bigwigs were against him, he made the scandalous and unprecedented decision to attend the convention in person, in an attempt to sway the decision with the force of his charisma. The night before the proceedings opened, Roosevelt warned his supporters to be vigilant over the "great moral issue" of counting delegates. He concluded in memorable fashion: "We stand at Armageddon, and we battle for the Lord!"<sup>237</sup>

The 1912 presidential campaign *was*, in some ways, a battle for the nation's soul. Not just a contest over the proper size of government, it was one of the few elections in American history to put a constitutional theory at stake.<sup>238</sup> The four-way competition pitted the Republican Party incumbent, President Taft, against the Democrats' Woodrow Wilson; Teddy Roosevelt, who had bolted the Republican Party to lead the Progressive ticket; and the charismatic Socialist reformer, Eugene Debs. Progressivism was on the

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236. *See id.* (stating that the Founders succeeded by creating a democratic republic that is still our frame of government). For more discussion of the machine metaphor and an excellent cultural history of the Constitution, see MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 17–20 (1986).

237. *See* JAMES CHACE, *1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY* 116–18 (2004) (chronicling Theodore Roosevelt's campaign at the 1912 Republican National Convention).

238. On the epochal nature of the 1912 election, see generally *id.* at 220; JOHN MILTON COOPER JR., *PIVOTAL DECADES: THE UNITED STATES, 1900–1920* (1990) [hereinafter COOPER, *PIVOTAL DECADES*]; JOHN MILTON COOPER JR., *THE WARRIOR AND THE PRIEST: WOODROW WILSON AND THEODORE ROOSEVELT* (1983) [hereinafter COOPER, *THE WARRIOR*]; and Sidney M. Milkis & Daniel J. Tichenor, "*Direct Democracy*" and *Social Justice: The Progressive Party Campaign of 1912*, 8 *STUD. AM. POL. DEV.* 282 (1994).

agenda, with three out of four candidates supporting broad progressive principles, and formalism too, with three of four party platforms calling for one or more constitutional amendments. For progressive formalism, 1912 was both a high-water mark and an inflection point. Roosevelt, as a newly recast Progressive, had come to believe that progressive democracy required major structural alterations. Wilson, a rising star in the Democratic Party, embodied reformism with a pragmatic attitude toward the Constitution. Wilson's victory over Roosevelt was a triumph for the political goals of the progressive movement.<sup>239</sup> But for progressive formalism, it was the beginning of the end.

The man who wrote that, as President, he had vowed "to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin," is not often, or easily, associated with legal formalism.<sup>240</sup> In a now-famous address of December 12, 1906, Roosevelt's Secretary of State, Elihu Root, promised supporters that if the public wanted something done, "sooner or later" certain "constructions of the Constitution" would be "found" to permit the government to do it.<sup>241</sup> Theodore Roosevelt's theory of the presidency as the "steward" of the nation contemplated an "undefined residuum of [executive] power" beyond the strict provisions of the law, as his erstwhile friend Taft later wrote, an implication many found troubling.<sup>242</sup>

Roosevelt was frequently accused of being a fair-weather Progressive, but after he left office in 1908, his political radicalism had only sharpened, and with it, his belief that the Constitution was fundamentally defective.<sup>243</sup> On February 21, in a speech entitled "A Charter of Democracy," Roosevelt set forth a progressive agenda calling for a popular recall aimed at both judges and judicial decisions. The purpose "of every American constitution,"

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239. See *supra* note 50 and accompanying text.

240. THEODORE ROOSEVELT, *THEODORE ROOSEVELT: AN AUTOBIOGRAPHY* 389 (1913).

241. PIERCE, *supra* note 134, at 88.

242. *Id.*; WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 140, 144 (1925).

243. Whether Roosevelt's partnership with the Progressive Party was genuine or simply one of mutual self-interest has been a topic of extensive debate. Those who felt Roosevelt's commitment to key tenets of Progressivism was genuine include JOHN MORTON BLUM, *THE REPUBLICAN ROOSEVELT*, at ix, 7, 86, 143 (2d ed. 1977); COOPER, *THE WARRIOR*, *supra* note 238, at 399–400, 400 n.2; and Harold L. Ickes, *Who Killed the Progressive Party?*, 46 *AM. HIST. REV.* 306, 311–13 (1941). Those who take the opposing view include Robert La Follette himself, who fought a bitter battle with Roosevelt for the 1912 Progressive Party nomination. See ROBERT M. LA FOLLETTE, *LA FOLLETTE'S AUTOBIOGRAPHY: A PERSONAL NARRATIVE OF POLITICAL EXPERIENCES* 672–77 (5th ed. 1913) (criticizing Roosevelt for his lack of commitment to the progressive cause); Lorraine M. Jung, *A Comparison of Theodore Roosevelt and Robert La Follette as Representative of the Principles of the Progressive Republican Party of 1912* 141–42 (June 1947) (unpublished M.A. thesis, Loyola University), <https://core.ac.uk/download/pdf/48598342.pdf> [<https://perma.cc/SQX4-PFBY>] (describing how La Follette propelled the progressive movement forward and denounced Roosevelt for failing to uphold progressive ideals).

insisted Roosevelt, “must be to obtain justice between man and man by means of genuine popular self-government.”<sup>244</sup> If the Constitution could be used to block efforts to remedy injustice, “it is proof positive either that the Constitution needs immediate amendment or else that it is being wrongfully and improperly construed.”<sup>245</sup> At the Progressive Party Convention in August 1912, Roosevelt proclaimed: “The people themselves must be the ultimate makers of their own constitution . . . .”<sup>246</sup> Yet another stump speech saw Roosevelt propose the idea of a general recall “applied to *everybody*, including the President.” The remark prompted a horrified *New York Times* to report, “Roosevelt tonight exceeded the speed limit in radicalism.”<sup>247</sup>

For his part, as a young man Woodrow Wilson had also been a staunch critic of the Constitution. On July 4, 1876, as a twenty-year-old student at the College of New Jersey (now Princeton University), Wilson wrote in his diary, “How much happier [America] would be if she had England’s form of government instead of this miserable delusion of a republic.”<sup>248</sup> In an unpublished 1882 essay, “Government by Debate,” Wilson proposed two constitutional reforms to move the nation closer to a parliamentary form of government. First, the President should be made a symbolic head of state, serving an indefinite term to last on “good behavior,” though he would conserve a legislative veto and the power to appoint a Cabinet, which would sit on the floor of the House, initiating legislation and leading debate on bills, subject to Congress’s power to dissolve it if policy disagreement arose.<sup>249</sup> Second, House members’ terms should be extended from two to six or eight years, but the President would have the power to dissolve the legislature early and call for new elections in case of gridlock.<sup>250</sup> In just a few years, Wilson would come to view these positions, so earnestly held by his younger self, as childish. A man on a “mission of statesmanship” had to offer realistic solutions, not utopianism. Wilson’s thinking was surely swayed, too, by Harper Press’s refusal to publish his 1882 piece because its constitutional proposals were too radical. In fact, when a review of his 1885 book, *Congressional Government*, came out lavishing praise on Wilson for being a

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244. WILLIAM R. NESTER, *THEODORE ROOSEVELT AND THE ART OF AMERICAN POWER: AN AMERICAN FOR ALL TIME* 256 (2019).

245. *Id.* On Roosevelt’s constitutional thought, see *id.* at 8–9.

246. SIDNEY MILKIS, *THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* 217 (2009).

247. *Id.* at 218–19.

248. DANIEL D. STID, *THE PRESIDENT AS STATESMAN: WOODROW WILSON AND THE CONSTITUTION* 10 (1998).

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

250. STID, *supra* note 248, at 21.

hardline constitutional critic in light of his earlier (unpublished) work, Wilson was furious that his past views had been aired.<sup>251</sup>

Wilson the discontented youth was a far cry from the man who, in his 1908 *Constitutional Government in the United States*, praised the Constitution as a “thoroughly workable model” and its Framers for their “quick practical sagacity in respect of the actual structure of government.”<sup>252</sup> Vestiges of the old Wilson remained: it was true that the “constitutional structure of the government [had] hampered and limited” the President’s action in important roles.<sup>253</sup> But it did not entirely thwart it. Somehow, happily, “the definitions and prescriptions of our constitutional law, though conceived in the Newtonian spirit and upon the Newtonian principle,” were “sufficiently broad and elastic to allow for the play of life and circumstance.”<sup>254</sup> In Wilson’s hands, the historicism and organicism of Oliver Wendell Holmes became a way to defang even the sharpest of constitutional critiques. Progressive democracy could now be reconciled with constitutional fidelity: if the Framers had not *foreseen* the development of an activist federal government, they had knowingly built an endlessly adaptable system—an evolving organism (following the metaphors of the day), not a machine.<sup>255</sup>

If the Darwinian organism represented Wilson’s idea of the Constitution, the metaphor of the machine better describes what he saw as the President’s ideal constitutional role: the engine of the system.<sup>256</sup> As a theorist, Wilson proved instrumental in constructing—and, as a politician, in bringing about—a *presidential* democracy built around the Chief Executive. No other national office could snap the Constitution out of its self-induced stupor: political parties were too parochial; courts too backward-looking; and Congress too slow, divided, and beholden to special interests. On the Wilsonian theory, “[o]nly the presidency had the national vision to articulate the public’s evolving interests, the political incentive to represent those interests in action, and the wherewithal to act upon them with dispatch.”<sup>257</sup> His duty was to keep national opinion mobilized behind great public purposes and to overcome all of the obstacles in the path to their achievement: “If he

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251. *Id.* at 21–22.

252. WILSON, *supra* note 25, at 57.

253. *Id.* at 60.

254. *Id.* at 57.

255. On the imagistic metaphors used in diverse periods to refer to the Constitution, see KAMMEN, *supra* note 236, at 17–19.

256. See RICHARD J. ELLIS, *THE DEVELOPMENT OF THE AMERICAN PRESIDENCY* 108 (3d ed. 2018) (explaining that Wilson’s viewpoint on the presidency changed after Roosevelt’s term such that he “now saw the rhetorical presidency as the engine that could carry the nation safely through the challenges of the twentieth century”).

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

rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for unified action, and it craves a single leader.”<sup>258</sup> For Wilson and other Progressives like Croly and Beard, the modern president was an adaptation that rescued a “defective apparatus” by allowing popular energy to course through it, “breaking through the constitutional form.”<sup>259</sup>

By the time Woodrow Wilson and Teddy Roosevelt confronted each other in 1912, the two had switched places in their constitutional thought. Wilson traveled from critic to apologist thanks to the magic formula of realism. Roosevelt, by contrast, evolved from a loose constructionist to a progressive formalist on the strength of his growing commitment to “pure democracy,” which he now viewed as impossible under the existing Constitution.<sup>260</sup> These competing views of the Constitution came to a head in the 1912 campaign. These were not second-order issues but front and center in each campaign. Progressives like Herbert Croly—who consulted for Roosevelt on the party agenda, even coining the phrase “New Nationalism”—devised a campaign that was formalist through and through, with pledges to revise senatorial elections; extend Congress’s regulatory power; establish the initiative, referendum, and recall at the national level; and amend Article V.<sup>261</sup> The Socialists called for a similar slate of changes. The Democrats had far fewer ambitious proposals, though their platform did reflect a prevailing mood of tyrannophobia in calling for an amendment to limit the President to a single term.<sup>262</sup> And although Wilson believed almost as ardently as Roosevelt in popular democracy oriented around strong executive leadership, the Democrats deliberately stopped short of calling for referenda on court decisions and the recall of all public officials.<sup>263</sup> Ironically,

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258. WILSON, *supra* note 25, at 68.

259. HENRY JONES FORD, *THE RISE AND GROWTH OF AMERICAN POLITICS: A SKETCH OF CONSTITUTIONAL DEVELOPMENT* 292–93 (1967). For examples of the great amount of scholarship that has been written on the changes the Progressives left on the face of the office, see generally ARNOLD, *supra* note 50; JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 170–212 (1979); MILKIS, *supra* note 246; and TULIS, *supra* note 50.

260. See MILKIS, *supra* note 246, at 217 (discussing Roosevelt’s proposals to amend the Constitution with the hopes of “strengthening the ties between constitutional forms and public opinion”). Somewhere in the evolving trajectories of Teddy Roosevelt’s and Woodrow Wilson’s thoughts on the Constitution is a lesson about political power and opportunism, given the fact that neither expressed particular dissatisfaction with the U.S. Constitution while in office, however concerned they were with it as civilians.

261. *1912 Progressive Party Platform*, *supra* note 232.

262. See *1912 Democratic Party Platform*, *supra* note 22 (calling for an amendment to the Constitution that would limit the presidency to one term).

263. See MILKIS, *supra* note 246, at 186–87 (highlighting the differences between Roosevelt, who hoped “to make the election a mass constitutional convention” and Wilson, who “offered a more moderate version of reform”).



it was probably Roosevelt's own example as President that convinced Wilson to turn away from forms. What, after all, was T.R. but living proof that, through the power of the "bully pulpit," the President could bridge the Constitution's mechanical separations to lead party and nation, and become "as big a man as he can"?<sup>264</sup>

Under the Wilson presidency, formalism became the road not taken. To be sure, Wilson presided over the greatest period of constitution-revising in American history after the Bill of Rights. But these victories had little to do with Wilson or his agenda. The Income Tax Amendment, approved by Congress in 1909, had been steered through Congress by Taft and heartland Progressives like Republican Senator Norris Brown of Nebraska. The campaign for direct senatorial election long predated Wilson's presidency, and the Seventeenth Amendment itself was mostly the work of Republican reformers in Congress like Senators La Follette, Joseph Bristow (R-KS), and William Borah (R-ID) and Representative George Norris (R-NE). Prohibition split the Democrats, and Wilson personally never came out in favor of the proposal.<sup>265</sup> As for women's suffrage, Wilson had never endorsed it before World War I, leading many to suspect that he reluctantly took up the cause to bolster the appeal of his scheme for a League of Nations.<sup>266</sup> Besides, as transformative as these amendments were, they did not reach the deep structural problems reformers had identified and decried decades before: divided government, deadlock, judicial supremacy, or the separation of legislative and administrative functions. Nor, obviously, did they deal with the problem of "usurpation," or how to square twentieth-century structures and powers with an eighteenth-century Constitution.

By 1920, World War I and Progressivism were over, and across American politics, a palpable conservatism and disillusionment were settling in. The Republican candidate for President, Warren G. Harding, ran a sober campaign promising the nation "a return to normalcy."<sup>267</sup> En route to the Republican nomination, Harding defeated Senator Hiram Johnson of California, Theodore Roosevelt's running mate in 1912 and a reminder of the Republican Party's fading associations with Progressivism. Johnson had himself been courted by the Progressive Party to be its flagbearer after the

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264. See Andrea S. Katz, *The Progressive Presidency and the Shaping of the Modern Executive* (Sept. 1–4, 2011) (unpublished paper presented at the American Political Science Association Conference), <https://ssrn.com/abstract=1900936> (explaining that in today's political setting, the Progressive Party's vision of an empowered executive has come to fruition, but without the political checks that the group once desired).

265. In fact, Wilson vetoed the Volstead Act giving Congress enforcement power over alcohol production, but it passed over his veto in 1919. KYVIG, *supra* note 21, at 225.

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

267. Warren G. Harding, *Readjustment Speech* (June 29, 1920).

death of T.R. in 1919, but he declined, choosing to seek the presidential nomination on the Republican ticket. In 1924, the indefatigable “Fighting Bob” La Follette dusted off the Progressive Party for one more presidential run in 1924, but by this time, the seventy-year-old seemed like an old knight tilting at windmills.<sup>268</sup>

Herbert Croly’s *The New Republic* had arrived on the scene in 1914, a highbrow voice for progressive ideas that became a bellwether of broader currents in the nation’s intellectual life and that turned its co-founders—Croly, Walter Weyl, and Walter Lippmann—into stars. Croly and the editorial pages of *The New Republic* had initially been cool towards Wilson, unsure whether Wilson’s progressivism was real or pretended, but Wilson’s active leadership and first-term legislative victories warmed the journal to him. By 1919, however, the unity of the Progressive front, such as it had been, was irreparably damaged. The Great War split isolationists like La Follette and William Jennings Bryan from interventionists (some said “warmongers”) like President Wilson and former President Roosevelt. Progressivism’s associations with dubious social experiments like eugenics and prohibition and the Wilson Administration’s zealous prosecution of radicals under the Sedition Act of 1918 soured many on social meliorism, and provoked a reorientation of attitudes away from big government in particular. This was particularly true for legal Progressives like Felix Frankfurter and Louis Brandeis whose thoughts on free speech were strongly shaped by the war, eventually coming to embrace broader civil protections against government than the earlier generation.<sup>269</sup> Wilson’s failed League of Nations campaign was the final straw for many onetime supporters. Under the spell of his illusions, Lippmann wrote, President Wilson “had lost his grip on America.”<sup>270</sup> Frankfurter, in a letter to Lippmann, was even more cutting:

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268. SNYDER, *supra* note 54, at 370–83 (discussing how the 1924 La Follette campaign divided erstwhile Progressives). One last gasp of progressive formalism was the proposed Twentieth Amendment, a response to the Supreme Court’s *Bailey v. Drexel Furniture* decision in 1922 invalidating statutes banning or penalizing child labor. Two days after the judgment, Representative Roy Fitzgerald (R-OH) introduced a resolution calling for an amendment that would give Congress the ability to limit or prohibit work by children under eighteen. The amendment passed both Houses by June 1924. After that, however, opponents mobilized against it, and after twenty-eight states had signed it, the campaign fizzled out in the late 1920s, and the amendment was never ratified. Tellingly, among the apparent reasons for the ratification movement’s losing steam was “lingering resentment over the success of prohibition and the extension of suffrage to women.” Novkov, *supra* note 23, at 374, 395–96.

269. As Snyder recounts, the “Red Scare” of anti-Communist paranoia touched Brandeis and Frankfurter personally when it spread to Harvard Law School, jeopardizing the careers of Frankfurter and Dean Roscoe Pound. SNYDER, *supra* note 54, at 116, 276, 281–86, 298–99, 459–60. For more on Brandeis and Frankfurter’s views on free speech, see generally Elizabeth Todd Byron, *A Progressive Mind: Louis D. Brandeis and the Origins of Free Speech*, 33 TOURO L. REV. 195 (2017) and Joseph L. Rauh Jr., *Felix Frankfurter: Civil Libertarian*, 11 HARV. C.R.-C.L. L. REV. 496 (1976).

270. SNYDER, *supra* note 54, at 262.

Wilson and his advisors “were the naïvest children in the world.”<sup>271</sup> The Progressive coalition was fraying and losing its faith in democratic ideals.

Walter Lippman’s own intellectual trajectory was dramatic, but by no means unrepresentative of a larger turn of intellectuals away from Progressivism.<sup>272</sup> A younger Lippmann had galvanized the country with his 1914 *Drift and Mastery*, urging the nation to abandon its policy of aimless “drift,” hitch its political fortunes to the wisdom of scientific progress, and become master of its own destiny.<sup>273</sup> Yet disappointments with public life—Wilson’s failed barnstorming tour of America to sell the nation on the League of Nations, the Sacco-Vanzetti case, among others—helped convince Lippmann of the fickleness of the public and ultimately, of the futility of democracy. By the time of his 1922 *Public Opinion* and his 1928 *Phantom Public*, whatever democratic spirit Lippmann had had in his youth had been stamped out, leaving behind only a cynical relativism and technocratic elitism.

Brandeis and Frankfurter held onto their progressive commitments, but they too came to see the emphasis on forms as naïve.<sup>274</sup> For all his democratic commitments, Brandeis never lost his faith in courts, his long and distinguished career a testament to his attempts to reconcile Supreme Court power and judicial review with legislative supremacy and a progressive agenda.<sup>275</sup> Frankfurter remained a solid Progressive in his commitments, but he too turned away from reformist projects. For instance, although Frankfurter personally believed that the Due Process Clause should be written out of the Constitution, he believed that the slim chances of such an amendment made it a futile cause.<sup>276</sup> Frankfurter remained a devoted supporter of La Follette’s campaign of 1924, notwithstanding its radical attacks on the Court and its solemn amendment proposals (including one to

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271. *Id.* at 261.

272. Link, *supra* note 15, at 841, 844. Here, Link provides two reasons for Progressivism’s decline after 1918. First is the flight of the middle class. *Id.* Second is the desertion from its ranks of a good part of the intellectual leadership of the country. “Indeed, more than simple desertion . . . ; it was often a matter of a cynical repudiation of the ideals from which Progressivism derived its strength,” ideals such as the very cause of democracy. *Id.*

273. See LIPPMAN, *supra* note 43, at 147–48.

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

275. See UROFSKY, *supra* note 1, at 431–32 (noting that although Brandeis was sympathetic to popular dissatisfaction with the law failing to keep pace with social change, he also claimed that courts were becoming more sensitive to the facts of modern life); EDWARD PURCELL JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 1–2 (2000) (arguing that Brandeis’s constitutional theory was shaped by the tension between the Supreme Court’s expansion of federal judicial power to review government regulatory efforts and the progressive view that significant social reform could only occur if legislative power were expanded and judicial power curtailed).

276. SNYDER, *supra* note 54, at 345–46.

stop courts from voiding laws). Frankfurter still admired La Follette's disinterestedness and egalitarianism, but increasingly, his thought was headed in another direction: away from populist plans to rewrite the Constitution and towards a jurisprudence that could reconcile judicial review with progressive societal ends.<sup>277</sup>

For Croly, meanwhile, the decade after 1919 can be described as years of despair.<sup>278</sup> Croly and *The New Republic's* editors felt betrayed at Wilson's capitulation to a Treaty of Versailles that virtually guaranteed "a Europe of wars and revolution and agony."<sup>279</sup> They confessed: "We were wrong. We hoped and lost."<sup>280</sup> Croly lost not only illusions, but many of his best friends too. Some perished in the influenza epidemic of 1919; Walter Weyl died of throat cancer; others, including Learned Hand and Walter Lippmann, grew estranged from Croly over growing philosophical differences.<sup>281</sup> Croly remained a contributor to *The New Republic* until his death in 1930, but in spirit, the magazine was never the same. Croly had always been something of a slippery Progressive: his visions were grand, but elusive. Like the realists, Croly believed that public opinion could be vindicated through progressive judicial philosophies, but he also seemed to believe that the channels of government needed to be opened in more literal ways too.<sup>282</sup> He vaguely gestured at the initiative, abolishment of the distinction between domestic and interstate commerce, a reorganization of the separation of powers, and amendment of Article V, but these ideas were scarcely developed in his books.<sup>283</sup> Croly famously claimed that his thought combined the hard-edged realism of Alexander Hamilton with the democratic spirit of Thomas Jefferson, and compared to the "utopian" La Follette Republicans,

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277. *See id.* at 349 ("[Frankfurter] continued to believe that state laws, not pie-in-the-sky constitutional amendments, were the best way to protect the rights of women and children workers."); *cf.* Snyder, *supra* note 18, at 1, 350–51 (describing Frankfurter as a popular constitutionalist in his faith in enlightened democratic majorities, and "broaden[ing] the definition of popular constitutionalism beyond political and social movements and elected officials to include the Supreme Court Justices themselves").

278. DAVID W. LEVY, HERBERT CROLY OF *THE NEW REPUBLIC*: THE LIFE AND THOUGHT OF AN AMERICAN PROGRESSIVE 266 (1985).

279. *Id.*

280. *Id.*

281. *Id.* at 266–68.

282. *See id.* at 134 (maintaining that Croly wanted to "divert the course of national policy into more fruitful channels").

283. *See id.* at 131 (discussing that Croly felt compelled to write about and offer opinions on all of the most controversial issues of the day, including the initiative); *id.* at 113 ("[T]he states were simply unable to cope with the complexities of interstate commerce."); *id.* at 115 ("[T]he key then to Herbert Croly's political reorganization was a central government strong enough to achieve the Promise."); *id.* at 235 ("The New Republic insisted . . . that the Constitution be rendered simpler to amend.").

Croly has gone down as a clear-eyed realist.<sup>284</sup> Yet in reality, he was always better at envisioning ways to empower the State than at devising instruments for holding it accountable to the people.<sup>285</sup> Stripped of the tools to channel the popular will, progressive democracy became as empty a formula as the social contract in J. Allen Smith's telling. It seems ironic that the "utopian" progressive formalists were those who best understood this point.

Just as the remnants of progressive formalism were tamed by Wilson's reformist energy and realist methods and later brought, once and for all, into the Democratic Party fold during the Administration of T.R.'s nephew, Franklin D. Roosevelt, so too did the spirit of radical reform disappear under the mantle of legal realism and New Deal technocratic paternalism.<sup>286</sup> Fittingly, these two narratives would expose Progressives to the same critique by a later generation of opponents: substituting scientific expertise for democratic will was, in the words of Ellsworth Faris, the chairman of Chicago's sociology department, "indeed to rule man out."<sup>287</sup>

#### IV. The Lost Promise of Formal Constitutional Change

In his 1905 study of the American Constitution, the Australian statesman Henry B. Higgins shared an anecdote. Some years earlier, on a trip to New Zealand, Higgins had been shown a thick-trunked tree, the *rimu*, gracefully encircled by a flowering vine called the *rata*. Higgins was surprised to learn from his hosts that, with time, "the fair and clinging *rata*" would grow stronger and thicker, eventually choking the *rimu* to death, "for all its pride and seeming might."<sup>288</sup> Higgins reflected, "[s]o it may be with this rigid constitution and [its extra-constitutional] parasitic growths."<sup>289</sup> What, Higgins wondered, would the Framers think of an American President

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284. See FOER, *supra* note 155, at XXV ("Croly wanted to use a Hamiltonian conception of federal action to achieve the sort of individual autonomy and genuine democracy that Jefferson claim to cherish."); CROLY, *supra* note 14, at 54–55 (arguing that, contrary to the stated beliefs of Hamiltonian Federalists and Jeffersonian Democrats, the Federalist desire "to give integrity to the political system" actually resulted in greater "exercise of popular political power," whereas the "indiscriminate individualism" of the Democrats led to a "a monarchy of the Law superior in right to the monarchy of the people").

285. Christopher Lasch, *Herbert Croly's America*, N.Y. REV. (July 1, 1965), <https://www.nybooks.com/articles/1965/07/01/herbert-crolys-america/> [<https://perma.cc/AJW8-ZKB4>].

286. Some Roosevelt New Dealers contemplated the path of constitutional reform in the face of persistent obstruction by the Supreme Court. The 1936 Democratic Party platform contained a threat to pass a "clarifying amendment" to make clear that Congress had national regulatory power should the Court refuse to step aside. Nevertheless, in 1937, Roosevelt made a "self-conscious decision" to reject his party's amendment proposals in favor of Court-packing as a mechanism to steamroll the Court's resistance. This decision, writes Bruce Ackerman, came with a "long-term cost to the higher lawmaking system." ACKERMAN, *REVOLUTIONARY CONSTITUTIONS* 390 (2019); KYVIG, *supra* note 21, at 289–93, 301–02.

287. PURCELL, *supra* note 17, at 192–93.

288. Henry Bourne Higgins, *The Rigid Constitution*, 20 POL. SCI. Q. 203, 214 (1905).

289. *Id.*

who, during wartime, became “a dictator with almost unlimited powers,” a Vice President whose role was mainly symbolic, a Congress dominated by overgrown party machines, judicial appointments dictated by partisanship and venality, or the mighty impeachment power, reduced to a “mere scarecrow,” even when executives like Jefferson, Jackson, and Lincoln disregarded the law?<sup>290</sup>

Henry Higgins was following a by-then well-grooved path of scholars struck by America’s “extra-constitutional” constitutional life. For some, this could not be taken as proof that the system was thriving by ingenious adaptation. Instead, the images they turned to (a vine choking a tree, a safety valve ready to burst, a straitjacket, a wall of water bearing down upon a dam) spoke of a democratic people subject to and suffocated by a text instead of mastering it. Extending his arboreal metaphor, Higgins wrote: “A tree may grow notwithstanding the iron band bound around it as a sapling; but it grows deformed, stunted, wanting rondure and completeness.”<sup>291</sup>

This view, so important to the political life of a century ago, finds practically no defenders today.<sup>292</sup> The vast majority of constitutional scholars take for granted what many Progressives did not: that textual amendment is impossible, undesirable, or in any case superfluous.<sup>293</sup> On the right, conservatives share Higgins’s concerns about “extra-constitutional growths” like the social welfare state, Congress’s commerce clause powers, or the broad construction of the right to privacy by the Court.<sup>294</sup> Yet these scholars would vehemently reject Higgins’s characterization of Article V as an “iron

290. *Id.*

291. *Id.* at 213, 215.

292. One important exception is Sanford Levinson, the rare modern-day Progressive who considers the Constitution irremediably defined by “hard-wired” undemocratic features like bicameralism and the “indefensibly apportioned Senate,” and which therefore can only be salvaged by a new drafting convention. LEVINSON, *supra* note 49, at 21–22. Unlike Higgins or Bryce, however, Levinson’s preoccupation is not with the *rata*’s growth but the *rimu* tree’s inherent defectiveness. Other notable Constitution-skeptics include ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001) and LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012). Still others make the point that constitutional rigidity creates pathologies in interpretation. See Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 552 (2018) (arguing that an interpreter of an unamendable text “will increasingly substitute analysis of precedent interpreting the text for interpretation of the text itself,” rendering the process “a species of common law incrementalism”).

293. Gerald Magliocca, *Constitutional Change*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 909, 919 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) (“[C]onstitutional amendments are typically unnecessary to change constitutional law or culture” because “[t]here is no significant advantage to using the Article Five process when other options are available, which is why political activists of all stripes focus on litigation and influencing public opinion rather than hammering out proposed changes to the Constitution itself”).

294. See generally EPSTEIN, *supra* note 18; PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); Gary Lawson & Steven G. Calabresi, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821 (2018). For these and other strands of conservative thought, see generally KERSCH, *supra* note 18.

band” and on the whole, view the immobility of the Constitution as a solemn virtue.<sup>295</sup> Liberal constitutionalists, meanwhile, sympathize deeply with the concern that an unchanging Constitution is asphyxiating and presumptively undemocratic, but tend to view what Bryce called “flexible parasites growing upon a rigid stem” as necessary and beneficial adaptations to an inflexible text.<sup>296</sup>

Constitutions are doomed to have flaws and gaps, and consequently, societies that live under a written higher law cannot avoid the problem of constitutional imperfection.<sup>297</sup> As this Article has emphasized, however, whether they do so by amendment or by construction has critical consequences for their political life. Those that, like the fifty states, make amendment easier must contend with lengthy, unstable, and potentially politicized (or populist) constitutions. Constitutions that are difficult to amend, on the other hand, shift power to officeholders; favor the status quo; and risk obsolescence, concept stretching, or even outright defiance. It is worth considering how several features of America’s present constitutional life relate back to a rigid Constitution: the sacralization of the Constitution, the marginalization of popular constitutionalism, and rising interpretive difficulties and a politicization of constitutional law.

#### A. *Constitutional Sacralization*

A healthy constitutional system requires “reverence for the laws,” to borrow Madison’s phrase, but how much distance from the text is *too* much?<sup>298</sup> The United States has eternally admired Jefferson’s ideal of popular sovereignty, but it never embraced the idea of cyclical amending conventions or the idea that a majority of the electorate could simply ignore Article V and rewrite the text.<sup>299</sup> Still, Jefferson’s worry that a people who considered their

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295. Two classic examples of scholarship devoted to eradicating the Beardian view of the Constitution as elitist and undemocratic are MARTIN DIAMOND, *THE FOUNDING OF THE DEMOCRATIC REPUBLIC* (1981) and FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958). For work with a similar thrust that traces a decline in constitutional fidelity and certainty to the Progressive Era, see generally EPSTEIN, *supra* note 18; RONALD PESTRITTO, *WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM* (2005); JEAN M. YARBROUGH, *THEODORE ROOSEVELT AND THE AMERICAN POLITICAL TRADITION* (2012); CLAREMONT INST., <https://www.claremont.org/featured/the-progressive-revolt-against-the-founding/> [<https://perma.cc/MKC9-TTUP>]; and Ken Kersch, *Constitutional Conservatives Remember the Progressive Era*, in *THE PROGRESSIVES’ CENTURY* 130 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).

296. JAMES BRYCE, *1 STUDIES IN HISTORY AND JURISPRUDENCE* 120 (1901). Among such historically minded constitutionalist theories, the best-known are Bruce Ackerman’s *We the People* trilogy, *supra* note 60, and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

297. BAILEY, *supra* note 36, at 1.

298. *THE FEDERALIST* NO. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961).

299. FRITZ, *supra* note 209, at 279–80 (asserting that we have “lost” the Jeffersonian ideal of popular sovereignty “as a viable principle in the constitutionalism we know today”).

Constitution “too sacred to be touched” would effectively be ceding sovereignty to past generations is echoed, for example, by those who lament the continued existence of the Electoral College today.<sup>300</sup>

As the years pass without substantive reform, some scholars have come to believe that just such a “sacralization of the text” is taking place.<sup>301</sup> More than a blueprint for government, the Constitution is one of the pillars of American national identity.<sup>302</sup> For all the sharp tenor of their disagreements, mainstream liberals and conservatives alike overwhelmingly agree that the Constitution and the American creed are one and the same.<sup>303</sup> Conservatives ascribe to the Constitution enduring values that define our national character and that risk being lost if the text were amended.<sup>304</sup> Liberals somewhat strangely profess to believe in a living Constitution that evolves and adapts but still share conservatives’ faith in a Constitution that contains unchanging principles surviving through time: a higher law, so to speak, that is even “higher” than the higher law.<sup>305</sup>

Veneration of the Constitution not only “discourage[s] recognition of its all-too-present imperfections,” as Herman Ames wrote in 1897, but also fuels a “fundamentalist,” reactionary strand of politics that construes even friendly constitutional critique as tantamount to treason.<sup>306</sup> Such a view justifies a rejection of two ideas vital to a democracy, political compromise and “the

300. See, e.g., LEVINSON, *supra* note 49, at 95 (describing the Electoral College as “an iron cage preventing necessary change”).

301. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 4–5 (2011) (discussing the concept of “constitutional faith” as a “wholehearted attachment to the constitution as the center of one’s . . . political life” and its role in modern American identity); cf. Levinson, *supra* note 18, at 2663 (arguing in favor of expanding the constitutional canon and asking “will we continue to insist that ‘the Constitution’ is found only in the text of an eighteenth century document, as formally amended, plus judicial decisions purporting to ‘interpret’ that document?”). For more on diagnosing what he calls “creedal constitutionalism,” see AZIZ RANA, *THE RISE OF THE CONSTITUTION* 1–4 (forthcoming) (manuscript on file with author).

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

303. GUNNAR MYRDAL, RICHARD STERNER & ARNOLD ROSE, *AN AMERICAN DILEMMA* 4 (9th ed. 1947); Rana, *supra* note 22, at 58.

304. See, e.g., KERSCH, *supra* note 18, at 1–6 (describing the conservative mindset towards the Constitution).

305. See, e.g., Jack M. Balkin & Reva B. Siegel, *Introduction to THE CONSTITUTION IN 2020*, at 2 (Jack M. Balkin & Reva B. Siegel eds., 2009) (describing a “redemptive constitutionalism” whose “basic premise” is that “our Constitution is always a work in progress”); BARACK OBAMA, *THE AUDACITY OF HOPE* 231–32 (2006) (extolling “a Constitution that—despite being marred by the original sin of slavery—has at its very core the idea of equal citizenship under the law; and an economic system that, more than any other, has offered opportunity to all comers, regardless of status or title or rank”).

306. Stephen Teles describes this as a “fundamentalist” strand of politics struggling over the meaning of the Constitution. Teles, *supra* note 18, at 455; see also David Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 940–41 (2016) (arguing that the sacralization of the Constitution turns disagreements about interpretation into moral arguments).



loyal opposition,” and it may be related to prolonged and entrenched standoffs in our political system of late: blocked judicial nominations, government shutdowns, and presidential impeachment, a possible omen of impending institutional crisis. Between treating the Constitution as an eternal symbol and treating it instrumentally as a tool for each generation to experiment with, there is a wide span of daylight. Going forward, Americans might think of turning their creative energies toward this middle ground.<sup>307</sup>

*B. Interpreting an Unamendable Text*

There is a reason even judges who favor a pragmatic or sociological style of jurisprudence tend not to describe themselves as “living constitutionalists.”<sup>308</sup> To paraphrase Elena Kagan at her Supreme Court confirmation hearing, “We are all originalists now.” Forswearing allegiance to the text is a nonstarter; yet for Progressives, this presents a dilemma. While conservatives construe their legal approach as “calling balls and strikes,” the left is at pains to demonstrate its own textual fidelity in judging, trying to scrub out any hint of extrajudicial considerations of justice and policy.<sup>309</sup> The effort is doomed to be at least partly self-defeating, since extra-constitutional considerations that inform the “living constitution” are precisely what a liberal constitutionalism is based on.<sup>310</sup>

The competing judicial approaches of originalism and textualism also fail to offer a way out of what Lawrence Lessig calls the problem of translation, or what Thomas Merrill describes as the “pathologies” of “interpreting an unamendable text.”<sup>311</sup> As the Founding recedes ever farther into the distance and American government resembles less and less that of “original understandings,” literal or “plain meaning” readings of the text

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307. LEVINSON, *supra* note 49, at 21–22 (echoing a progressive experimental attitude toward the Constitution by examining the importance of the amendment process to the structural aspects of U.S. government); RANA, *supra* note 22, at 58–60 (arguing that a more “disenchanted” attitude toward the Constitution would help carve out a space for reformist politics).

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

309. This was a problem that, to say the least, did not particularly trouble Justices Holmes and Brandeis. On the “problematic asymmetry” between left and right constitutional discourse, see Brian Z. Tamanaha, *The Progressive Struggle with the Courts: A Problematic Asymmetry*, in *THE PROGRESSIVES’ CENTURY* 65, 67 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).

310. Pragmatically minded judges trying to make room for the play of time and experience in constitutional meaning will often finesse the difference between fixity and change, appealing to fidelity to constitutional *principles* if not text. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 6–7 (2011) (explaining a theory of constitutional construction that relies on the application of abstract constitutional principles “in our own time”).

311. Lawrence Lessig, *Fidelity in Translation*, 71 *TEXAS L. REV.* 1165, 1173 (1993); Merrill, *supra* note 292, at 547.

require increasingly heroic interpretive leaps. As a result, constitutional text must be invoked, in the words of one scholar, “at such a high level of generality that it ceases to function as an effective constraint on the interpreter.”<sup>312</sup>

Today, countless interpretive disputes take place around vague provisions of the Constitution that Congress and the people have failed to update. One illustrative example is the debate over where the Constitution vests the power to declare war. Lined up on one side are eminent scholars like John Ely, Louis Fisher, Harold Koh, Leonard Levy, Charles Lofgren, Arthur Schlesinger, Jr., William Van Alstyne, and Bruce Ackerman who contend that, on an original understanding, the President cannot commit troops to combat without congressional authorization, save for a limited power to repel attacks.<sup>313</sup> Lined up on the other, Philip Bobbitt, Robert Bork, Edward Corwin, Henry Monaghan, Eugene Rostow, and John Yoo have argued that the power to “declare” war was supposed to be the limited one of classifying a conflict as a war for purposes of international law.<sup>314</sup> The debate

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312. CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 395 (1994). Critics have long pointed out flaws in originalism, including its methodological fuzziness, the undesirability of its premise of fixed, unchanging law, and its reliance on a fictitious, abstract social compact to sustain its democratic basis. See JAMES FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION* 3 (2015) (arguing that the most faithful reading of the Constitution is one that makes moral judgments); ERIC J. SEGALL, *ORIGINALISM AS FAITH*, at xi, 123–24 (2018) (noting that originalism has not been consistently applied by Justice Scalia and Justice Thomas and is a misleading label); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 26 (Jack Balkin & Reva Siegel eds., 2009) (suggesting that originalism denies the historical fact of past dynamic constitutional interpretations); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 205 (1980) (arguing that in many constitutional disputes, “nonoriginalist adjudication” is preferable to even a moderate form of originalism); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 549 (2006) (asserting that the ascendancy of originalism depends on its political utility rather than its analytic force).

313. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3–10 (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 205–06 (1995); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 75 (1990); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 30–37, 52–53 (1988); Charles A. Lofgren, *Commentary, On War-Making, Original Intent, and Ultra-Whiggery*, 21 *VAL. U. L. REV.* 53, 54–55 (1986); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672, 699–701 (1972); ARTHUR M. SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* 3–9 (1973); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 *U. PA. L. REV.* 1, 9 (1972); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 *MICH. L. REV.* 447, 452–53 (2011).

314. Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 *MICH. L. REV.* 1364, 1375–81 (1994) (book review); Robert Bork, *Address, Erosion of the President’s Power in Foreign Affairs*, 68 *WASH. U. L.Q.* 693, 698–99 (1990); EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 234, 256 (5th ed. rev. 1984); Henry P. Monaghan, *Presidential War-Making*, 50 *B.U. L. REV.* 19, 32 (1970); Eugene V. Rostow, *“Once More Unto the Breach”: The War Powers*

remains unsettled, with federal courts mostly refusing to reach the merits of the issue.<sup>315</sup> William Treanor concludes that “[t]he debate has reached a point of stalemate.”<sup>316</sup> In other words, for an office whose limited formal powers were laid out in a couple of bare lines of text and whose evolution over two centuries has been radical, the originalist-textualist approach looks more and more like a dead end.<sup>317</sup>

A second example shows a different problem: how clinging to forms where underlying norms have shifted can produce perverse results.<sup>318</sup> In 2014, the Supreme Court invalidated two recess appointments made by President Obama to the National Labor Relations Board (NLRB).<sup>319</sup> The difficulty of the case lay in the underlying context of political gamesmanship: an intransigent Republican-led Senate was making it a policy to hold up Obama nominations, holding pro forma sessions attended by a skeleton crew of senators to stave off formal recess. The Administration, meanwhile, adopted a transparently self-serving theory of the appointment power that allowed President Obama to ignore these pro forma sessions and effectively bypass senatorial consent.<sup>320</sup> In a 9–0 opinion, the Court reasoned that neither the drafters’ intent nor the legislative history of the Recess Appointment Clause supported the Administration’s position.<sup>321</sup> In an ironic twist, it was arch-formalist Justice Scalia who, in concurrence, chastised the majority opinion (authored by the Court’s reigning pragmatist, Justice Stephen Breyer) for disregarding the nontextual “self-evident purpose” of the Clause: to preserve the balance of power between the President and the Senate

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*Resolution Revisited*, 21 VAL. U. L. REV. 1, 6 (1986); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 173–74 (1996).

315. A number of recent cases presented challenges to the constitutionality of the President’s unilateral power to deploy troops. *See* *Smith v. Obama*, 217 F. Supp. 3d 283, 285 (D.D.C. 2016) (dismissing, for lack of standing and jurisdiction, a challenge by an active-duty soldier asserting that his overseas deployment in the war against the Islamic State was unconstitutional as unauthorized by Congress), *Campbell v. Clinton*, 203 F.3d 19, 19–20 (D.C. Cir. 2000) (dismissing, for lack of standing, a suit by thirty-one Members of Congress challenging the President’s use of American forces in the former Yugoslavia); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002) (dismissing, for lack of standing, a challenge by thirty-two members of the House to President Bush’s unilateral withdrawal from the 1972 Anti-Ballistic Missile Treaty); *Kucinich v. Obama*, 821 F. Supp. 2d 110, 112–13 (D.D.C. 2011) (dismissing, for lack of standing, a challenge by ten members of the House to President Obama’s order of airstrikes in Libya).

316. William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 698 (1990).

317. *See* David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1797 (1998) (arguing, in a different context, that neither the text nor the legislative history of Article II support a singular construction of the Treaty Clause).

318. *See* Pozen, *supra* note 306, at 887–88 (on the Court’s refusal to consider, or censure, norms of constitutional “bad faith”).

319. *NLRB v. Noel Canning*, 573 U.S. 513, 519 (2014).

320. *See id.* (discussing the Senate’s pro forma sessions and executive appointments being made during these timeframes).

321. *Id.* at 535–37.

regarding appointments.<sup>322</sup> Formalism was indeed a crude lens for an interbranch conflict that was about politicking through and through, drawing in larger subtextual issues, to boot: the decades-long conservative assault on the NLRB and administrative agencies more broadly, the Senate's increasing use of the "approval and consent" power to shelve nominations, a looming "vacancy crisis" on the federal bench, and even the question of why, in an era of jet travel, Congress should have recesses at all.<sup>323</sup>

The more remote the constitutional text grows from practical legal problems and the more "play in the joints" there is in constitutional argument, and the less reliable the Constitution becomes as an authority. A recent wave of conservative scholarship sees the Progressives' legacy as the ultimate destruction of constitutional meaning and calls for a "return" to original understandings.<sup>324</sup> Yet scholars of American political development have drawn attention to a well-established pattern of conservative political actors appropriating progressive tools (e.g., the administrative state,<sup>325</sup> presidential public opinion leadership,<sup>326</sup> judicial activism,<sup>327</sup> and crisis government<sup>328</sup>) to serve their own ends. Originalism tries to put the genie back in the bottle, so to speak, yet it still tends to resemble what sociologist Paul Starr calls rules that entrench power, as opposed to rules that entrench rules: only the latter tend to pinch the beliefs of the interpreter that applies them.<sup>329</sup> Originalism, in its modern incarnation, thus increasingly resembles realism by another name.

322. *Id.* at 579 (Scalia, J., concurring).

323. Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 884 (2018); Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER (Dec. 12, 2013), <https://www.newyorker.com/magazine/2013/12/09/our-broken-constitution> [https://perma.cc/3EN6-ALSB].

324. KERSCH, *supra* note 18, at 99; Teles, *supra* note 18.

325. Skowronek, *supra* note 257, at 2092; Sheila Jasanoff, *A Century of Reason: Experts and Citizens in the Administrative State*, in THE PROGRESSIVES' CENTURY 382 (Stephen Skowronek, Stephen M. Engle & Bruce Ackerman eds., 2016); Joana Grisinger, *The (Long) Administrative Century: Progressive Models of Governance*, in THE PROGRESSIVES' CENTURY 360 (Stephen Skowronek, Stephen M. Engle & Bruce Ackerman eds., 2016); Sidney Milkis, *The Progressive Party and the Rise of Executive-Centered Partisanship*, in THE PROGRESSIVES' CENTURY 174 (Stephen Skowronek, Stephen M. Engle & Bruce Ackerman eds., 2016).

326. TULIS, *supra* note 50, at 175–76.

327. See Ackerman, *supra* note 55, at 1742 (arguing that, given the chance, conservatives will utilize judicial activism to achieve desirable policy goals in line with conservative thinking).

328. TULIS, *supra* note 50, at 181.

329. PAUL STARR, ENTRENCHMENT, at xiii–xiv (2019); SEGALL, *supra* note 312, at 3–4 (arguing that originalism as a doctrine provides few constraints on judges' reasoning, which is in turn much more likely to be guided primarily by their personal values).

C. *A “Popular” Popular Constitutionalism?*

With systemic constitutional critique and formal amendment off the table, notable changes in governing authority under our Constitution take place through informal, incremental change in the behavior of political actors.<sup>330</sup> Congress may pass statutes in new areas, for instance the construction and improvement of roads, canals, and harbors; presidents may take on greater decision-making power, for instance, in war making; the Supreme Court may recognize and approve of such changes, or even take preemptive action itself, as in recognizing abortion rights.<sup>331</sup> Judicial sanction of ordinary political change is the keystone of the system. As Bruce Ackerman writes, “It is judicial revolution, not formal amendment, that serves as one of the great pathways for fundamental change” under our Constitution.<sup>332</sup>

Today, the great constitutional debates of the age—abortion, religion, federalism, and the powers of the presidency—take place before the bench. Social movements do exercise agency in molding constitutional culture, as does public opinion, which judges often heed.<sup>333</sup> Yet these voices are stunted by their dependence on legal interpreters—the advocate who translates claims into legally cognizable categories; the judge who passes on such claims; the legal scholar who stamps these struggles with a constitutional imprimatur.<sup>334</sup> Moreover, a left jurisprudence that purports to embody textual fidelity (however at odds this is with popular constitutionalism) shows the

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

331. Contrasting such behavior with formal amendment at the state level, see DINAN, *supra* note 52, at 2. See also Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 *AM. J. COMP. L.* 641, 641 (2014) (drawing attention to an under-recognized form of informal constitutional amendment whereby a constitutional provision loses binding force through conscious sustained non-use and public repudiation).

332. Ackerman, *supra* note 55, at 1742.

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

334. See KRAMER, *supra* note 18, at 249–53 (characterizing judicial review without judicial supremacy); William Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Self-Rule*, 81 *CHI.-KENT L. REV.* 967, 968 (2006) (distinguishing the Progressives’ sustained attacks on judicial finality from New Deal-era acceptance of “the ideal or myth of judicially enforceable constitutional commitments standing obdurately above and beyond the sway of non-judicial political actors”).

lingering effects of a devastating mid-century conservative critique of realism as value-free or nihilistic.<sup>335</sup>

It is important to recall the vehemence with which Progressives rejected both the classical model of the Constitution as a fixed contract signed between the People and their government, and the idea that courts' role in interpreting that contract was to vindicate choices the People had made.<sup>336</sup> Writing in 1907, Columbia historian J. Allen Smith described such abstract appeals to the People's sovereignty over "their" higher law as pacifying metaphors disseminated by conservatives to insulate judicial review from popular ire.<sup>337</sup> Smith would have none of these metaphors when the way the Constitution functioned in practice was so different: he wanted institutions like a popular recall of judicial decisions that would give people real, tangible political power.<sup>338</sup> In the same spirit, Judge Walter Clark urged, "Let us not be deceived by forms, but look at the substance. Government rests not upon forms, but upon a true reply to the question, 'Where does the governing power reside?'"<sup>339</sup>

Today, the particular topography of constitutional discourse—constitution-affirming and court-centered—means that, more than ever, when we speak of "constitutional law," we mean the creations of scholars, judges, or other legal practitioners. Scholars construe the constitutionalist project as one of insisting that new political settlements are consistent with or in fact vindicate old principles and values. Works of constitutional scholarship treat the New Deal as an epochal "constitutional moment" outside of the text; the feminist wave of the '70s and '80s as establishing a "de facto ERA" compensating for the failure of the real amendment; or LGBT legal mobilization as moving the constitutional needle in unconventional, non-"juricentric" ways.<sup>340</sup> The conservative constitutional

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335. See Tamanaha, *supra* note 309, at 74–76 (characterizing the conservative critique of progressive value neutrality); see also PURCELL, *supra* note 17, at 42–45 (characterizing the realists' flirtation with nihilism).

336. See generally KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999) (articulating a modern version of the rejection).

337. SMITH, *supra* note 68, at 94, 150–51, 256, 275–76 (critiquing the social compact and summarizing other works of the period critical of the theory).

338. "Popular ratification of all constitutional changes . . . is absolutely necessary if the constitution is to afford the people any protection in the enjoyment of their political rights." *Id.* at 136.

339. Clark, *supra* note 178, at 71.

340. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323, 1324 (2006); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 960–69 (2011); Douglas NeJaime, *The Family's Constitution*, 32 CONST. COMMENT. 413, 415–16 (2017). On "juricentric" popular constitutional change, see Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004). See generally 2 ACKERMAN, *supra* note 60.

project purports to do nothing of the sort, insisting that its adherents are merely translating “the Constitution’s objective communicative content.”<sup>341</sup> Yet in practice, conservatives can also be seen employing progressive methods of popular constitutionalism to provide shelter under the text for any number of newfangled conservative projects.<sup>342</sup>

The citizen’s distinctly truncated role in constitutionalism augurs problems, not just for the citizenry, but for constitutionalism too. As avenues for literal popular authorship of constitutional text dry up, American constitutional life becomes a performance of warring legal elites advancing canons of “super-precedents” that, they claim, *definitively* set the proper bounds of what is constitutional. The power claims at stake in these arguments are increasingly obvious, which makes them, in turn, increasingly suspect. Paradoxically, too, as the Constitution itself grows increasingly fixed, features of the “unwritten Constitution” may be harder to entrench. The common law-like body of constitutional interpretation that Merrill describes as an “echo chamber” lies, essentially, at the whim of judges.<sup>343</sup> Those, for instance, who view the New Deal or the Civil Rights era as constitutional settlements are witnessing with dismay a mounting rollback of the protections of *Roe v. Wade*<sup>344</sup> or the *Auer v. Robbins*<sup>345</sup> principle of deference to administrative agencies.<sup>346</sup> Constitutional canonization is not, it seems, a perfect substitute for a real democratic constitutional politics.<sup>347</sup>

A rising tide of court skepticism, particularly on the left, may distantly hint at a revival of the Progressive tradition of hostility toward judicial activism and calls for the literal production of higher law.<sup>348</sup> Conceivably,

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341. Gary Lawson, *Right About the Constitution*, BALKINIZATION BLOG (June 5, 2019, 9:30 AM), <https://balkin.blogspot.com/2019/06/right-about-constitution.html> [<https://perma.cc/P8PZ-C55Y>].

342. See Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 192, 193–94 (2008) (showing how *Heller*’s originalism enforced understandings of the Second Amendment produced in the late twentieth century through popular constitutionalism).

343. Merrill, *supra* note 292, at 547.

344. 410 U.S. 113 (1973).

345. 519 U.S. 452 (1997).

346. On the propriety of *Auer* deference, see Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017).

347. KYVIG, *supra* note 21, at xvii (concluding that “in practice as well as by design formal amendment has no equal in the American constitutional order”).

348. See, e.g., Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy> [<https://perma.cc/3YS8-4X2J>] (offering progressive criticism of utilizing courts as a strategy to achieve social change); see also Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 674–75 (canvassing the twentieth-century history of progressive legal scholars’ attitudes toward judicial review and warning that eschewing the institution poses risks to the progressive legal agenda in the long term); Linda C. McClain & James E. Fleming, *Constitutionalism, Judicial Review, and Progressive Change*, 84 TEXAS L. REV. 433, 440–41 (2005)

this mood of pessimism could trigger new reach for the work of scholars like Stephen Gardbaum, Ran Hirschl, Mark Tushnet, and Jeremy Waldron, who have long been lobbing small-p progressive attacks on the institution of judicial review.<sup>349</sup> Tushnet, in particular, advocates a “populist” constitutional law in which judicial declarations are entitled to no particular privileged normative status.<sup>350</sup> At this point, there are many unfinished links in the chain, however. The point, at any rate, is that in an enlightened democracy, no abstract appeal to the “popular sovereign” can substitute for productive social conflict over constitutional meaning.

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

A century later, progressive frustrations with rising corporate power, corruption, economic inequality, and political dysfunction are again prompting reformers to search for solutions: initiatives being floated today include curbing Court power, reducing the anti-majoritarian composition of institutions like the Senate and the Electoral College, and erecting statutory firewalls between politics and money.<sup>351</sup> One major difference between these proposals and their forebears is that, for all their transformative aims, today’s reforms show a profound pessimism regarding their ability to capture broad-based democratic approval. It goes without saying that few see the use in calling for a new constitutional convention.

Back in the Progressive Era, however, the idea of serious constitutional revision was not the remote province of law professors with idealistic tendencies or policy wonks with a particular axe to grind. To the contrary, it was the life’s work of a generation of committed reformers who have in large

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(arguing that liberal American constitutionalists have seldom harbored hopes that courts will serve as instruments of progressive social change).

349. *E.g.*, RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000); STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM* (2014); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006). Interestingly, all of these scholars have comparative experience studying the British model, perhaps echoing the similar critique made over a hundred years ago by Bagehot, Bryce, and Dicey.

350. *E.g.*, TUSHNET, *supra* note 349, at 6.

351. *See, e.g.*, KRAMER, *supra* note 18, at 249–54; Mark Tushnet, *Democracy Versus Judicial Review: Is It Time to Amend the Constitution?*, *DISSENT*, Spring 2005, at 59 (proposing a constitutional amendment abolishing judicial review).



part been lost to history. Revisiting the era not only shatters the illusion of a sacrosanct Constitution whose stewardship of the nation has endured unassailed since the time of the Founders; it also provides an example upon which a serious modern politics of constitutional reform might be built. Perhaps the main contribution that the lost doctrine of progressive formalism offers us today is to elucidate what is possible and to focus us on a moment when democratic theories of constitutionalism were focused on what should be, rather than what can.