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The Progressive Presidency and the Shaping of the Modern Executive

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

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Abstract

The contemporary presidency, with its expanded foreign policy, administrative and public duties, is largely a brainchild of the Progressive Era. The Progressives envisioned an enlarged executive, one outside the original guidelines of the U.S. Constitution, which they deemed “archaic,” “undemocratic,” and unsuited to the demands of the modern age, in which mass capitalism dislocated, alienated and disenfranchised the common man. The Progressives wanted to bring about a more energetic, streamlined, and unified state at the helm of which stood the presidency, an office of popular leadership and swift action. To accommodate this new, active figure, some Progressives believed it necessary to break with the old Constitution, something moderates like Woodrow Wilson were loath to do. Wilson saw the Constitution as a “living document,” capable of adapting to fit the spirit of the times. This claim, geared to placate legal conservatives, unfortunately allowed future presidents to take advantage of the new tools of the Progressive executive without pondering its rightful constitutional status.

In this paper, I explore the Progressive “legacy” for the president and suggest that in expanding executive institutional power without enacting corresponding constitutional changes, it has left present-day constitutionalists in a bind. The modern presidential toolkit is functionally equivalent to that of the Progressive president, although, by legitimating itself on “originalist” grounds, it has shed the proposed Progressive constraints upon it of a more active citizenry and a new constitutionalism. As a result, today we find ourselves tenaciously defending the unerring wisdom of the separation of powers even while confronted with the increasingly obvious realization that the old constitutional checks alone are insufficient to cabin executive power. The Progressives took us far enough from the Founding Fathers’ modest executive that we can no longer return to this original vision, but in failing to smash our formalist paradigms of presidential power, they did not take us far enough.

Introduction: Executive Expansion and Constitutional Crisis

The U.S. Constitution has weathered fierce storms in its two-hundred-odd years of existence, but today, it may be braving some of the worst attacks yet leveled upon it. On the left, critics shudder at the increasing militarism and decreasing accountability of the unitary executive, and at the plethora of legal apologies attempting to legitimate these phenomena in “constitutional” terms. For some critics on the right, it is the growth of the administrative state and the ascendance of historicist constitutionalism that have “weakened the permanence of the Constitution”¹: seemingly, a vast bureaucratic complex of experts threatens to railroad past a bewildered public a platform of “reform without democracy,” all the while currying favor with activist judges “who use [the] living Constitution to defy popular will in the name of progress.”²

What is remarkable about the present-day debate is the extent to which each side, while talking past the other, accuses the other of the same thing: massive institutional expansion legitimated by a conveniently flexible reading of the Constitution. The left sees the right as guilty of having used the terror phenomenon to voluntarily create what Giorgio Agamben calls “a permanent state of emergency,” leading as such to a normalization of exceptional executive discretionary power in law.³ The right sees the left as guilty of a major assault upon individual rights through a massive buildup of the state couched in judicial activism and a loosey-goosey discourse of rights and entitlements.

Of course, both sides are partly correct in their diagnoses. Ideology aside, it is hard to ignore the fact that the “modern” presidency is an office which, in both responsibilities and powers, has vastly outgrown its constitutional origins. Hence, both the left- and right-wing variants of presidential expansion are the descendants, however unlikely, of the thought of the Progressives, political and social reformers of the late nineteenth and early twentieth century who agitated—among other things—for executive expansion as a means of combating the ills plaguing society. Alongside packages of social reforms, some Progressives also introduced critiques of the American Constitution, which they held greatly responsible for leaving the state divided against itself and too weak to take concerted action to remedy the ills of society. In this period originated the United States’ first stabs at activist governance. Here, too, originated twin phenomena, the buildup of the state and the Constitution’s

(temporary) “fall from grace,” the lingering effects of which we see today.

In this essay, I seek to build upon Stephen Skowronek’s critique of the unitary executive, in particular his claim that the institutional toolkit of the modern president is functionally that of the Progressive executive, although troublingly stripped of the Progressives’ proposed checks on executive leadership through increased popular participation.ⁱ⁴ I also draw upon Eldon Eisenach’s contention that the “conservatism” of the late Woodrow Wilson (as both president and scholar) halted the Progressive movement in its tracks, although I suggest that, in his legal philosophy, Wilson was more pragmatic and accommodationist than conservative. Abandoning both pro-status quo conservatives and radical Progressives advocating deep-cutting legal reform, Wilson argued that the Constitution, in all its prescience and flexibility, *could* accommodate a presidency powerful enough to meet the challenges of industrial democracy. Wilson’s “organic constitutionalism” allowed both Progressives and originalists to claim the executive as their own. In so doing, it unwittingly set the stage for the development of an aggrandized executive, in either his “unitary,” “rhetorical” or “managerial” guises—a newly powerful but ostensibly still constitutional entity.

Although I hesitate to make speculative and anachronistic assertions regarding the Founding Fathers’ intentions vis-à-vis the executive branch, I claim here that the ideal-typical Progressive president, with its bolstered administrative and legislative powers, is an institution fundamentally irreconcilable with an originalist understanding of the presidency, and hence, indissociable from the constitutional critiques put forth by such Progressive thinkers as James Allen Smith, Frank Goodnow, Herbert Croly and others. The Progressives had great success in expanding the contours of the executive branch, but they did not do enough—or did what they could, but ultimately failed—to convince practitioners and public alike that the expanded prerogatives of the president could only be accommodated by a break from (existing) constitutional stricture and a move toward a more energetic form of popular democracy. *My central claim is that this failure—the failure to incorporate into politics the cohesive, mutually reinforcing constituent parts of the Progressive theory of governmental reform—has made possible the paradoxical capture of an anti-*

ⁱ Unlike Skowronek, however, I advance a new understanding of what is meant by the “failure” of the Progressive movement and offer a causal claim about how that failure paved the way for the emergence of the modern unitary executive.

originalist presidency by constitutional originalists, a maneuver unimaginable outside of Wilson's flexible, accommodationist constitutionalism.

In the sections that follow, I briefly outline the Progressives' social and constitutional critiques, the nature of the institutional reforms they sought, and the extent to which they succeeded in passing said reforms. I argue that, with certain exceptions, the Progressives were impressively successful in reshaping the political system. I then give a brief history of Progressive theory in practice, through a look at the two "Progressive presidencies" of the age, of Theodore Roosevelt and Wilson. I suggest that while Progressives enjoyed great programmatic success in passing reforms, they failed to provide—or at least, Roosevelt and Wilson never agreed upon—a consistent rationale to legitimate the institutional transformations taking place under their auspices. In the penultimate section, I discuss two competing Progressive theories of constitutionalism intended to legitimate the new institutional order, *interpretivism* and *formalism*. I argue in particular that the triumph of Wilsonian interpretivism emerged from the Progressives' failure to devise a justificatory rationale for the new order they left behind, and has ultimately led to our present-day "constitutional crisis."

A distinction between institutional, legal, and theoretical levels of reform may help to clarify the thesis.ⁱⁱ Institutionally, I claim, the Progressives had great success: they retooled the presidency and the electoral system, built up the administrative state, loosened the grip of party networks on candidates, and brought the people into greater contact with the government. Legally as well, their success was immense, ranging from national economic regulation to women's suffrage to state constitutional reforms. But crucially, these reforms did not correspond to each other, in the sense of both policy domains and relative importance. For example, in an important sense the great hullabaloo around Prohibitionism and the passage of the Eighteenth Amendment obscure the fact that the latter represents much less of a "constitutional" sea change than did the creation, in 1905, of Roosevelt's "Committee on

ⁱⁱ I define *institutional* reforms as those that, in practice, altered the configuration or relative importance of diverse political organs, including administrative agencies, electoral bodies, regulatory commissions, etc. These need not (and often did not) occur in concert with *legal* reforms, which correspond strictly to textual alterations of existing law, both constitutional and statutory. This distinction corresponds more or less to that between *de facto* and *de jure* reform. *Theoretical* reforms, the most ambitious of all, are those that demand new conceptions of the nature of and justification for political institutions, of which Herbert Croly's "New Nationalism," Walter Lippman's calls for social "mastery" through science, and Justice Holmes' critiques of formalist law are but a few examples.

Departmental Methods,” or Keep Commission. In this and other instances, a stillness at the textual surface conceals the magnitude of the institutional changes taking place deep below, just as the increased use of presidential signing statements in recent years represents a far greater institutional change than the legal silence greeting it suggests. Finally, from a theoretical perspective, two of the crucial planks supporting Progressive thought have crumbled in time: just as we have not replaced our old “constitutionalism” with new standards, neither have we become a cohesive, activated public in the manner advocated by John Dewey and others. Restated, the “failure” of the Progressives consists in a failure to ensure that a coherent theory of executive reform involving interdependent and mutually supporting legal, institutional, and theoretical transformations was adopted in practice at all three levels.

And so, today’s legal scholarship on the presidency finds itself in an awkward predicament, tenaciously defending, on one front, the unerring wisdom of the separation of powers even while confronted with the increasingly obvious realization that constitutional provisions—“parchment barriers” in the *Federalist*’s famous formulation—alone are insufficient checks on executive power. Particularly from the perspective of the Progressives’ conservative critics in the retrenchment years of the 1920s, 1950s, and 1970s, the failure of Progressive constitutional engineers is indeed ironic: Progressive reforms took us far enough from the Founding Fathers’ modest executive that we can no longer return to the paradigms of old. But at the same time, the dramatic reconceptualization of the office they put forth necessitated a correspondingly dramatic transformation of the legal founts of presidential authority in order to remain logically consistent and democratically accountable. In ratcheting up the institutional power of the presidency while failing to smash our formalist paradigms of executive power, the Progressives took us far from our original constitutional moorings—but not far enough.ⁱⁱⁱ

Progressive Political Thought: Civic Republicanism, Executive Activism and Anti-Formalism

ⁱⁱⁱ An important caveat: I do not address here the deeper question of whether the theoretical Progressive presidency was logically consistent, implementable, or even desirable. I do, however, suggest that the piecemeal fashion in which Progressive politicians adopted planned Progressive reforms of the executive was both incoherent and, in permitting the development of a “Progressive-originalist” presidency, ultimately dangerous.

In the waning decades of the nineteenth century, a new generation of social and political reformers surveyed the political system around them with increasing discontent.⁵ The Progressive movement began “convulsively”⁶ in the 1880s as a series of urban-based popular uprisings against endemic corruption and patronage politics at the state and city level. The movement gained exposure and momentum through a wave of journalistic efforts at exposing the evils of “corruption, crime, waste, brutality, and autocracy in the dark corners” of American political life. The new crop of young, ambitious “muck-rakers” hoped not just to tell “sordid stories” of “corrupt bosses, sweated labor, civic decay, and monopolistic extortion,” but to provoke their readers into “wrest[ing] power away from city and state bosses, millionaire senators, and the other minions of invisible government and tak[ing] it back into their own hands.”⁷

The muckraking movement certainly aroused public sentiment, leading to a rash of state and local political reforms in the north and Midwest, but its limitations as a vehicle for transformative reform soon became evident. A moralizing Teddy Roosevelt took much of the wind out the muckrakers’ sails when, as president in 1906, he argued that “the man who never does anything else, who never thinks or speaks or writes, save of his feats with the muck-rake, speedily becomes, not a help to society, not an incitement to good, but one of the most potent forces for evil.”⁸ Herbert Croly considered the “agitation” a “complete success,” but admitted that it failed to provide either a “searching diagnosis” or “effective remedial measures.”⁹ By 1914, acknowledged Walter Lippmann, the muckraking movement had “exhausted itself.” Urging the nation to abandon its policy of aimless “drift” and become master of its own destiny, he argued: “You cannot go very far by reiterating that public officials are corrupt, that businessmen break the law... For without a vivid sense of what politics and business might be, you cannot wage a very fruitful campaign.”¹⁰

The success of the movement, the Progressives realized, depended on cultivating a sweeping, panoramic agenda for political reform. In Lippmann’s words, a new generation would have to substitute “purpose for tradition,” and “conscious intention for unconscious striving.”¹¹ The later Progressives proposed not merely to clean up the system, but to reform it wholesale. Convinced that the success of the movement depended on taking control of political parties and local and state governments out of the hands of political bosses and placing it in the custody of the

people, the Progressives proposed a host of democratic reforms aimed at sundering the “illicit relation” between politics and its old allies, money and patronage.¹²

Unsurprisingly, they found few friends in government. The early Progressives were socialized in an era of tight-knit, locally-based political parties and legislative supremacy, a system Woodrow Wilson termed “congressional government.” The effects of these institutions upon the entire governmental apparatus—corruption, patronage politics, immobilism, decentralization, executive weakness—were endemic. The Progressives argued that the U.S. Congress had become an “incurably deficient and inferior organ,”¹³ fractured, myopic—Walter Lippmann called it “a group of blind men in a vast, unknown world”!¹⁴—, beholden to private interests, and hence incapable of taking decisive, independent action. The “moral and intellectual cowardice”¹⁵ of Congress, scathingly argued Croly, had spawned a government tainted with particularism, stagnation, diffuse responsibility and a lack of purpose.

Another common enemy against which the Progressives coalesced was the “guardianship of the robe,” as Croly put it—the court system. Reformers saw these legal apparatuses as impenetrable bastions of conservatism bolstered by the force of the supreme law, the Constitution. Critics argued that the courts, rigidly formalist and blindly devoted to the old order, served to perpetuate an unequal, undemocratic system. The Founding Fathers, for all their virtues, had constructed a manifestly obstructionist, anti-democratic system¹⁶: the theory of checks and balances, intended to thwart tyranny by preventing a concentration of power in any one branch, had worked too well, now standing in the way of concerted state action. Representative institutions like Senate malapportionment and the electoral college had led to a “democratic aristocracy”¹⁷ in which the voice of the common individual was stifled. Finally, economic laissez-fairism, once the safeguard of the Jeffersonian smallholder against governmental abuse, now supported a system of facially neutral law in which the small were held hostage to the whims of the big. At the helm of this system were judges, courts, and lawyers, all steadfastly refusing to “recognize their duty of weighing considerations of social advantage,”¹⁸ that is, to yield form for functionality, and textualism for democracy.

Another consequence of corruption in the legislature and fierce ancestor worship in the courts was an inherent conservative tilt to the government which frustrated attempts at active policymaking and reform. “Anybody who squinted in the direction of economic and social reform,” writes Croly, “was stigmatized as a

Bryanite or at worst a Socialist, and was thereafter to be excluded from the universe of polite political discourse. . . . Once that sentence had been passed on a man, he was considered as much beyond the pale as a heretic would have been to the medieval church.”¹⁹ Thus, early Progressives began to work not so much with lawmaking bodies as against them. Although the Progressive movement had begun in the cities, reformers soon came to realize that without statewide legal reform, it would be impossible to hold party bosses and robber barons to account.

The Progressives were to be strikingly successful in remedying this institutional weakness, however. After 1900, a rash of Progressive politicians were elected to the state governorship promising to bring energy and activism to the office. These included Robert La Follette of Wisconsin, Hiram Johnson (California), Charles Evan Hughes (New York), Joseph Folk (Missouri), and later, Woodrow Wilson (New Jersey) and James M. Cox (Ohio). In these states and others, the strength of party-dominated state legislatures and city councils was gradually sapped by the emergence of regulatory boards and increasingly powerful political executives. Political parties were gradually transformed from unregulated and uninclusive private organizations into public corporations.²⁰ By 1908, party primaries had been instituted in thirty-one states,²¹ with other reforms waging war on the political machines being passed at a dizzying rate, including the first federal campaign finance law, the income tax, railroad rate regulation, the Australian (secret) ballot, campaign finance reform, and the direct election of senators.²² Between 1903 and 1908, a host of electoral reforms made it illegal for business corporations to contribute to political campaigns in twenty-two states, further sundering the relationship between party machines and “special interests.”²³

As the movement spread from cities to states, so too, did its focus shift from legislatures to executives. “[T]he distinguishing thing about the Progressives,” observes Richard Hofstadter, was not their commitment to social progress per se, but their “activism”: their commitment to energetic action, vigorous engagement and experimentation[.]”²⁴ The Progressives believed that only through vigorous governmental action would the ills of society be eradicated, and the promise of social progress realized. Hence, their platform of root-and-branch social reform was inextricable from their broader political thought on the necessity of freeing up government—specifically the executive—to take decisive, purposive action. The assault on the party system, for example, was not just an attempt to “clean up”

government, but also a means of streamlining and energizing it by freeing the executive from partisan controls. Not for nothing would Progressives like Herbert Croly describe their platform as one of “Jeffersonian ends through Hamiltonian means”: for the Progressives, no less than for Hamilton, energy in the executive was the key ingredient to good government.²⁵

At the turn of the twentieth century, however, the Progressives had found both state governorships and the presidency in a parlous state. The Jacksonian party machine, largely blamed for the corruption tainting local and federal legislatures, had seized control of the nomination process, thereby depersonalizing and enfeebling the executive, turning the denizens of the office into colorless, unmemorable “party men.” By the time of the “progressive insurgency,” writes Skowronek, “the party convention that had empowered the mid-nineteenth-century Presidents had become the plaything of state and local ‘bosses’ who held the executive branch hostage to the patronage demands of their local organizations.”²⁶ Largely as a result, the prestige of the executive hit an all-time low by the late nineteenth century.

Building upon the strengths of its local and state-level successes, and in pursuit of its ideal of a “pure national democracy,”²⁷ Progressivism began to take on a national character in the “pivotal decades”²⁸ spanning from 1900-1920. As the movement expanded, the Progressives became convinced that the presidency was the preferred instrument for the “moral leadership” and social activism deemed necessary for the salvation of the nation from the corrupting influences of big business.²⁹ The presidency, as Henry Jones Ford had put it in 1898, was the “only organ sufficient for the exercise of [the people’s] sovereignty.”³⁰ One reason the Progressives saw the president as a particularly apt choice to be the “people’s advocate” was his electoral position: selected by a nationwide vote, Progressives felt the president was “uniquely representative of the people as a whole.”³¹ Perhaps more importantly, Progressives, following Wilson’s critique of Congress, believed that it was only in the presidency that the necessary “energy” for social action could be found.

But how much political reform was necessary to make good on the possibility of social reform? Wrote Frank Goodnow in 1911, “The question which Americans have to ask themselves is: Can the solution of the political and social problems which exist in the United States be undertaken with hope of success under the constitutional law now in force in this country?”³² Indeed, the key questions for Progressives, ones over which they ultimately stumbled, were firstly, how radical a severance with the

existing order they would advocate, and secondly, what form this severance would take. These questions would prove the moment of the Progressives' greatest intellectual failure, for in failing to coalesce around an answer, they would bequeath their modern-day successors with a legacy of institutional change lacking clear theoretical grounding.

The Progressives and the Constitution: Critiques of the Old Order

It would soon become clear that social and institutional critiques of the later Progressives ran deeper than the muckraking exposés that preceded them. Though building upon these attacks, the works of Progressive intellectuals would indict the entire extant legal regime, particularly the Constitution, and they called for wide-ranging, deep institutional reforms on several fronts.³³ Progressives pinned the blame for the social injustice and economic inequality plaguing the country on a constitutional system which, while useful in its own time, could no longer serve the interests of a modern, industrial society. As Sidney Milkis argues, Progressivism advanced a new understanding of the relationship between the individual and his government based on three new commitments: a concern with the power of business, a dedication to societal rights as a bulwark against the vagaries of the marketplace, and a commitment to “pure democracy.”³⁴ These commitments corresponded roughly to three groups of Progressive critiques of the Constitution denouncing its commitments to Lockean natural rights, representative institutions, and the separation of powers.

In 1913, Charles Beard famously criticized the Constitution as the handiwork of a conservative, property-rich minority in the young nation.³⁵ Beard argued that the Constitution “was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.”³⁶ Progressive legal thinkers before and after him would repeat and build upon this critique, closely scrutinizing the Constitution and its history in order to detect monarchic and aristocratic elements therein contained.

Some argued that in the modern era, the document's elitist tenor and economic distortions were even more exacerbated. Like Beard, legal scholar Frank Goodnow believed that the Jeffersonian belief in certain “eternal” and “inalienable” rights constituted the “basis of the American constitutional system.” This belief, however,

depended on an understanding of society as “static rather than dynamic,”³⁷ an understanding which, in the wake of the Industrial Revolution, seemed increasingly far from reality. Between the years of 1870 and 1900, the population of the United States doubled, and urbanization and immigration skyrocketed as the economy underwent a shift from local, small-scale manufacturing and commerce to large-scale factory production and vast national corporations. Seemingly overnight, America was confronted with the “demons” of a typical Western capitalist democracy: the concentration of wealth in the hands of a privileged few and the increased political power of business leadership.³⁸ These economic changes, Progressives argued, had created a world unanticipated by the Founders, the new industrial conditions of which rendered the Constitution’s protective attitude toward property not merely outdated, but manifestly unjust.

The injustices of the new system were not merely tolerated by the existing constitutional order; they were sustained by the Constitution, “a political trust,” as Walter Weyl provocatively described it. Increasingly concerned with the law’s failure to protect the individual against the corporation, Woodrow Wilson thundered, “America is not a place of which it can be said, as it used to be, that a man may choose his own calling and pursue it just as far as his abilities enable him to pursue it... American industry is not free, as once it was free; American enterprise is not free...[T]he laws of this country do not prevent the strong from crushing the weak.”³⁹ Money served as the “mortar” of the corrupt “edifice” of the pyramidal party system running from ward heeler to ward, city, and State bosses, and finally, the Senate. But it was not the only thing sustaining the regime. “Despite race and sex limitations,” wrote Weyl, “we have a practically democratic suffrage, and if we were once fairly united in opposition to any institution, however protected by money, we could vote it off the face of the continent.”⁴⁰

What stood in the way of such action, believed the Progressives, was the deadening, fragmenting effect of representative, intermediary institutions of government—staggered and indirect elections, the Electoral College, a labyrinthine process of constitutional amendment requiring a “very strong and persistent popular majority”⁴¹ to make its will prevail. Progressives everywhere seemed to agree that the Founding Fathers had had a crippling fear of majorities. The Framers, argues Herbert Croly, avoided pure majoritarian rule out of the fear that the will of the majority might be “expressed in a manner hostile to the national interest,”⁴² leading to

discontent, revolution, and possibly, tyranny. For all that Federalists like John Marshall could deem the government “emphatically, and truly, a government of” — and thus dependent upon — “the people”;⁴³ for all that Madison might see the three branches as mere “agents and trustees of the people,”⁴⁴ it was clear, to the Progressives at least, that the federal government neither served the people’s interests, nor had ever been intended to do so. The lawyer Franklin Pierce called the American Constitution “the most undemocratic instrument to be found in any country in the world today,”⁴⁵ a claim borne out in part by James Madison’s discussion, in *Federalist* 10, of the distinction between the “republican” form of government and that of “pure democracy,”⁴⁶ and his emphasis on the superior qualities of the former. As J. Allen Smith bluntly puts it, “Nothing, in fact, was farther from the minds of those who framed the Constitution than the idea of creating an organization distinct from, and entirely outside of, the government [that is, a popular sovereign body], which would control the Constitution and through it all officials who exercised the political power.”⁴⁷

Just as the Framers believed that a supreme People were to be feared, so, too, was an unchecked government; hence, the need for separating governmental powers into three equal and mutually checking branches. For Croly, the doctrine seemed a reactionary manifestation of the Founding Fathers’ dread of unrestrained power and “profound suspicion of human nature,” a charter cementing in place a vision of a government “divided against itself,” one so incapable of concerted, deliberate action as to be “deliberately and effectively weakened.”⁴⁸ The theory of checks and balances, Croly claimed, constituted an “organization of obstacles and precautions” designed to smother the voice of the people and doomed to foster tedious gridlock and institutional weakness.⁴⁹ Woodrow Wilson agreed that “no government can be successfully conducted upon so mechanical a theory.”⁵⁰ Discovering “real government as it lives,” suggested Wilson, meant embracing a unity of purpose and understanding government’s possibilities for “operative cooperation as a whole.” “Government,” Wilson wrote, “is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their cooperation is indispensable, their warfare fatal.”⁵¹

And so, having exposed the Constitution’s numerous faults, Progressives argued that it was time to wean the nation off of its reactionary legalism and ancestor worship. Croly unsentimentally decried conservatives’ “unqualified affirmation” of

the traditional constitutional system as the “political salvation” of republic. The problem, as he saw it, was the fetishization of the law, and particularly, the Constitution as the supreme expression of an unimprovable, enduring system. “Law in the shape of the Federal Constitution,” said Croly, had come to be a “monarchy of the Word”⁵² imposed upon the popular will, steadfast and unbendable to the will of the people. The American democracy had been born into a “world of law” and orderly procedure, but its “pathetic and priggish confidence in the power of rules to determine reasonable and righteous political conduct” were now, in a different age, beginning to hamper its “freedom of movement” and its ability to meet its responsibilities to its own people.⁵³

Croly’s critiques were echoed by other legal pragmatists, among them Holmes, Goodnow, and Henry Carter Adams. The law, said these thinkers, should not hang, heavy and vise-like, upon a government to restrain it from taking action; it should facilitate action in the name of positive ends. Moreover, it was fruitless to conceive of the legal system as a sacred, untouchable whole, divinely mandated or logically necessitated; the law was an imperfect, humanly wrought composite, and it served for little if it was not *useful* to society. Goodnow criticized legal textualism as “mere useless opprobrious theory,” and called for political and social reform to bring the legal and political systems “into conformity with modern conditions.”⁵⁴ Adams warned that if the law could not be made to develop alongside the “society whose ethical ideals it is designed to express,” “serious mischief” would ensue, as men came to be convinced that “the law fails to express rights which they hold to be fundamental.”⁵⁵

As Walter Weyl announced in 1912, “America to-day is in a somber, soul-questioning mood... We are in a period of clamor, of bewilderment, of an almost tremulous arrests. We are hastily revising all our social conceptions. We are hastily testing all our political ideals. We are profoundly disenchanted with the fruits of a century of independence.”⁵⁶ The time, Progressives saw, was ripe for a rupture with tradition. “Public opinion can no longer be hypnotized and scared into accepting the traditional constitutionalism as the final word in politics,” Croly pronounced.⁵⁷

But the Progressives could not condemn the Constitution’s language of natural rights and divisions of power without offering a substitute: Croly acknowledged that it would be “mere nihilism” for Progressives to attack the “exposed citadel of conservatism” unless they were prepared to construct a “new social bond” to replace

it. What was needed to replace the old constitutional regime, the Progressives argued, was a “system of government that would give expression to the growing demands for government action, a system in which the unity of the ‘powers’ of government would be as important a consideration as their separation.”⁵⁸ But what, in practice, did such a system look like? Was there such a thing as a “Progressive constitutionalism” with which to replace the old order?

The Progressives and the State: Administrative Buildup, Executive Leadership, Popular Democracy

Progressivism, encompassing a wealth of diverse and often contradictory ideas, is often criticized for lacking both common goals and a common set of tools with which to pursue them.⁵⁹ The critique is inapt, I believe, with regard to the former—Progressive critiques of the old order and calls for reform were, in fact, remarkably trenchant and consistent, from Ida Tarbell’s 1902 exposé of the “ruthless methods”⁶⁰ of the Standard Oil Company, to Senator Robert La Follette’s plea to Congress, on April 23, 1906, for increased railroad regulation, to Teddy Roosevelt’s invectives against the trusts. Moreover, Progressive calls for institutional (i.e. political) reforms were also quite consistent, generally proposing greater executive leadership, administrative expansion, and direct democracy (direct election of senators, the initiative, referendum, recall, and so forth).

Where things became less clear for the Progressives, I argue, was in articulating a rationale for the bold institutional steps they had taken. If the “what” of institutional reform was more or less clear, the “why” was never quite as obvious. Progressives were internally split less over the nature of the political system they had built than over theoretical justifications for it, in particular the new legal system they sought to erect to replace the decadent Constitution.

Progressive institutional reforms took place on three fronts, each of which were interrelated, and all of which stemmed from a belief in the central importance of presidential leadership. The Progressives’ suspicion of congressional and party government and critiques of the separation of powers led them to call for an *empowered executive* who would have an expanded role in legislating, leading public opinion, and guiding his political party. The Progressives’ heightened understanding of the complexity and new demands of modernity forced them to the conclusion that “[t]he president needs help,”⁶¹ and paved the way for the expansion and consolidation

of an *administrative apparatus*. Finally, consistent with their critiques of representative institutions of democracy and the privileging of elites by law, the Progressives sought to bolster the system's "*direct democratic*" credentials. Leadership, administration, and direct democracy were linked concepts, mutually sustaining and reinforcing each other.

First was the expanded role of the president. Many scholars today agree that the Progressives set the presidency upon the path of expansion that would culminate in its present-day limits.⁶² Certainly, the political thought and presidency of Woodrow Wilson was emblematic of these changes: Wilson's critique of the "slow and cumbersome" Constitution as artificially fixing institutional relationships and limiting government mobility has, through the years, been taken up by conservative and Progressive critics alike as a paradigmatic statement of Progressive principles.⁶³ His oft-repeated counsel that the president is "free to be as big a man as he can" is almost a mantra of today's presidency, while scholars of the "rhetorical presidency" argue that Wilson's transformative style of public-opinion leadership presented such a radical break with precedent as to practically demand a new grounding "outside the constitutional order."^{iv,64}

In both his first and his last works,^v Wilson argued that the separation-of-powers regime, in both its limited eighteenth century and congressionally dominated nineteenth century variants, lacked harmony and cooperation. The "makers of the Constitution," argued Wilson, had conceived of the executive in a limited, negative role, as "only the legal executive, the presiding and guiding authority in the application of law and the execution of policy." The president's legislative veto, his "check" on Congress, was "a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not to be given an opportunity to make good ones."⁶⁵ Wilson, not surprisingly, had little patience for such a constricting conception of executive power.

^{iv} Focusing on Wilson as the quintessential Progressive president leaves us with two problems, however: first, it eclipses the transformative effects of the two-term Roosevelt presidency, effects which undeniably affected Wilson's thought on executive power, particularly by strengthening his faith in the power of presidential leadership to initiate systematic change. Second, such a focus on the early Wilson's radical assessments of the inadequacy of the constitutional system and need for greater executive leadership bear little resemblance to his actual—overwhelmingly pragmatic—presidency. For these two reasons, I will discuss the Roosevelt and Wilson presidencies in a separate section to illustrate the partial divide between theory and practice in executive leadership.

^v *Congressional Government* (1885) and *Constitutional Government* (1907)

Wilson, as Jeffrey Tulis points out, inaugurated (both in theory and in practice) a new style of “plebiscitary” presidential leadership, one whose authority derived from “rightly interpret[ing] the national thought,” and whose power, from his position as the spokesperson for the nation at large. Rhetorical leadership was crucial to Wilson’s understanding of presidential power and legitimacy. The president, for Wilson, could “dominate his party by being spokesman for the real sentiment and purpose of the country.” Chosen by the people as a whole, the president would be the “political leader” of the nation: “His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him.”⁶⁶ Wilsonian leadership, then, depended primarily on a close relationship between the president and the people: the former derived his power from the latter, and fulfilled his duties to them by educating and informing them, and by correctly interpreting their wishes and shaping them into policy. Insofar as the “rhetorical president” was the lynchpin for, and wielded the force of, popular opinion, his influence—over Congress and party, notably—could be great, but was always, Wilson reminded his readers, dependent on the favor of the public.^{vi} The Wilsonian executive was a “bigger” man than his predecessors, more colorful and visible in the administration, but also, as opinion leader, more often heard, too.

But the rhetorical president, powerful though he was, was but a single piece in the new governmental order of the Progressives, of which the national administrative apparatus was to be the “centerpiece.” The focus on public administration was initially academic, spreading from German intellectual centers over the Atlantic and into the hands of enterprising Progressive regime-builders. The Progressives presided over the birth of the formal study of political science in America, and the study of public administration was to be one of the principal focal points for the discipline, particularly insofar as it could be used to advance the case of “municipal reform.” Of the need for a new “science of administration,” Woodrow Wilson wrote in 1887:

The functions of government are everyday becoming more complex and difficult, they are also vastly multiplying in number. Administration is everywhere putting its hands to new undertakings... Whatever hold of authority state or federal governments are to take upon corporations, there must follow cares and responsibilities which will require not a little wisdom, knowledge, and experience. Such things must be studied in order to be well done.

^{vi} Ironically, Wilson’s failed tour around the country in 1919 to promote the idea of the League of Nations proved just this fact.

The idea of the state and the consequent ideal of its duty are undergoing noteworthy change; and “the idea of the state is the conscience of administration.” Seeing every day new things which the state ought to do, the next thing is to see clearly how it ought to do them... This is why there should be a science of administration which shall seek to straighten the paths of government, to make its business less unbusinesslike, to strengthen and purify its organization, and to crown its duties with dutifulness.⁶⁷

Progressive scholarship on the bureaucracy was heavily influenced by nineteenth-century German economics and sociology, in particular its study of bureaucracy, and by the example of the Prussian administrative apparatus.⁶⁸ Both Frank Goodnow and Wilson, the first and sixth presidents of the American Political Science Association (APSA), respectively, were particularly sensitive to the fact that American public administration was “backwards” with respect to, and could learn a great deal from, its Prussian counterpart.⁶⁹

Goodnow, one of the most influential early American scholars of public administration, offered a theory of the State under which all government action fell under one of two classes of operations: those necessary to the expression of its will, *politics*, and those necessary to the execution of that will, *administration*.⁷⁰ Goodnow believed that greater harmony between the legislative and executive powers, the government organs entrusted with the “making” of and the “enforcement” of law, was desirable and achievable by centralizing and professionalizing the administration and political parties. Goodnow argued that by legally recognizing and strengthening political parties, it would be possible to hold them more accountable to the popular will.^{vii} Through a concomitant centralization of administration, he held, both its efficiency and its accountability might be increased.⁷¹ Goodnow believed that the administration should be made relatively autonomous, provided that a “sound public opinion” was cultivated to follow its performance closely.⁷² This thesis would lead Goodnow to a loosely bipartite conception of the State in which the judiciary was subsumed into the executive branch in the form of the administrative tribunal. Among other reforms, he also proposed to implement the Swiss-style referendum at a national level, which, he believed, “would have the effect of relieving the party of the work of obtaining decisions on important questions of policy.”⁷³

Woodrow Wilson, too, built upon the distinction between politics and administration, arguing that the administrative buildup could be accommodated by

^{vii} Worth noting is that Croly starkly disagreed with Goodnow and Wilson on this point. In *Progressive Democracy*, he would argue that executive leadership is “incompatible with a really vital party system. If the other party leaders are men of conviction who take their joint partisan responsibility to the electorate seriously, they will not submit to a method of leadership which is necessarily dictatorial.” (345)

splitting the expanded executive branch cleanly into two parts. The first, the political, would be composed of elected officials involved in making policy decisions; the second, the administration, was to be made up of officials appointed by the president “to put these decisions into effect with impartial, expert efficiency.”⁷⁴ Wilson, like Goodnow, argued that “administration lies outside of the proper sphere of *politics*,”⁷⁵ and had to be granted some measure of autonomy if it was to function smoothly. Like Goodnow, he believed that public opinion would be crucial in directing the bureaucracy, and that the more extensive the responsibilities and powers of the latter, the easier to monitor it.

[L]arge powers and unhampered discretion seem to me the indispensable conditions of responsibility. Public attention must be easily directed, in each case of good or bad administration, to just the man deserving of praise or blame. There is no danger in power, if only it be not irresponsible. If it be divided, dealt out in shares to many, it is obscured; and if it be obscured, it is made irresponsible. But if it be centered in heads of the service and in heads of branches of the service, it is easily watched and brought to book... The ideal for us is a civil service cultured and self-sufficient enough to act with sense and vigor, and yet so intimately connected with the popular thought, by means of elections and constant public counsel, as to find arbitrariness of class spirit quite out of the question.⁷⁶

For Wilson, the “bureaucratic remedy,” as Skowronek calls it, also presented a way to bring the energy and decisiveness of executive leadership to a wider range of policy areas. Wilson admitted that the president was overtaxed: “[He] is the most heavily burdened officer in the world. No other man’s day is so full as his, so full of the responsibilities which tax mind and conscience alike and demand an inexhaustible vitality... Men of ordinary physique and discretion cannot be Presidents and live, if the strain be not somehow relieved.”⁷⁷ The mere task of appointing cabinet and civil service officers, fretted Wilson, was enough to wear down an ordinary man – and this was to say nothing of his executive responsibilities! The actual “daily execution” of laws, Wilson felt, should be undertaken by the several executive departments and the federal officials who staffed them: “In respect of the strictly executive duties of his office the President may be said to administer the presidency in conjunction with the members of his cabinet, like the chairman of a commission... It is therefore becoming more and more true, as the business of the government becomes more and more complex and extended, that the President is becoming more and more a political and less and less an executive officer.”⁷⁸ In this sense, we might say that the early Wilson

laid the groundwork for the rise of not just the “rhetorical presidency,” but also what Peri Arnold calls the “managerial presidency.”^{viii}

While the Progressives’ critics pointed out the risks administrative expansion posed to popular democracy, for Progressives these two things were in fact linked. Good administration, they believed, depended on and even *promoted* the refinement of institutions of direct democracy. Goodnow argues, for example, that the centralization of administration could actually support local self-government, insofar as it allowed the local community to use “its own organs for the expression of its own will” to formulate policy and delegate it to the centralized administration for execution. Thus, local legislatures would maintain control over the “political” sphere, while the central bureaucracy took care of the “administrative” sphere. Eventually, this would lead to legislative decentralization and thus local autonomy, as “centrally appointed officials [would] have in their hands the execution of policies which, by the law, are recognized as distinctly local.”⁷⁹

To counteract the expanding prerogatives of the presidency, the Progressives called for transformative political reforms that would engender a greater sense of community, render the People stronger and more vigilant in their collective capacity, and provide them with a greater array of institutional tools by which to check the expanded executive. These reforms included the direct election of senators, direct party primaries, women’s suffrage, popular referenda, recall of elected officials (and, Roosevelt controversially suggested in 1911, of judges), and the popular legislative initiative. On the whole, the Progressives had great programmatic success in pushing forward these reforms: the presidential primary election, viewed by Progressives as a way to delink popular opinion from the influence of party, first appeared in Oregon in 1910, although by 1912, some twelve states had adopted the practice. Meanwhile, the direct election of senators was passed by amendment in 1913, while the 19th Amendment, passed in 1920, guaranteed women the vote.

On these and other fronts, the states represented the vanguard rather than the federal government. Herbert Croly parsed some of the major institutional and constitutional experiments run by late-19th century state governments as examples of this pedigree of direct democratic reforms, quite obviously to suggest a blueprint for

^{viii} Nonetheless, Wilson’s views on administrative leadership departed starkly from those of Roosevelt, who, as president, presided over a swift expansion of the bureaucracy, and preferred greater control over the bureaucracy, and far less delegation and compromise. (See, for example, James R. Hurtgen, *The Divided Mind*, on this point.)

national popular reform.⁸⁰ The Wisconsin Constitution—retooled in 1913 by a “patient and cautious process of reconstruction”—was a model very much to his liking. The latest reforms streamlined the legislative process and redressed the executive-legislative imbalance: they increased the legislative powers of the governor and the administration by giving the governor the initiative, setting up governing commissions, condensing the preparation of legislation, clearly demarcating respective spheres of legislative and administrative authority, reducing legislators’ pay, and coordinating the work of administrative and legislative bodies over a number of policy issues, including land conservation, construction and maintenance of highways, state income tax, and the provision of state insurance. They curtailed the power of the judiciary by fixing the number of state Supreme Court justices and setting their tenure at a maximum of ten years. Importantly, they also vastly increased the influence of the public over the state government, newly providing for amendment of the state constitution by petition, and adopted new provisions for the recall of civil officials, the public initiative and the referendum.^{81,82}

For Croly, strengthened governorships, newly established commissions, and calls for active political participation by the public represented an “encouraging expression” of strong progressive government.⁸³ Croly also believed that greater governmental accountability could be achieved by subjecting elected officials to direct recall and certain administrative decisions to suspension by popular vote. In the same way, he believed the electorate was best served when it retained the power to initiate and adopt legislation without seeking the consent of administrative organs.

To sum up, proposed Progressive reforms of executive, administrative, and direct democratic institutions were to be taken as a complete, holistic package. Just as the buildup of administrative capabilities tied in neatly with the Progressives’ emphasis on executive leadership, expanding and refining the president’s influence over policy, so too, they believed, did administrative functioning depend on and contribute to direct democracy. In these new conceptions of governmental and state functions, the Progressives clearly saw a new, or at least a different constitutional order from the one they had received. The question was how they would implement the changes, whether from within the old legal order or by altering it. On this score their much-vaunted unity encountered its limitations.

The Progressive Presidents: Theory in Practice

In *The Lost Promise of Progressivism*, Eldon Eisenach warns that efforts to translate social theories into coherent political policies are ever at risk of becoming distorted and diffused.⁸⁴ Telling a story of the appropriation and *re*-appropriation of political ideas by new traditions, Skowronek cautions, “a political tradition is not a coherent set of political ambitions but a common grammar through which ambitions are manipulated and redefined.”⁸⁵ Unfortunately for modern Progressives, the long-term fate of the Progressive legacy has largely followed a pattern in which programmatic successes were followed by changing political configurations that reconfigured and redefined these changes.⁸⁶ Having failed to secure a consensual rationale for institutional buildup and social reform, second-generation and modern-day Progressives have witnessed the capture of their institutional handiwork by their long-time political opponents, an efficient machine deployed in the service of ever *less* Progressive ends.

A look at the tenures of the Progressive-era presidents under the auspices of the Progressive-era presidents, Theodore Roosevelt, Woodrow Wilson and even, although to a lesser degree, William Howard Taft brings clearly into focus the division between theory and practice. While all three of these presidents professed, to some extent, their support for Progressive prescriptions, ultimately each defended an entirely different vision of the presidency and its sources of institutional power: Roosevelt presided over an abrupt expansion of the bureaucracy, from which his executive, as consummate driver of the administration, drew much of his institutional power. Taft, meanwhile, as president, saw himself in a conciliatory role, trying to preserve the uneasy balance between the extant legal order he stood for and the bursting dam of social and economic reform that threatened to overwhelm it. Wilson’s president, finally, drew its strength from a new source, the support of party and people, and embraced new tactics, oratorical leadership and the brokering of legislative consensus.

Although the 1912 election seemed a three-cornered contest between Progressive candidates, exaggerating the superficial similarities of the candidates threatens to disguise the extent to which they held fundamentally dissimilar—and competing—theories of state power. To rationalize the new power of an office whose very contours were changing beneath their feet, these three presidents turned to

administrative power, constitutional law, and the popular mandate, respectively.^{ix} However, in spite of their theoretical differences, they were *all* “complicit,” we might say, in the expansion of the administrative and the popular capabilities—on this latter count, Taft reluctantly, however—of the president. Especially in view of the profound faultlines crossing Progressive thought on governmental power and prerogatives, a comparative glance at these three presidencies suggests just how impressive Progressives’ success in steamrolling institutional reforms past an entrenched opposition really was.

Early on, Progressive reforms met with precipitous success in the administration of Theodore Roosevelt. With the legitimacy of the old democratic order of “courts and party machines” crumbling under Progressive critiques, calls mounted for “placing relations between the American economy and the American polity on a new foundation.”⁸⁷ For a public fearful of both unchecked industrial capitalism and radical socialism, the bureaucratic solution represented a moderate alternative, while also offering the promise of expertise, efficiency, continuity, durability, and accountability in administration—at least in greater measure than under the party boss system.^x Progressive calls to augment the power of the administration over a vast range of policy and turn the executive into an instrument of popular, social leadership and proactive legislative activity found a valuable ally in TR. After 1900, government officials in the administration of the energetic and popular Theodore Roosevelt “finally made the pivotal turn down the bureaucratic road,” exploring institutional innovations to strengthen the governmental resources of the executive branch.⁸⁸

Calls, like those of Goodnow, Wilson and Croly, to embrace the bureaucratic solution to the problems of modernity perfectly suited TR’s politics, philosophy of government and leadership style. Unlike great denizens of past White Houses like Washington, Jackson and Lincoln, who had seen fit to expand the president’s

^{ix} Roosevelt, to be fair, seems to have viewed the presidency as capable of both administrative and political leadership, with his strict control over both the civil service and the “bully pulpit.” If the distinction between politics and administration was important to Wilson, it seems to have been less so for TR.

^x Although it is worth noting that the problem of bureaucratic accountability, particularly that of hiring and firing, has never been solved. Wilson wrote in 1908, “It may be laid down as a political maxim that whatever assigns to the people a power which they are naturally incapable of wielding takes it away from them.” The people, under the Constitution, had been assigned power over numerous elective offices, but for lack of time and means of cooperative action, could not exercise it. This “democratic deficiency” of administration persists today. (*Const. Govt.*, 182)

authority in times of national crises, Roosevelt was the first chief executive to embrace a broader reading of his powers as “the proper recipe for day-to-day administration of government.”⁸⁹ Like the agrarian, heavily Jeffersonian Populists—William Jennings Bryan, J. Allen Smith and to some extent, Woodrow Wilson fit this mold—Roosevelt constantly voiced his concern for the plight of the common man, but his embrace of active, all-embracing government power could not have been more antithetical to the small-government individualism espoused by the former group. Writes M.C. Vile, “[N]o longer an attack upon oppressive arbitrary rule taking the form of demands for freedom *from* government action, [Progressivism was] a demand *for* government to act to deal with pressing economic and social problems.”⁹⁰

Admittedly, TR was a stouthearted Progressive in both his political commitments and his resolve “to use the government as an agency of human welfare.”⁹¹ Speaking from the podium of the 1912 Progressive Party Convention, Roosevelt philosophized, “There was once a time in history when the limitation of governmental power meant increasing liberty for the people. In the present day the limitation of governmental power, of governmental action, means the enslavement of the people by the great corporations.”⁹² Roosevelt would provoke a flurry of Progressive legislation during his tenure in the White House, and also presided over significant changes to the shape of the administration.⁹³ Under the banner of the “Square Deal,” Roosevelt fought to protect the “just balance” between management and labor, producer and consumer—a philosophy that in practice often entailed siding with labor, through the expansion of government regulation over private industry. Roosevelt took a fairly moderate stance in response to the Great Coal Strike of 1902, setting up an “expert commission” to defuse the standoff, but his antitrust prosecution of the Northern Securities Company and forty-three other corporations and renegade campaigns against Congress to protect the national forests and claim the issue of conservation for the administration thoroughly bolstered his reformist credentials. He also earned hard-won victories in the name of Progressive ideals by forcing through several pieces of landmark regulatory legislation, including the Elkins and Expedition Acts of 1903, the Pure Food and Drug Act of 1906, and, in 1905, the Hepburn Act, which created the Interstate Commerce Commission.

Roosevelt’s triumph with the Hepburn Act represents the epitome of another facet of his presidential legacy—his move to ground executive power in extra-constitutional sources, namely the public and the bureaucracy. Partly a consequence

of his aggrandized legislative ambitions, TR's relations with Congress were often stormy, but he soon discovered that he could turn his charismatic public appeals into a potent source of legislative influence.⁹⁴ Faced, in the spring of 1905, with a solidly deadlocked Senate, Roosevelt departed on a tour of the Midwest and Southwest, speaking out loudly about the need "to prevent the imposition of unjust and unreasonable rates." Within Congress, Roosevelt managed to force conservative stalwarts into line by raising the specter of the always-unpopular tariff issue, feigning interest in a tariff revision bill he considered of marginal importance.⁹⁵ As a result of Roosevelt's pressure tactics and the force of public demand, a number of senators, although privately still opposed to the Hepburn bill, gave it their support, signing into existence a milestone in the history of federal regulation against private industry. With this and other successes, Roosevelt hatched the idea of the president as leader of public opinion, ushering in the era of the rhetorical presidency from his "bully pulpit," a move inspired by Progressive calls to localize the fount of governmental legitimacy—and executive power—in the people itself.⁹⁶

Also significantly, it was Roosevelt who, with his extensive civil service reforms and expansion of the bureaucracy, launched the first era of the "managerial presidency," during which time the presidency and the administrative state began to be knit together. As the executive office slowly began to expand relative to Congress, TR would find in the growth of administrative agencies added responsibilities, but also a way to increase his policymaking authority. TR's administrative reforms gave him "managerial leverage"⁹⁷ over the administrative state, allowing him to expand the political jurisdiction of the executive branch, steer leadership away from partisan politics and more toward "nonpolitical administration" as a principal tool of governance.⁹⁸ Roosevelt believed that only continuous, impartial administration, not the dicta of the bench or the give and take of partisan conflict in Congress, could properly guide the development of the United States as an industrial society.⁹⁹ TR created the first presidentially initiated executive reorganization commission, the Keep Commission, which provided the president with recommendations on how to streamline operations by standardizing and centralizing discrete administrative processes such as salary policy, clerical procedures, and purchasing.¹⁰⁰ The administrative accomplishments of the Commission have been hailed, variously, as the "first of the orderly examinations into [Federal] administrative problems,"¹⁰¹ and

as “a clear shift of leadership in a long movement for federal administrative reform from the legislative to the executive branch of the United States government[.]”¹⁰²

In the last years of his presidency, Roosevelt’s commitment to government intervention in and regulation of the economy—commitments to which administrative expansion was integral—grew ever stauncher. Around 1907, TR abandoned his earlier, more conciliatory stance toward big business. He called on Congress to enact a series of “trust-busting” new regulatory laws, including a national incorporation law for all corporations, limits on the use of court injunctions against labor unions during strikes, a national employee liability law for industrial injuries, as well as an eight-hour law for federal employees, a postal savings system, a federal income tax and inheritance tax, and, finally, campaign reform laws.¹⁰³ Although these legislative projects met with scant success during his tenure, they would form a great part of the Progressive Party platform in 1912, when, as its presidential candidate, Roosevelt would make his radical reformist tendencies clear. “The nation and government,” he admonished, “within the range of fair play and a just administration of law, must inevitably sympathize with the men who have nothing, with the men who are struggling for a decent life, as opposed to men, however honorable, who are merely fighting for larger profits and autocratic control of business.”¹⁰⁴ TR’s strident calls for reform alienated the conservative wing of the Republican Party, pushing party coherence to the point of near-rupture.¹⁰⁵ Not for nothing did Taft, campaigning against Roosevelt in 1912, warn of his old friend’s platform: “[T]he equal opportunity which those seek who proclaim the coming of so-called social justice involves a forced division of property, and that means socialism.”¹⁰⁶

William Howard Taft, Roosevelt’s Secretary of War and his hand-picked successor to the presidency in 1908, admitted that he felt “deeply wounded” by the schism that appeared between the two men during his four beleaguered years as president.¹⁰⁷ Roosevelt, even while out of office, remained a central figure for the reform wing of the Republican Party, and he had made no bones about his discrepancies with the administration’s policies. Taft’s timid handling of the tariff issue, his firing of Secretary of the Interior Gifford Pinchot, a leading conservationist and close friend of Roosevelt, his attempts to use the courts, attorneys and the law—that is, rather than government—to secure the “destruction”—not regulation, as

Roosevelt wished—of the trusts sat poorly with Roosevelt, proof positive of Taft’s capitulation to the interests of the Old Guard faction of the Republican Party.^{xi, 108}

In addition to Roosevelt’s take no prisoners approach to legislation, Taft struggled to distance himself from another part of TR’s legacy—the latter’s efforts to push the presidency “beyond the state of courts and parties.”¹⁰⁹ Taft was uncomfortable with Roosevelt’s so-called “stewardship theory” of presidential power, on which it was claimed that, in the absence of strict textual limits to executive prerogatives, the president possessed an implied mandate for action. Ever the jurist, Taft pushed for a return to the Constitution as the sole controlling authority for evaluating presidential power, rejecting “populist trumps” to constitutional strictures, denying the existence of an “undefined residuum” of presidential power, and calling for stringent textual standards by which the powers and duties of the chief executive could be checked.¹¹⁰

But it seemed that by the time Taft took office, his efforts at constitutional revivalism had come too late. On the one hand, Roosevelt had already forged a strong connection between the president and the electorate, forcing into vogue the sort of public politicking that had been abhorred as base and demagogic by the Founding Fathers.¹¹¹ Although Taft would abandon Roosevelt’s gestures at public leadership, the president was now a popular leader, whether Taft liked it or not.

On the other hand, Taft, perhaps surprisingly, saw no constitutional problems in the expansive Rooseveltian bureaucracy. Taft would generally follow Roosevelt’s lead on administrative questions, calling for increased centralization of the bureaucracy under executive control, and finding considerable success in extending Roosevelt’s effort at bureaucratic reorganization, his Commission on Economy and Efficiency the centerpiece of his policy achievements.¹¹² The Commission, aimed at achieving a coherent and centrally managed executive branch, ultimately judged that since a capable president was a prerequisite for good administration, an executive budget giving the president responsibility for managing the executive branch’s

^{xi} Notes Skowronek, however: “To dismiss Taft as an incompetent politician who retreated from Roosevelt’s bold reform initiatives is to obscure rather than clarify the dynamics of state-building politics.” As president, Taft found himself forced to contend with the incipient rupture of the Republican Party and entrenched resistance to reform, a situation largely precipitated by TR’s increased radicalism and lack of scruples about passing major reforms over the heads of the conservative wing of the party. Indeed, many of Taft’s failures as a president and party leader can be considered a product of Roosevelt’s own failure to “consolidate his new order.” (Skowronek 1982, 173)

appropriation requests to Congress was to be recommended.¹¹³ Particularly in view of the efforts of modern conservative legal scholars to prove that the administrative state is “inconsistent”¹¹⁴ with the constitutional order, Taft’s unquestioning embrace of centralized administrative power and Progressive ideals of efficiency and innovation is noteworthy. Moreover, it suggests that the present-day rift between constitutional theory and presidential practice had already begun to open.

By 1912, Taft’s middle-of-the-road policies had led to his estrangement from both sides of his party. The Republican Old Guard, led by Nelson Aldrich in the Senate and Joseph Cannon in the House, had “betrayed”¹¹⁵ Taft over the tariff issue and parted ways with him over his moderate attempts at regulation of the trusts. Progressive Republicans, meanwhile, felt increasing impatience with Taft’s conservatism and weak leadership. And so, although Taft would eventually secure the Republican Party nomination, he threw himself into the campaign fray only reluctantly, seized with a “strong presentiment” that the larger-than-life Roosevelt would defeat him.¹¹⁶

Taft would be proved right on this score. The monumental 1912 presidential election went down as a sound defeat for Taft and the Republican Party, a narrow loss for Roosevelt and the newly formed Progressive Party, and a slim victory for newcomer Woodrow Wilson and the Democrats. By many accounts, the only clear winner in 1912 was Progressivism as a political movement. Between Wilson, TR, and the popular Socialist Eugene Debs, candidates “urg[ing] Progressive measures” in varying degrees collected over 75% of the votes of the electorate.¹¹⁷ The election, in Milkis’ words, “marked a fundamental departure in constitutional principles and practices, which progressives and conservatives alike would eventually embrace.”¹¹⁸

And although it was the Progressive Party’s Roosevelt who championed an agenda of national health insurance, government-led industrial planning, women’s suffrage, direct senatorial elections, and the universal use of the primary, the victor, Wilson, would take up most of these causes while in office. As president, Wilson would take up much of TR’s political agenda, building into it his more intellectualized understandings of public opinion, international involvement, constitutional “informalism,” and reform of the party system. Wilson promised tariff and banking reform, pledged to protect competition in business and productivity in agriculture, and called on government to “uplift Americans,” enhance national life and promote justice.¹¹⁹ In his two terms as president, Wilson would enjoy great

programmatic success, and his attacks on special-interest groups and Republican networks of protectionism were distinctly Progressive in flavor. He presided over the enactment of a number of sweeping economic and political reforms, including the Underwood-Simmons tariff, the creation of the Federal Trade Commission, which intensified government regulation of business; the Clayton Anti-Trust Act; the popular election of senators; and the creation of the Federal Reserve banking system.¹²⁰

But insofar as historian Arthur Link is correct in describing the central tenet of the Progressive movement as the effort to “insure the survival of democracy in the United States by the enlargement of governmental power to control and offset the power of private economic groups over the nation’s institutions and life,”¹²¹ it seems that Woodrow Wilson can at best be described as a “reluctant” Progressive. The early Wilson of the academia had bolstered his Progressive credentials with his radical constitutional critiques, studies of administration, and calls for a British-flavored, executive-led form of cabinet government, but as President, Wilson was both more accommodationist with regard to the old order and more circumspect in his defense of presidential power. Wilson’s biographers often remind us that Wilson, born in Staunton, Virginia and raised in Georgia and South Carolina, was ever a Southerner at heart, carrying with him childhood memories of the South’s subjugation to the North during Reconstruction, and an instinctual distrust for the potential abuses of federal government.¹²² On November 1, 1912, just days before his narrow victory, Wilson warned his supporters against radical reformers who proposed to change “all the centers of energy and organization in the Government of the United States...to the discretionary action of the executive.”¹²³ A clearer indictment of the administrative politics of Teddy Roosevelt—and indeed, of Taft—could scarcely have been made.

Moreover, Wilson was ever a greater apologist for pure capitalism than Roosevelt—of his New Freedom platform, he argued, “If America is not to have free enterprise, then she can have freedom of no sort whatever”¹²⁴—and a more reluctant steward of the bureaucracy than his two immediate predecessors. Taft and Roosevelt’s interactions with Congress had been too combative for Wilson’s taste, and this latter would recast the presidency in more of a prime ministerial, that is, cooperative but legislatively empowered, role.¹²⁵ Like TR, Wilson believed in a vigorous, executive-led government. However, unlike the tempestuous Roosevelt, Wilson believed that the president’s legislative authority could best be expanded by

greater cooperation with his Congress. To this end, Wilson cultivated the president's role as party leader, although unlike the nineteenth-century Jacksonians, he saw parties not as a constraint on the presidency, but as a tool for its empowerment. Wilson believed that the party should "form around" the president and "adopt his program or 'vision' as its own."¹²⁶

Ultimately, this view also signaled a major retreat from the policy of executive leadership over civil administration, a retreat that, in Skowronek's words, "would lead to a humiliating loss of legitimacy in the Civil Service Commission in the wake of the World War I crisis."¹²⁷ The southern Bourbons who still dominated the ranks of the Democratic Party cared little for Wilsonian progressivism but had "a tremendous thirst for offices." Wilson's decision to prop up his scant electoral mandate through partisan compromise led him to an administrative strategy of bartering offices for party support of his legislative program. Although Wilson never gave up rhetorical support for the ideal of administrative impartiality and independence, one of the enduring features of his first term was "the abandonment of the idea that administrative control required independent and imposing executive machinery and [the] turn toward a cooperation system that would join President and Congress through reliance on party and department heads."¹²⁸ Under Wilson, Taft's Economy and Efficiency Commission was dismantled and privatized, and hiring decisions in the FTC, Agricultural Credits Commission, IRS, and Tariff Commission politicized. Most tellingly, perhaps, Wilson signed off on the creation of a Congressional Bureau of Efficiency, a development which signaled that "the quest for control over the new realm of civil administration [had] effectively passed from the President to Congress."¹²⁹

Even while relinquishing administrative control to his political opponents and fortifying party ties, Wilson sought to ground executive power in another source, public opinion leadership. A vigorous defender of measures of direct democracy during his presidential campaign, once in office Wilson enthusiastically took aim at mediating electoral institutions—interest groups, indirect elections, and checks and balances—that he believed frustrated transformative political action and discouraged direct contact between reform leaders and the people.¹³⁰ While kowtowing to party interests in administrative affairs, Wilson pursued electoral reforms to "free" candidates from the "constraints of parties," central to which were national primary elections.¹³¹ With the implementation of primary systems to replace party conventions,

the Progressives eventually were able to “unleash the entrepreneurial skills of individual leaders and render political coalitions more responsive to opinion at large.”¹³² These reforms, tying electoral success to the ability of individual leaders to win public support for their own programs, also served to increase the discretion of the president over policy matters. No longer would “party men” occupy the White House.

Although TR’s success as a public speaker provided Wilson with an example of the importance of managing his relationship with the people, today it is Wilson who is often credited with catalyzing the development of the “rhetorical presidency.” Wilson took pains to make himself particularly visible to the public, reviving, for example, the tradition of delivering the annual state of the union address orally, a tradition in disuse since the administration of John Adams but which every president since Franklin D. Roosevelt has followed. For Wilson, presidential legitimacy and institutional power were rooted in popular opinion and depend rather less on institutional prerogatives than on informal powers of rhetoric and persuasion.¹³³ Progressives like John Dewey, Franklin Giddings and the early Walter Lippmann argued that in a democratic society, public opinion comes into being when shared beliefs are subjected to informed criticism and constant debate. For these thinkers, public opinion was “almost wholly an intellectual product,” molded and directed by leaders, subjected by intellectuals to careful scrutiny and critique, and then communicated, in revised form, to larger audiences.¹³⁴

Today, Progressive theories of democracy and public opinion are particularly vulnerable to critiques of elitism, and Wilson’s vision of the president’s relationship with the public is in no sense free from this inherent ambivalence. For Wilson, the president’s role was to interpret public opinion and explain people’s true desires to them in a convincing, familiar and easily comprehended fashion, but also to “articulate a vision of the future and to guide the nation toward it.”¹³⁵ As Progressives’ critics have noted, at the core of this ambivalence about public opinion leadership lies a fundamental uncertainty about the nature of the “public” itself. Although Progressives like Dewey and the early Walter Lippmann believed that through strong political and civic education, it was possible to turn a disparate, inchoate public into a cohesive whole, by 1922, Lippmann would turn away from his own theory of the enlightened public and “omnicompetent voter.”¹³⁶ By 1928, with *The Phantom Public*, he would deny the very existence of a cohesive “public” at all.

Wilson's failed barnstorming tour attempting to "sell" to the American nation the ideas of a League of Nations suggest the limits of Wilson's efforts to link executive power to public support.

As we have seen, although Wilson's conception of public leadership mirrored that of Theodore Roosevelt, his conciliatory stance toward Congress over administrative control led to diminished accountability in, and a legacy of institutional conflict between Congress and the executive for control over, the federal bureaucracy. Wilson's decision to "work [his legislative agenda] through the regular Democratic Party"¹³⁷ sprang, most likely, from his need to win his party's support to bolster his scant electoral mandate. More importantly, we may notice that Wilson's deference to the interests of party cronies stands in stark contrast to Roosevelt's "take no prisoners"-style of executive leadership over policymaking—Wilson's obdurate and self-destructive defense of the League of Nations notwithstanding.

In the next section, I wish to extend the parallel between Rooseveltian institutional rupture and Wilsonian accommodationism to encompass differing constitutional philosophies. As I will note, Wilson's calls for an expanded government to take up the cause of the common man, unlike those of Roosevelt and his more radical Progressive counterparts, were framed not as a clean break from historical and legal precedent, but rather as a reapplication of old principles to new conditions. As Wilson stated during a campaign stop in New Haven, "I am confident that if Jefferson had lived in our day, he would see what we see—that the individual is caught in a great confused nexus of all sorts of complicated circumstances, and that to let him alone is to leave him helpless as against the obstacles with which he has to contend, that, therefore, law in our day must come to the assistance of the individual."¹³⁸ Wilson believed, unlike TR, that if courts and parties had become corrupt, this was merely a contingent symptom of the unfortunate alliance into which the American government had entered with business. To extricate the government from this partnership, Wilson believed, was his mission as president,¹³⁹ and to do so necessitated a restructuring of the party apparatus, although not the Constitution.

Progressive Constitutionalism: Old Attempts at Legitimizing a New System

I have suggested that a focus on the superficial similarities between the “Progressive” presidencies of Roosevelt, Taft and Wilson obscures the extent to which these leaders held profoundly differing—even incompatible—theories of executive power. These three heads of state pursued markedly different strategies of administrative and public leadership, each suggesting a different model of executive power with disparate impacts for constitutional theory in general. I believe that Wilson’s approach to these matters became dominant in the years following this era. Specifically, I have suggested, following the work of Stephen Skowronek on the growth of the bureaucracy, that Wilson’s *administrative* strategy of courting congressional support through the exchange of patronage for legislative support left an enduring legacy of an administration lacking both accountability and a clear mission. Following the work of Sam Kernell and Jeffrey Tulis, I also contended that the *rhetorical leadership* and electoral reforms pushed forward by Wilson augured the rise of the modern “rhetorical president.”

In this section, I suggest that constitutionally, too, Wilson’s model of the executive survived, for reasons I will explore in this section. Here, I discuss one discarded alternative constitutional theory, a “Progressive formalism” of sorts, to show that the adoption of Wilson’s brand of “interpretivist” constitutionalism was not a foregone conclusion. I suggest that the philosophy of the “living constitution,” a particularly Wilsonian, conciliatory doctrine in its attempts to bridge the divide between Progressive reform and constitutional originalism, became the dominant constitutional philosophy of Progressivism and of the present day. This is largely so, I believe, because it was flexible enough to accommodate Progressive calls for institutional expansion, but familiar enough that conservatives in government could accept it, or at least turn a blind eye to its future implications.

The Progressives, although convinced of the legitimacy of the new social and political order they were helping to create, were quite aware that the new order they were helping to construct was, legally and practically speaking, *sui generis* and unanticipated by anything the Founding Fathers had put forth. The pending question, then, was whether it was *incompatible* with the Framers’ handiwork—whether the new regime demanded constitutional reform, or whether it could be accommodated within the old scheme. Most Progressives, as we have seen, took a critical stance toward the Constitution, deeming it antiquated, aristocratic and obstructionist.

Writing in 1898, Henry Jones Ford^{xii} mocked the rosy Whiggish version of constitutional history, on which if the government worked poorly it was not the fault of the “noble” constitutional ideal, but of “vile” politicians.¹⁴⁰ Ford professed his skepticism for a government predicated on the “infallibility of laws and regulations,” for whatever they would be, politicians would get around them. Ford warned that under a policy of constitutional near-worship, “[t]he science of evasion [of the laws], already tolerably understood, would then be brought to the greatest perfection.”¹⁴¹ Burke’s—and Ford’s—proposal to cure factional strife and corruption in government was to adopt a strong form of party rule, conferring upon party “full power to act, coupled with complete responsibility for what was done.”¹⁴² Ford, like Goodnow after him, believed that with increased powers would come increased visibility and accountability, allowing the people to better serve as “popular checks” upon government excess. “Party organization” and “administrative union between the executive and legislative branches of government,” argued Ford, made for “orderly politics and constitutional progress... This is the cardinal principle of American politics.”¹⁴³

Yet Ford believed that said administrative union could be brought about through a number of reforms—all possible, he believed, *within* the existing constitutional framework. Ford recommended three main avenues of reform: first, expanding and rendering more meritocratic the bureaucracy, such that the management of public affairs might “take on a more scientific character... [as] the resources of special ability and information” were brought directly to bear on policymaking.¹⁴⁴ Secondly, he advocated fostering a greater unity of action and purpose between the President and the House of Representatives in order to curb the “oligarchical power of the Senate.”¹⁴⁵ He proposed to “make the House the real base of administration” by installing heads of executive departments directly in the House, so that they could report directly to legislators about technical issues, provide recommendations for policy formation and facilitate direct negotiation between the branches. Thirdly, he espoused a vague project for an American form of cabinet government in which the President would be “converted into a Grand Elector,” with

^{xii} Ford’s Progressive “credentials” have sometimes been questioned, largely because of his distaste for massive administrative power and his defense of representative institutions, but because of his early reformism, constitutional critiques, and emphasis on the need for efficiency and order in government, I have chosen to “lump him in” with the Progressives. On Ford as “anti-Progressive,” see Lonc H. Sandy-Bailey, “Ideological dissent in the Progressive Era: Uncovering the challengers to direct democracy reforms.” Unpublished PhD dissertation, U. Mass Amherst (2006).

the power to constitute and undo the government in the same way that the English Parliament could establish and dissolve cabinet governments, a system which had the particular virtue of allowing the electors to “preside over [their] work, and to test its worth, with power to undo it and refer the matter to the constituencies for a fresh declaration of public opinion.”¹⁴⁶

This system would represent the height of “national unity,” Ford thought, and amazingly enough, required no major constitutional change to be implemented. Bureaucratic retooling of the sort originally espoused by Wilson and Goodnow could be achieved extra-constitutionally, while the admission of executive leaders to the congressional floor seemed to fall within the provisions of Article I of the Constitution, granting Congress power to control the “Rules of its Proceedings” and admit delegates and outside authorities for testimony. As to the third prong of his reforms, Ford left the question frustratingly unclear. Perhaps he thought that the existing presidency could be better attuned to public opinion through purely behavioral incentives, for example by learning to guide decisions over cabinet hires and fires according to the public will.

Quoting from an 1881 Senate report proposing some of the aforementioned structural reforms, Ford writes:^{xiii}

If there is anything perfectly plain in the Constitution and organization of the Government of the United States, it is that the great departments were not intended to be independent and isolated in the strict meaning of these terms; but that, although having a separate existence, they were to cooperate with the other, as the different members of the human body must cooperate with each other in order to form the figure and perform the duties of a perfect man.¹⁴⁷

Whether this report accurately describes the Framers’ original intent with regard to the separation of powers or not, it is remarkable for the degree to which the authors seem to have predicted the constitutional thought of the main Progressives several years before they had written it!

For Frank Goodnow, the point was not so much whether the Framers had *intended* this “flexible” form of checks and balances as the fact that even dyed-in-the-wool constitutionalists were powerless to stop it in practice. “No sooner is such an instrument”—that is, a constitution—“adopted than political forces at once begin to interpret it and amend it until the actual political system becomes, almost without the

^{xiii} Senate Bill 307 was originally proposed on December 8, 1881 by Senator George H. Pendleton (D-OH), among others. A report pursuant to the bill held that since both the executive and Congress were mutually dependent (the executive on Congress for lawmaking and the establishment of offices; Congress on the executive for approval of legislation, administrative updates, and suggestions for legislation), it made sense to provide in law for a functional interdependence of branches.

knowledge of the people, quite different from the system as outlined in the constitution itself.”¹⁴⁸ Goodnow, like Wilson, believed that the Constitution must be allowed to evolve naturally. Hence, the best constitutional system was that whose doctrine could easily be brought in line with the substance of the social orders. “Custom,” he admonished, “must... be considered in order to set forth the constitution. It is not possible for the investigator altogether to omit the consideration of extra-legal institutions.”¹⁴⁹ Like that of Ford and Wilson, Goodnow’s work carried an endorsement of the unwritten British constitutional system. For these thinkers, such a system was more malleable, responsive and closer to present-day popular will than that of the United States.

Goodnow’s rejection of textual fealty as an end unto itself was anathema to conservatives, of course, for whom pragmatism constituted a full-frontal attack on ethics, values and standards. If pragmatist justices like Oliver Wendell Holmes could be allowed the free rein to determine what constituted meaningful societal ethos, what was to prevent them from essentially rewriting the Constitution through wild interpretation? Goodnow acknowledged this possibility, arguing that although higher lawmaking in theory “consists in the making and amending of the constitution... we must remember that the authority interpreting the constitution also discharges it.” Because the judiciary was considered by many to have supreme authority to interpret the Constitution, it had effectively arrogated to itself the prerogative to divine the nation’s true interests.¹⁵⁰ Goodnow wanted to avoid the path of judicial supremacy.

But his solution was still unpalatable to constitutionalists: to continue to chip away at constitutional limits through popular action, which might thereby direct constitutional reinterpretation by the judiciary. Goodnow suggests an example: statewide popular movements to weaken the role of the Electoral College in national presidential elections had made it so that the President was elected “as a result of popular vote, the constitution... notwithstanding.”¹⁵¹ Although Goodnow did not call for constitutional amendment—believing the Article V process too cumbersome—he did argue that social reform was “impossible” under the existing conception of the separation of powers.¹⁵² Believing that the Constitution was fatally flawed, and too resistant to change to be rewritten—that is, changed from *within*, Goodnow advocated embracing new political practices that might better meet societal needs, and then simply reinterpreting the Constitution to accommodate them! Judicial review, Goodnow thought, excessively privileged the courts as constitutional interpreters:

since constitutional drift happens naturally, he suggested, the solution was for the people at large to all “get in the business” of constitutional reinterpretation.

Woodrow Wilson, however, was not insensitive to conservative critiques of Goodnow and other pragmatists’ lack of concern for manageable standards. To try and rescue Progressive constitutionalism from the abyss of nihilism, Wilson picked up Goodnow’s proposal to “save” the Constitution by reinterpreting it, but tacked onto it the proviso that such change was actually true to the document’s “original” nature. Having, in 1885, advanced a loosely Darwinian idea of government as a “living organism” constantly evolving to meet the changing demands of society, in 1908 he put forward idea of the “living political constitution,” a charter flexible enough that its true significance would evolve along with societal needs. The U.S. Constitution, he claimed, was just such a document, having “proved itself eminently adapted to express the changing temper and purposes of the American people from age to age.”¹⁵³

This position represented a radical about-face from his earlier thought in *Congressional Government*, in which he claimed that the United States was saddled with a rigid, unworkable constitution whose system of checks and balances “parcels out power and confuses responsibility,” a “radical defect” in Wilson’s eyes.¹⁵⁴ Perhaps by the time he published *Constitutional Government* in 1908, the Cleveland, McKinley and Roosevelt presidencies had provided Wilson with heartening examples of strong leadership. Or perhaps Wilson was merely softening his stance in preparation for the start of his own political career. In any case, there is a marked difference between the early Wilson as constitutional critic and the pragmatism of the late Wilson, of which this new, refined constitutional thought is an example.¹⁵⁵

With regard to Progressive demands for active, energetic government, Wilson now claimed that the Constitution did not represent a check on government and executive power, but rather a “vehicle of life” whose “spirit is always the spirit of the age.” Far now from blaming government inactivity on the principle of checks and balances, Wilson asserted that presidents who had “not made themselves leaders have lived no more truly on that account in the spirit of the Constitution than those whose force has told in the determination of law and policy.”¹⁵⁶ In this manner, Progressive principles of government intervention and economic regulation could be brought in line with the doctrine of constitutional originalism: if the Framers had not foreseen the

development of an interventionist, activist government, they *had* knowingly built, Wilson claimed, the potential for future change into the government they designed.¹⁵⁷

For another school of Progressives, however, paying such a compliment to the Framers' far-sightedness smacked of just the sort of Whiggish ancestor worship that Henry Jones Ford had criticized in the first place. These hard-boiled progressives constituted a more realist school of constitutionalists, of which the clearest examples were Herbert Croly's *Progressive Democracy* (1914) and Franklin Pierce's *Federal Usurpation* (1908). Not content merely to salvage constitutionalism by reinterpreting the existing document they had, these thinkers called for wholesale revision of it.

Herbert Croly believed that features of the current regime like weak congressional leadership, the industrial sector, federalism, social conservatism, term limits, and the "guardianship of the robe" were among the many obstacles blocking the path to transformative reform.¹⁵⁸ Croly stated the problem of Progressivism thusly: although the "ideal of social justice with which constitutional government was associated ha[d] increased in authority," the means for achieving it have not been modified.¹⁵⁹ Spurning conservatives' "unqualified affirmation" and zealous defense of the constitution, Croly argued that as a "living document," the document had to be periodically scrutinized and actually *revised* by the people as befitted the era.¹⁶⁰

Croly's early work has elements of the Wilsonian to it, particularly in his emphasis on the organic, mutually sustaining relationship between government, society and law. However, Eisenach suggests that Croly's thought broadened over the years from a critique of the American upper bar for its protective stance toward corporations and disregard for the public interest in *The Promise of American Life* (1908) to, in *Progressive Democracy* (1914), outspoken calls for "rethink[ing] the entire relationship between political democracy, constitutionalism, and the rule of law." Eisenach argues that in this later work, Croly hoped to "lay the groundwork for a shift away from the current reliance on 'mechanical jurisprudence' and toward the increased reliance on the power of popular sovereignty, executive power, and administrative law shaped by expert commissions."¹⁶¹ Although Croly's emphasis was still legal, he had become more democratic in the span between these two works.¹⁶² Reconciling the two positions, we might say that Croly's aim was ultimately to make law more *popular*, to a degree with which Wilson never seemed comfortable.

Croly believed that while the popular conscience could be an important factor weighing into the meaning of the Constitution, he also believed that legal channels

would have to be opened to allow for increased participation by the masses in the working of their democracy. Increasing the ease with which the Constitution was amended was an example of just such a change. Under the existing system, passing constitutional amendments, Croly felt, was an unwieldy, “almost insuperably difficult” task. He suggested amending Article V, the amending clause, itself so that “power of revision [might] be possessed by a majority of the electorate,” with the sole limitations on this power that there be a method of procedure allowing time for deliberation and a “certain territorial distribution” of the prevailing majority.¹⁶³

As noted before, Croly sought inspiration for reform not transatlantically in English constitutionalism, as did Wilson and Goodnow, but rather locally, in state practices. Progressivism, though usually told as a story of the centralization of state power, also contains an important lesson about the virtues of federalism: Many Progressive reforms were initially experimented with and implemented at the state level, including the income tax, direct election of legislators and executives, primary elections, and women’s suffrage. Some practices of state governments were later advocated at the national level by reformers like La Follette, Roosevelt and Croly, although they were never officially implemented: these included popular recall of elected officials and judges, government by local commissions, and granting the executive proactive legislative power. Crucially for Croly, state charters, on the whole longer and more easily amended than the federal Constitution, also provided a different, more popular ideal of constitutionalism. For Croly, it was crucial that the electorate should “retain power to initiate legislation and adopt it without asking consent of administrative organ.” Making the national constitution easier to revise would be a step in this direction.¹⁶⁴

Franklin Pierce, a New York lawyer, also believed in salvaging the Constitution by reforming it altogether. His 1908 *Federal Usurpation* dramatically begins, “This book is a plea for the sacredness of the Constitution of the United States.” Lest he be taken for one of Croly’s worshippers at the “citadel of conservatism,” however, Pierce immediately makes it clear that his sympathies are *not* with the originalists: “I do not mean by this,” he writes, “that I consider our Constitution, framed a hundred and twenty years ago, well suited to the needs of our existing government. Its rigid provisions, its system of checks and balances, are an obstacle to popular government, and they should be radically changed by amendment, *but never by construction or usurpation.*”¹⁶⁵ Inveighing against the Roosevelt

administration, Pierce suggested that the power of the president exceeded “that of any constitutional monarch.” Roosevelt, in a 1906 speech in Harrisburg, Pennsylvania, had suggested the necessity of increasing the power of the federal government “through executive action...and through judicial interpretation and construction of law.” A short time later, Elihu Root, Secretary of State and close legal advisor to Roosevelt claimed that if the people desire it “sooner or later constructions of the Constitution...will be found” to vest additional power in the government.¹⁶⁶

Pierce intended his work less as a critique of a particular administration, though, than as an indictment of a politically convenient constitutional philosophy in widespread use among political practitioners. Indeed, Pierce believed that the danger of usurpation could come, through the means of legal construction, from any branch: such threats included presidential attempts to influence the action of Congress or assault the courts; the extinguishing of meaningful debate in Congress through factionalism and the rapid growth of the moneyed influences in the Senate; growth of the powers of the courts by judicial construction; the weakness of federal elections; and popular apathy to national politics.

Pierce understood that expanding government power through construction was a path of lesser resistance than actual amendment, but he warned that the effects of such “silent and gradual attacks upon constitutional safeguards” would be dire. Instead, he called for such “radical” reforms as to make the text ready to meet the challenges of “centralization which results from natural causes,” that is, in industry and economics, about which he had no complaint.¹⁶⁷

In calling for deep social and legislative reforms to neutralize the virulent materialism pervading the country and frustrating the development of communal bonds, Pierce echoed existing Progressive formulas. The public, Pierce felt, had to agitate for the destruction of “monopolies, special privileges, sumptuary laws, and restraints upon trade” through heavy taxation, in order to restore free government.¹⁶⁸ Additionally, legislative spending and the volume of bills proposed in Congress should be cut by having the public push for the ban of private bills and any other kind of special legislation by Congress. Specifically, Congressional activity should be “limit[ed]...to general taxation, war, treaties, foreign and interstate commerce, postal service, bankruptcy, copyrights, patent rights, naturalization, and coinage, objects which are of common concern to all the people.”¹⁶⁹

But Pierce's reform plan transcended the statutory and the moral: It included five specific planks that explicitly called for constitutional revision. First, he called upon the people to "arouse themselves to one supreme effort" and vote to amend Article V such that future amendments could be submitted by one-third of state legislatures and passed upon approval by a simple majority of voters. The only way to curb corruption and "usurpation," Pierce argued, "is to remodel the whole Constitution, and that can never be accomplished unless the right to amend it is less difficult to obtain."¹⁷⁰ Secondly, Pierce proposed to remedy the deadlock created by divided party government by making a majority of the House of Representatives "supreme in lawmaking," with the Senate given a suspensive veto, subject to the second passage of a rejected measure in the House. Seconding Ford, he suggested that department heads occupy a seat on the House floor one day a week at least, an arrangement to be provided for "either by Congressional act, or by amendment to the Constitution, if necessary."^{xiv,171} Thirdly, the presidential term was to be lengthened to seven years and reelection abolished. The president would be given sole appointment power over ambassadors, consuls and judges without a Senate veto, in order to eliminate patronage appointments. On the other hand, the inferior executive officials would now be appointed by department heads and their tenure made "indefinite in time" and subject to high-grade examinations.¹⁷² Fourthly, the Constitution should be amended to provide for the direct election and nomination of senators by a majority of voters in each state. With these reforms, said Pierce wryly, "many a present representative in the Senate of the sugar trust, the steel trust, the railroads, the coal barons, the tobacco monopoly, and the express companies would be left in private life to continue his business as an attorney or trusty agent of these organizations."¹⁷³ Fifth and finally, both the power of the people and their responsibility for public affairs were to be increased by granting them the referendum, allowing them to vote on important legislation affecting their states and especially, their cities.

^{xiv} As Stephen Horn has shown in *The Cabinet and Congress*, the idea of seating the Cabinet in Congress has existed since Alexander Hamilton appeared before Congress to report on the post office system. Between 1864 and 1953, a total of 47 bills were introduced in Congress proposing a change in the relationship between Congress and the Cabinet, a great many by Progressives who, like Pierce, decried "the separation of [Congress] from the heads of departments, each working independently for a common end." Unlike Pierce's proposal, however, these bills proposed statutory, not constitutional change. (Horn, Stephen. 1960. *The Cabinet and Congress*. Columbia University Press: New York, NY.)

A survey of Croly and Pierce's proposed reforms, many of which sound quite bizarre and utopian today, makes it clear that these reformers got their wish far less often than they would have liked. By contrast, Wilson's laundry list of proposed reforms—democratic primaries, economic regulation of monopolies, increased presidential public opinion leadership, and so forth—has been integrated into our political system more or less intact. Even more crucially, we rarely speak today of the defects of our Constitution, secure in the joint belief that it has steered our nation competently throughout its two hundred-odd years of existence, and that it is flexible enough to weather any future contingencies. Pierce's reforms, if suggested today, would be panned as wild radicalism. Today, we live in the world of Wilsonian interpretivists.

But is the difference between the two camps perhaps exaggerated? After all, the Progressives did have considerable success at permanently fixing their reforms into law by constitutional amendments. And after all, Wilson did seemingly preside over four constitutional amendments—the Sixteenth, establishing the income tax; the Seventeenth, providing for the direct election of senators; the Eighteenth, banning the transport and sale of alcohol; and the Nineteenth, granting women the vote—more than any other president, with the obvious exception of George Washington and the Bill of Rights.

On this count, however, the facts are misleading. First, these amendments had very little to do with Wilson or his agenda.^{xv} The national movement in favor of the direct senatorial election predated Wilson's presidency, and had more to do with the efforts of Republican reformers in Congress like Senators La Follette (R-WI), Joseph Bristow (R-KS) and William Borah (R-ID) and Rep. George Norris (R-NE). The income tax amendment was actually a major campaign issue for Taft in 1908, and was approved by Congress and submitted to the state legislatures for ratification in 1909, well before Wilson took office.¹⁷⁴ Wilson's Democratic Party was split over the Eighteenth, or Prohibition Amendment, and Wilson personally did not come out in favor of it. In fact, he vetoed an act giving Congress enforcement power for the production of alcohol, but the "Volstead Act," as it was known, passed over his veto in 1919. As for women's suffrage, Wilson had never endorsed it before World War I,

^{xv} Of course, constitutional amendments do not formally require the support of the president, but certainly his endorsement helps their chances!

lending some support to the idea that Wilson took up the cause solely as a means to strengthen the United States' image abroad as a liberal minded, egalitarian nation.¹⁷⁵

Second of all, unlike the amendments proposed by Croly and Pierce, none of these reforms actually implemented were structural in nature, with the partial exception of the Seventeenth Amendment, which served to make the Senate *somewhat* more democratic, and the Nineteenth, which greatly expanded the franchise. These amendments added to the government's direct democratic credentials, but failed to address the structural problems of the checks and balances system—divided government, immobility, deadlock, and the separation of legislative and administrative functions—or more pressingly, how to square bureaucratic growth and increased government activity with the existing constitutional order.

Although both interpretivist and formalist Progressives acknowledged the flaws of the old Constitution, only the latter clearly saw the problems posed by new government activity in a determined constitutional order. For the interpretivists, textual drift was a matter of fact, and as long as the Supreme Court did not maintain exclusive privileges of interpretation, democracy would remain on sure footing. Formalists, on the other hand, denied the existence of, or at least sought to prevent, the evolution of constitutional meaning separate from constitutional text, and in this way, they were closer to conservative thinkers of the day than their pragmatist counterparts. On the other hand, the reform plans they prescribed, working against the inertia engendered by the old constitutional system, were ambitious and could not count on conservatives' support for passage.

In *The Lost Promise of Progressivism*, Eldon Eisenach takes Wilson's "defense of constitutionalism" and of political parties as proof positive that Wilson represented a "conservative threat" to Progressive ideals.¹⁷⁶ It may be unfair, as does Eisenach, to blame Wilson for arresting the progress of Progressive formalism. Caught between the progressive and conservative wings of the Democratic Party and saddled with an electorate less than convinced of his legitimacy, Wilson was admittedly in an unpropitious spot to spearhead major systemic reform. Perhaps Wilson's remarkable programmatic success in passing major domestic reforms reflected the best possible outcome he could have provided Progressives, given his position. Or perhaps the marriage between Progressivism and formalism was never a viable possibility.

But in the sense that Wilson, unlike Croly and Goodnow, felt no need to probe alternatives to the extant constitutional order and provide new legitimation for a fortified executive branch, Eisenach is right. If it is a bit harsh to call Wilson “our reversible president,” as *Collier’s Weekly* did in 1914, deeming his commitment to Progressivism as “short-lived and insincere,” there is no denying that as president, Wilson proved himself most amenable to compromise with parties quite hostile to Progressive causes.¹⁷⁷ And, constitutionally speaking, it is true that Wilson took the idea of interpretivism and tried to make it palatable to conservatives by squaring it with the most unlikely of partners, originalism. As Wilson wrote in 1907:

Fortunately, the definitions and prescriptions of constitutional law, although conceived in the Newtonian spirit and upon the Newtonian principle, are sufficiently broad and elastic to allow for the play of life and circumstance. Though they were Whig theorists, the men who framed the federal Constitution were also practical statesmen with an experienced eye for affairs and a quick practical sagacity in respect of the actual structure of government, and they have given us a thoroughly workable model...¹⁷⁸

Needless to say, the cheery triumphalism of Wilson’s “organic constitutionalism” is a far cry from his early work indicting the U.S. Constitution’s “radical defects.”

Moreover, to engage in some counterfactual speculation, there is a strong possibility that a Progressive Party victory in the 1912 election might have tipped the balance in favor of the formalists. The Progressive platform called for women’s suffrage, direct state and national primary elections, nation-wide preferential primaries for presidential elections, the direct election of senators by the people, the initiative, referendum, and recall, and a more expeditious mechanism to amend the Constitution. It goes without saying that some of these proposals entailed formal constitutional change—in fact, the direct election of senators and women’s suffrage, the 17th and 19th amendments, respectively, did require it.

And although Franklin Pierce had indicted President Roosevelt in 1906 for expanding the government “by construction,” by 1912 it seemed increasingly likely that a third Roosevelt administration might provide the medium for such a constitutional revolution. Certainly, Roosevelt’s time out of office had sharpened his radical commitments.^{xvi} The example of Taft’s ineffectual attempts at brokering

^{xvi} Jeffrey Tulis considers Roosevelt a political moderate who put forth a “middle way” which he calls a “campaign for moderation—moderate use of popular rhetoric, moderate appeals for moderate reform (that did not socialize but merely regulated industrial capitalism), and most importantly, an appeal to moderate disputes that Roosevelt feared might anticipate and signal class antagonism severe enough to prompt civil war.” (Tulis *The Rhetorical President*, 96-7) Likewise, John Milton Cooper refers to Roosevelt as a “conservative,” emphasizing his distaste for labor disputes and abhorrence of class

compromise within the party, in particular, “closed Roosevelt’s mind to caution”¹⁷⁹ and increased his distaste for compromise with the Old Guard. While on the campaign trail in 1912 Roosevelt made clear his commitment to “pure democracy,” proclaiming in his “Confession of Faith” at the Progressive Party Convention in Chicago, Illinois: “The people themselves must be the ultimate makers of the their own constitution.”¹⁸⁰ In another stump speech, Roosevelt proposed to “go even further than the Progressive Platform,” floating the idea of a general recall “applied to *everybody*, including the President,” a remark which prompted a horrified *New York Times* to report, “Roosevelt tonight exceeded the speed limit in radicalism.”¹⁸¹

Even the mainstream political climate of the day suggests that, in the Progressive Era, constitutional reform was hardly the remote possibility it is today. Just as federal constitutional amendments mandating direct senatorial elections and extending women the vote originated in state practice, so, too, did reformers at the national level seek to take a page from the direct democratic practices of states like Oregon, Colorado, Wisconsin, and Iowa, whose constitutions had been revised to grant the sovereign people a greater role in lawmaking. Between 1895 and 1920, twenty-one states established the initiative and referendum, sixteen by constitutional amendment.¹⁸² At least five “I&R” proposals followed at the national level during this period, proposing, though constitutional amendment, varying thresholds for legislative initiatives and popular referenda. Proponents included Progressive champions Senators Bristow and La Follette, as well as the famed Socialist Representative from Michigan, Victor Berger.¹⁸³ Furthermore, between 1910 and 1919, no fewer than twenty proposals for amending Article V so as to lower the threshold for proposing constitutional amendments—“Gateway amendments,” or “meta-amendments,” as they were known—were submitted by Congressional legislators including the tireless La Follette, as well as Senators Robert L. Owen (D-OK), Albert B. Cummins (R-IA), and others.^{xvii,184}

conflict in general. (Milton Cooper, *Pivotal Decades*, esp. 36 and 47) I disagree. Although I do not have space to do justice to the argument here, I believe that Roosevelt’s later years in particular betrayed his increasing radicalism, and moreover, that his leadership style both as president and Progressive Party candidate reflected a total willingness to break with legal and political precedent in the service of programmatic ends, a much more uncompromising stance than Wilson ever showed.^{xvii} These proposals suggested setting lowered thresholds and streamlined mechanisms for proposing constitutional amendments. These included proposal by, variously, a majority of both houses, the vote of sixteen states, the vote of one-fourth of the states and a majority of the electorate, direct popular vote of varying thresholds, by ten percent of the voters of a majority of states, etc.

Of course, all of this is pure speculation. But insofar as the Progressive Party's electoral viability in 1912 was real, its champion an increasingly stalwart defender of constitutional change by public act, state practice converging upon an ideal of direct democracy, and Progressives in Congress increasingly attuned to the possibility of constitutional reform to achieve these ends, there are strong signs that Progressive formalism was not such a remote possibility, after all.

CONCLUSION

The latter-day president is a "Progressive" both in pedigree and in form. Today, the president is a highly scrutinized, charismatic, and articulate figure, fully cognizant of the necessity of carefully managing his "public connection" with the American people at large. He sits at the head of a vast administrative apparatus that, although unruly, still allows him great programmatic discretion, often under the guise of "nonpartisan" policymaking. The modern president has a larger mandate, both within the government and the nation as a whole, than that of his predecessors of centuries past. He is the figurehead of an economically and socially interventionist government, newly empowered to defend the common man from the vagrancies of life in a massive, post-industrial economy.

In large part, the resemblance between the modern and the Progressive presidencies is striking because, institutionally speaking, the Progressives' handiwork has had remarkable staying power. Besides a brief contraction during the anti-patronage crusades of Woodrow Wilson and the presidencies of the 1920s-era Republicans, the administrative bureaucracy expanded steadily throughout the twentieth century since the first Roosevelt presidency, and its growth continues to this day.^{xviii}

And from today's vantage point, the strong presidency has proven remarkably resilient. During the Progressive Era, the presidency became "the center of a new governmental theory," as Lowi argues, continuing to expand throughout the twentieth century in a piecemeal fashion through "a whole variety of analyses and writings...attempting to build some kind of consonance between the new, positive

^{xviii} It is a minor irony of the Wilson presidency that, having internalized the progressive notion of the presidential "popular mandate"—a concept inherited from the Jeffersonian, Jacksonian and now, Rooseveltian tradition—and decided that his own mandate, after the 1912 election, was too thin, Wilson declared his debt to the Democratic Party and doubled back on Progressive reforms like the expansion of the bureaucracy and halted the process of centralizing government control over industry.

state and American democratic values.”¹⁸⁵ Eventually, theory became customary practice and so became something akin to law. Likewise, Neustadt observes that the flexible constitutional order Wilson left behind has served to codify “the exceptional behavior of our earlier ‘strong’ Presidents” into statute.¹⁸⁶ He notes that whereas Theodore Roosevelt once assumed emergency powers in the crisis situation created by the great coal strike of 1902, today the Railway Labor Act and the Taft-Hartley Act obviate the need for executive discretion, making such interventions mandatory upon Presidents. While Wilson and FDR were flung into leading roles on the world stage in times of war, today multilateral alliances and security treaties prescribe that role, even in ‘peacetime.’

Here, I conclude by parsing the two strands of “Progressive constitutionalism,” the interpretivist, or pragmatist strand espoused by Wilson and Goodnow that became our dominant constitutional philosophy today, and the less acknowledged, formalist strand articulated by Franklin Pierce, Herbert Croly, and, in a later form, James Landis. I then assess the consequences of the Wilsonian doctrine on our constitutional development, and suggest that a new formalism might have provided a means of squaring Progressive institutional and constitutional development in such a way as to stave off our present-day “constitutional crisis.” My critiques of the Wilsonian constitutional legacy are three-fold. In attempting to reconcile major changes in the institutional landscape with a “living,” flexible Constitution—and thus, no concomitant reworking of the text—interpretivism firstly obscured the extent to which Progressive empowerment of the executive was intended as part of a holistic package of extra-constitutional social and moral changes, the bulk of which have simply been forgotten; secondly, it has yielded a legacy of “constitution-stretching,” under which textual checks have no practical meaning; and thirdly, it has forestalled a national conversation about the continued worth of our legal system, leaving us with major constitutional “blind spots,” including the legitimacy of the bureaucracy and the viability of direct democracy *sans* major civic and cultural reform.

1) The Eclipse of the Progressive Public

In *The Rhetorical Presidency*, Jeffrey Tulis suggests that the Wilsonian presidency is “buffeted by two constitutions,” the original 1787 Constitution and a second one whose view of executive leadership lies at odds with that of the original, laying a high “premium on active and continuous leadership of public opinion.”¹⁸⁷

Missing from this account, however, is the fact that the very *raison d'être* of Wilson's constitutional thought was to render the old order compatible with the new by reconciling administrative leadership with democracy!

In his 1887 study of administration, Wilson offered a vision of a healthy federalist system, one in which local and national governments—and coordinate branches too, we can presume— would “live with a like strength and an equally assured healthfulness, keeping each unquestionably its own master and yet making all interdependent and co-operative combining independence with mutual helpfulness.” Wilson, like Goodnow, argued for bureaucratic centralization in the name of greater *visibility* and *public accountability*. Likewise, thought Wilson, “immoral” and “destructive” executive interventions into legislative affairs were certain “in a country of free public opinion...to destroy both the fame and the power of the man who dares to practice them.”¹⁸⁸ In its profession of faith in popular checks to curtail executive power, this statement is vintage Progressive.

Herbert Croly believed even more fervently than did Wilson that a constitutional order could be sustained largely on the strength of popular checks. “Democracy must risk its success on the integrity of human nature,” Croly argued. “If among the citizens of a democratic state the intelligence should prove to be the enemy of the will, if individually and collectively they must purchase enlightenment at the expense of momentum, democracy is doomed to failure.”¹⁸⁹ Today, this seems like precious little on which to wager a regime. But we must remember that the public is today is not that envisioned by the Progressives.

The Progressives were acutely aware of the potential problems involved in calling for “Hamiltonian means” to satisfy “Jeffersonian ends,” but felt that safeguards against government intervention had to come from popular initiative, not textual provisions. Progressives felt that constitutions, no matter how ingeniously designed, were mere pieces of parchment without the proper civic “morale.” Neither politics nor economics nor society could function without the requisite “degree of good will and good feeling.”¹⁹⁰ For John Dewey, fostering this sense of community and the public good was essential. Like Pierce, Dewey believed that the Industrial Revolution had physically uprooted and relocated individuals, dispersed old communities, mechanized labor, wielded together great economic systems and introduced an element of self-regarding materialism, thus creating a fractured, atomistic and bewildered public. Only by creating a “Great Community” could the

nation make good on the ideal of democracy, which Dewey believed was “the idea of community life itself.”¹⁹¹

Believing that “the solution of public questions and the removal of evils rests directly upon the people,” Progressives deemed a “vigorous public sentiment” essential to the survival of democracy.¹⁹² Progressives sought to “elevate the moral and civic character of citizens,”¹⁹³ putting forward a national ideal of citizenship emphasizing the individual’s duty to distance himself from self-interest, party, and local ties in reflecting and acting upon ideas about the national public good.¹⁹⁴ Public spiritedness was to be placed among the highest virtues of the people, and greed, materialism and self-interest spurned. As Pierce uncompromisingly put it, “[t]he citizen who keeps aloof from public affairs should receive the condemnation of everyone.”¹⁹⁵ Correspondingly, Progressives called for a revolution in education to bring the strong public of their visions into being, enlisting the cooperation of universities, professional associations, and other powerful “parastate” institutions in their crusade to enlighten and empower the people.¹⁹⁶

Observes James Kloppenberg, “[P]rogressives insisted that substantive political change in a democracy is impossible without a profound cultural change; neither can proceed without the other.”¹⁹⁷ But although the Progressives managed to change institutional boundaries, their vision of direct democracy and community failed to change hearts and minds. It is easy to forget that the ideas of expanded administration, a larger-than-life president, and popular democracy they put forward were intended as an organic whole, predicated upon a particular transformation in national understanding. Progressive invocations of republican virtues and the “Great Community” were not just cosmetic changes. In order to make the institutional changes wrought in government meaningful, “we the people” had to become Deweyians. But instead, institutional buildup took place without a shift away from the old constitutionalism. Textually imposed checks and balances were weakened, but without an embrace of popular democracy, liberal reformers found insufficient reason to groom the people to become the presidential watchdogs that the Progressives envisioned to guard their new, powerful president. Over the course of the twentieth century, the major casualty of Progressive political thought seems to have been the people’s revolt against its constitutional master.

Skowronek's account of modern executive expansion under the unitary executive theory confirms that the growth of presidential power has proceeded apace, although stripped of its accompanying popular rationale. He writes:

The cutting edge of the new construction [of the unitary executive]...does not just scoop up the progressive legacy; it also marginalizes the extra-constitutional mechanisms that the progressives had relied upon to surround and regulate their presidency-centered system. Public opinion, pluralism, publicity, openness, empiricism, science, technical expertise, professionalism, administrative independence, freedom of information — all the operating norms and intermediary authorities on which the progressives pegged their faith in a “modern” presidency — are short-circuited by this appeal back to the formalities of the Constitution.¹⁹⁸

Progressive attempts at presidential empowerment in America were accompanied by campaigns to both revise the Constitution and provide extra-constitutional mechanisms so as to bolster the government's popular democratic credentials and render the executive more accountable to the people even as his administrative powers grew. Today, with the latter half of the equation missing, the consequences have been an executive buildup with weakened popular and, as we will see, textual constraints.

2) The Evisceration of Checks and Balances

Progressives may have thought of the constitution as a “cumbersome” sort of straightjacket, but today, our charter has grown so baggy as to permit most sorts of creative legal justification for presidential aggrandizement. Conservative defenders of unitary executive power today ground their handiwork in a the “formal” powers of the president, but, even absent major textual reforms, the resemblance between the classical theory of checks and balances and modern-day constitutionalism is ever more distant. Today, the contours of the executive branch loom so far outside of the constitutional blueprint into which they have been crammed that more than ever, calls for a “return to formalism” feel like the king's men's efforts to put Humpty Dumpty back together again.

Extolling constitutional flexibility as a virtue, Wilson argued in “The Study of Administration” for the possibility of squaring the new administrative apparatus with the existing system of law. Wilson believed that the rise of industrialism and mass democracy had made necessary the development of “a bureau of skilled, economical administration” to relieve an overtaxed, incompetent and corrupt legislature. What the American people needed, he thought, was a governmental unit that, machine-like, would operate efficiently and purposively in the name of public wellbeing. Wilson put

forward a three-stage scheme of the growth of the modern state, according to which nations transitioned from a time of absolute rulers and their subservient administrative systems to a second phase of popular constitutionalism, in which administration was neglected for “higher concerns”, and finally to a stage in which a sovereign people developed administration “under [the] new constitution[s] which [had] brought them into power.”¹⁹⁹

Wilson recognized the temptation to linger in the second stage, eternally “tinkering” constitutions in the pursuit of perfection. Nevertheless, he admonished, “administrative study and creation are imperatively necessary” to governmental well-being, and the time, Wilson thought, was ripe for America to develop a national administration. “We have only to filter it through our constitutions, only to put it over a slow fire of criticism and distil away its foreign gases.” There would be no need for constitutional change to accommodate this development, provided administrative architects kept sight of the distinction between “constitutional and administrative questions,” as Wilson put it, that is, “between those governmental adjustments which are essential to constitutional principle and those which are merely instrumental to the possibly changing purposes of a wisely adapting convenience.”

The flaws of Wilson’s vision are evident, however. Wilson himself never provides an answer for what “essential” constitutional principles might consist of, nor does he allot responsibility for the decision over which legal principles may or may not be scrapped in the interest of “wisely adapting convenience.” Similarly, in *Politics and Administration*, Frank Goodnow implies that because the separation of powers was being hollowed out in practice, it could be abandoned in theory. On Goodnow’s flexible constitutionalism, the major institutional changes occurring in the absence of constitutional reform and the seeming acquiescence of courts to these changes in the name of efficiency, entailed the need to grant the validity of these changes. Although popular opinion can and should hold weight in jurisprudential considerations, here Wilson and Goodnow imply that because a practice is common, it is also constitutional. The point both failed to consider is that if custom and practice could serve to hollow out the law from within, the sensible thing to do, from a legal point of view, was to bring the law into agreement with practice.

In 1908, Wilson wrote, “The Constitution contains no theories. It is as practical a document as Magna Carta.”²⁰⁰ This reading of the founding charter is simply too flexible and convenient to be a credible interpretation of the intentions of

the Founding Fathers. Moreover, it contradicts his earlier claim that reformers should preserve certain “essential constitutional principles” contained within the document. If the Constitution was, as Wilson believed, “neither a barrier to the larger forces of political change nor a particularly effective safeguard against leaders in the inevitable process of adaptation,”²⁰¹ how then could it have been consistent with the principle of checks and balances that motivated it? Although Wilson sought to make bureaucratic buildup safe for the Constitution by providing that the former could be achieved extraconstitutionally, the eventual result has been the degradation of constitutional standards holding government powers in place.

Today, the “conservative insurgency” of the Nixon, Reagan and, most notoriously, Bush presidencies, has left the incumbent order in place, while building a legal façade of constitutional formalism upon the vast bureaucratic machinery and “personal presidency”²⁰² that Progressive liberals helped create. The overall effect, argues Skowronek, has been to authorize the President to capitalize on all that the historical development of executive power has created, in particular the expansion of administrative and legislative capabilities under Teddy Roosevelt, the New Deal and the Cold War, while leaving to other branches the Constitution’s most rudimentary and unwieldy instruments for checking executive power: term limits and quadrennial elections, congressional control of the purse and Senate review of appointments, judicial intervention and the power of impeachment,²⁰³ a remedy so extreme and little used that Henry Jones Ford was prompted to call it a “rusted blunderbuss, that will probably never be taken in hand again.”²⁰⁴ Pointing out both the irony and the danger of the situation, Skowronek cautions, “Once a presidency-centered system of government built on the rejection of formalism and originalism is recast as the very expression of formalism and originalism...there is little left that appears reliable or settled.”²⁰⁵

The present-day “return” to the Constitution is different from the old formalism, too. Historically, legal conservatism has been a bulwark against government expansionism. Starting with the Progressives, however, a whole array of institutions designed to meet the challenges of a pluralist, post-industrial capitalist society were crammed into a laissez-faire, pre-industrial Constitution that could never have foreseen them. In the hands of its twentieth-century stewards, the institutional machinery at the disposal of the executive so far outgrew its constitutional confines that today, to stuff it back into a frame of legality requires some truly heroic

interpretations of constitutional strictures. Today more often than not, the authority of the highest law is often invoked retroactively to justify actions already taken on grounds of “necessity” (or as Wilson might have put it, “convenience”). The text of the law has been stretched to grant the executive a host of legislative, administrative and interpretive powers in all sorts of contingent emergency situations; indeed, this sort of “formalism,” it should be clear, does not have an ancestor in the legalism of a William Howard Taft, but rather in the textual flexibility of a Wilson. And, as Pierce predicted, it has resulted in the contravention of the force of law. Even worse, although the force of checks and balances seems to have reached its lowest ebb, in the absence of an alternative, we cling to it still.

3) A Constitutional Conversation Forestalled

Finally, I argue that by integrating Progressivism’s new landscape into the old constitutional order, the “living constitutionalists” succeeded in forestalling a national conversation about the viability of the constitutional system. Although institutional accretion has continued apace in the last century, we refuse to confront the challenges it poses in constitutional terms.

For example, the conservative legal scholar Richard Epstein has referred to the current administrative state as an embarrassment to the rule of law, criticizing the dereliction of the principles of freedom of association and contract it promotes, as well as the level of legal deference afforded its pronouncements. Rule by bureaucratic discretion, he argues, does not square well with the rule of law, which has always aimed to ground the authority of the state on democratic foundations.²⁰⁶

There is some evidence that, even in 1887, Wilson foresaw a head-on collision between the rule of law and administration and sought to avoid it: “The weightier debates of constitutional principle are even yet by no means concluded; but they are no longer of more immediate practical moment than questions of administration.” Here, the young Wilson was in a practical mood, calling for reformers to get their hands dirty and not waste time puzzling over legal details. And since then, there have been few serious attempts at pondering the constitutional status of the Progressives’ institutional legacy.

In a real sense, then, Wilsonian constitutionalism quashed a national conversation on the continued viability of our constitutional traditions. And as regards the bureaucracy, it seems that Lippmann’s rallying call for the mastery of democracy

through science and expertise has proven a non-starter. Today, the bureaucracy “drifts” without a mission statement, nor a clear place in the constitutional order. Ironically, even this apparatus of government could not be legitimated by appeals to professionalism alone; a conversation about principles of government still awaits us.

Within the world pantheon of written democratic constitutions, our Constitution remains the oldest and the shortest. Although we celebrate its pithiness and resistance to change almost unquestioningly, over a hundred years ago, this attitude was seen by Progressives as a mere failure of the imagination. Indeed, looking back at the rich political discourse of our Progressive forbearers, it is hard to avoid the feeling that something has been lost. Progressives argued that the best way to save constitutionalism was to change the Constitution we had. Some, like Wilson, felt that a change in how we *read* our Constitution was sufficient; others believed that the text itself had to be modified. Nonetheless, the constitutional problems spotted by Progressive reformers over a century ago have not been adequately resolved, and we no longer even ponder the worth of many of the solutions they proposed.

As an age of reform, the Progressive Era was among the most fruitful this nation ever witnessed. As I have argued, however, Progressive success in implementing institutional and legal change far outpaced theoretical changes on the ground regarding the constitutional order and the nature of the democratic public. It is possible that the theoretical “revolution” against the Constitution and the “eclipsed” public, by definition more radical and demanding than piecemeal changes to laws and political bodies, never stood much of a chance as a viable plan of action. I do not deny this asymmetry between levels of reform, nor do I want to question the ultimate feasibility of this transformative program. I have simply pointed out that the adoption of piecemeal institutional reforms to the executive branch stripped of their guiding theoretical rationale has had complex effects on the ways we think about and attempt to legitimate the office of the presidency today.

In the early years of the 20th century, critics of the Progressive movement wondered with alarm “how far the centralization of power in the national executive [would] go.”²⁰⁷ They feared, in particular, that Progressive expansion of the presidency was such as to render null and void the textual limitations placed upon

it.^{xix} In an important sense they were right. The president was still held to the same textual standards, but now the nation was dealing with neither the same president nor, substantively, the same textual standards. The Progressives had managed to change much of the substance of the old order, but not the form. Indeed, history has shown, paradoxically, that the Progressives' failure to ground substantive institutional change in more formal ways has led to the increasing degradation of those formal provisions they once protected.

Today, the Progressives' vision of an empowered executive has become a reality. Both liberals and conservatives seemingly accept the premise that the president must be empowered to be "as big a man as he can," without bothering to mull over whether, and how, we can still impose necessary constitutional limits upon the office. It has been almost a century since the constitutional revisions and popular checks the Progressives conjured to hold the president accountable were abandoned, but more than ever, it falls upon today's liberals and conservatives alike to recognize that legal constraints on the executive, as they stand, are insufficient without a return to the Progressives' plan of popular checks. It seems that we have two possible courses for "taming the prince": we can either return to the strict legal formalism of William H. Taft or to the popular democracy of John Dewey—although indeed, it is hard to see which is least implausible. Getting caught in the middle, however, as Wilson did and as we have done today, only leads to a realization of the worst of all worlds.

^{xix} Or perhaps, following Harvey Mansfield and Benjamin Kleinerman, we must conclude that Constitutional, legal stricture is never enough to "cabin" the power of the president. Mansfield observes that each president defines the office for him- or herself and thus, "the Constitution does not determine the behavior of those who govern under it, and is not intended to do so." (*Taming the Prince* 1989, 278)

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- ⁵⁸ Vile, M.C. 2010. *Constitutionalism and the Separation of Powers*. Liberty Fund: Indianapolis. 291.
- ⁵⁹ For scholarship on Progressivism as a "divided faith," see Hurtgen 2002, or Peter G. Filene, "An Obituary for 'The Progressive Movement,'" *American Quarterly* 22 (1970): 20-34. But see also Rodgers, Daniel T., "In Search of Progressivism," *Reviews in American History* 10 (1982): 113-32, urging a "pluralistic reading" of Progressive thought.
- ⁶⁰ Tarbell, Ida. 1902. "On the Methods of the Standard Oil Company." Excerpted in Hofstadter, *The Progressive Movement*, 20-27, at 20.
- ⁶¹ In the famous formulation of Franklin Delano Roosevelt's Brownlow Commission, in 1937.
- ⁶² See, for example, Harold Laski, *The American Presidency*, Richard Neustadt. 1991 (1960). *Presidential Power and the Modern Presidents*. Free Press: New York. 4, and Pfiffner, James P. (ed). 1999. *The Managerial Presidency*, 2nd ed. Texas A&M University: College Station.
- ⁶³ Some examples include Harold Laski's *The American Presidency*, Richard Neustadt's *Presidential Power and the Modern Presidents*, Theodore Lowi's *The Personal President: Power Invested, Promise Unfulfilled*, Jeffrey Tulis' *The Rhetorical Presidency*, Ronald Pestritto's *Woodrow Wilson and the Roots of Modern Liberalism*, Richard Epstein's *How Progressives Rewrote the Constitution*, and Benjamin Kleinerman's *The Discretionary President*.
- ⁶⁴ Tulis, Jeffrey. 1985. *The Rhetorical Presidency*, Princeton University: Princeton, 203.
- ⁶⁵ Wilson, *Constitutional Government*, 175-6.
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- ⁶⁷ Wilson, Woodrow. 1887. "The Study of Administration." *Political Science Quarterly*, Vol. 2, No. 2. 197-222. Accessed: <http://teachingamericanhistory.org/library/index.asp?document=465>
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- ⁶⁹ Jensen, MJ, Danziger, JN, and Venkatesh, A. 2004 “Electronic Government, Electronic Democracy, and Modalities of Membership in the Local Political Community,” Conference Papers – Western Political Science Association, 1-39.
- ⁷⁰ Goodnow, Frank J. 1900. *Politics and Administration*. MacMillan: New York, 9 and 18.
- ⁷¹ Goodnow, *Politics and Administration*, 38.
- ⁷² *Ibid*, 45.
- ⁷³ *Ibid*, 203.
- ⁷⁴ Wilson, “The Study of Administration.”
- ⁷⁵ *Ibid* (emphasis in the original)
- ⁷⁶ *Ibid*.
- ⁷⁷ Wilson, *Constitutional Government*, 188-89.
- ⁷⁸ *Ibid*, 182.
- ⁷⁹ Goodnow, *Politics and Administration*, 53.
- ⁸⁰ See Croly, *Progressive Democracy*, 285-7.
- ⁸¹ *Ibid*, 291.
- ⁸² “Wisconsin Constitution - History of Constitutional Amendments.” Marquette University. 2005-2006 Blue Book. Accessed: http://law.marquette.edu/s3/site/images/library/wis_con_amend.pdf
- ⁸³ Croly, *Progressive Democracy*, 287.
- ⁸⁴ Eisenach, Eldon. 1994. *The Lost Promise of Progressivism*. University of Kansas: Lawrence. 24.
- ⁸⁵ Skowronek, Stephen. 2006. “The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition.” *American Political Science Review*, Vol. 100, No. 3. 385-401, at 400.
- ⁸⁶ See, generally, Skowronek, Stephen. 1982. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. Cambridge: New York, 165.
- ⁸⁷ Skowronek, *Building a New American State*, 165.
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- ⁹⁰ Vile, *Constitutionalism and the Separation of Powers*, 290.
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- ⁹² Roosevelt, “The New Nationalism,” in Kennedy, *Progressivism*, 51.
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- ¹⁰⁷ Taft, quoted in *ibid*, 56.
- ¹⁰⁸ Chase, *1912*, 99, and Blum, *The Republican Roosevelt*, 146.
- ¹⁰⁹ Skowronek, *Building a New American State*, 173.
- ¹¹⁰ Skowronek, “The Conservative Insurgency,” 2094.
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- ¹¹² Skowronek, *Building a New American State*, 187-193.
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- ¹¹⁴ See, for example, Peter Strauss, 1984. "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," 84 *Columbia Law Review* 573, or Richard Epstein, "Why the Modern Administrative State."
- ¹¹⁵ Chase, 1912, 33-4.
- ¹¹⁶ Archibald Butt, *Taft and Roosevelt*, June 7, 1911, 672-673. Quoted in Chase 2004, 107.
- ¹¹⁷ Eisenach, *The Lost Promise*, 239.
- ¹¹⁸ Milkis, *Theodore Roosevelt*, xv.
- ¹¹⁹ Arnold, *Remaking the Presidency*, 168.
- ¹²⁰ *Ibid.*, 243-4.
- ¹²¹ Link, in Kennedy, *Progressivism*, 150.
- ¹²² See, for example, Arthur S. Link. 1970. "Woodrow Wilson: The American as Southerner." *The Journal of Southern History*, Vol. 36, No. 1, or John Milton Cooper. 2009. *Woodrow Wilson: A Biography*. Random House: New York, or Stephen Skowronek, "The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition."
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- ¹²⁵ Arnold, *Remaking the Presidency*, 169.
- ¹²⁶ Ceaser, *Presidential Selection*, 170.
- ¹²⁷ Skowronek, *Building a New American State*, 194.
- ¹²⁸ *Ibid.*, 195.
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- ¹³⁰ Milkis, *Theodore Roosevelt*, 3.
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- ¹³² Skowronek, "The Conservative Insurgency," 2085.
- ¹³³ This formulation was famously adopted by Richard Neustadt in his 1960 classic *Presidential Power*.
- ¹³⁴ Cooley and Giddings quoted in Eisenach, *The Social and Political Thought of American Progressives*, 75.
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- ¹³⁶ See generally Lippmann, *Public Opinion*.
- ¹³⁷ Skowronek, *Building a New American State*, 194.
- ¹³⁸ Quoted in Milkis, *Theodore Roosevelt*, 226.
- ¹³⁹ *Ibid.*, 227.
- ¹⁴⁰ Ford, *The Rise and Growth of American Politics*, 334-5.
- ¹⁴¹ *Ibid.*, 347.
- ¹⁴² *Ibid.*, 348.
- ¹⁴³ *Ibid.*, 356.
- ¹⁴⁴ *Ibid.*, 371.
- ¹⁴⁵ *Ibid.*, 363.
- ¹⁴⁶ *Ibid.*, 372.
- ¹⁴⁷ Excerpted from Senate Report No. 837, 46th Congress, 3rd Session, February 4, 1881. Quoted in Ford, *The Rise and Growth of American Politics*, 388.
- ¹⁴⁸ Goodnow 1900, 3.
- ¹⁴⁹ *Ibid.*, 4.
- ¹⁵⁰ *Ibid.*, 45-46.
- ¹⁵¹ *Ibid.*, 214.
- ¹⁵² *Ibid.*, 221.
- ¹⁵³ Wilson, *Constitutional Government*, 157.
- ¹⁵⁴ Wilson, Woodrow. 1898 (1885). *Congressional Government: A Study in American Politics*. Houghton, Mifflin and Co: Boston, 186-7.
- ¹⁵⁵ For more on Wilson as pragmatist and compromiser, see Walter Lippmann's *Drift and Mastery*, Peri Arnold's *Remaking the Presidency*, and Eldon Eisenach's *The Lost Promise of Progressivism*.
- ¹⁵⁶ Wilson, *Constitutional Government*, 69.
- ¹⁵⁷ This, indeed, is precisely the claim made by presidential unitarians today.
- ¹⁵⁸ Croly, *Progressive Democracy*, 234.
- ¹⁵⁹ *Ibid.*, 229.

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- ¹⁶¹ Eisenach, *The Social and Political Thought of American Progressives*, 123
- ¹⁶² Stettner, Edward A. 1993. *Shaping Modern Liberalism: Herbert Croly and Progressive Thought*. University Press of Kansas: Lawrence, KS, 5.
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- ¹⁶⁴ Ibid, 287.
- ¹⁶⁵ Pierce, *Federal Usurpation*, ix (italics mine).
- ¹⁶⁶ Quoted in *ibid*, ix.
- ¹⁶⁷ Ibid, xi.
- ¹⁶⁸ Ibid, 171 and 177.
- ¹⁶⁹ Ibid, 175 and 177.
- ¹⁷⁰ Ibid, 173.
- ¹⁷¹ Ibid, 173-4.
- ¹⁷² Ibid, 175.
- ¹⁷³ Ibid, 176.
- ¹⁷⁴ Buenker, John D. 1981. "The Ratification of the Federal Income Tax Amendment," *Cato Journal*, Vol. 1, No. 1, 183-223; and Taft, William Howard. "Special Message to Congress on June 12, 1909." American Presidency Project Online. Accessed at: <http://www.presidency.ucsb.edu/ws/print.php?pid=68517>
- ¹⁷⁵ Sanders, Elizabeth, "Chapter 11: Presidents and Social Movements: A Logic and Preliminary Results," in Skowronek, Stephen, and Matthew Glassman, *Formative Acts: American Politics in the Making*. University of Pennsylvania Press: Philadelphia, PA, 234.
- ¹⁷⁶ Eisenach, *The Lost Promise*, 124-128. For a classification of so-called "anti-Progressives" as defenders of representative institutions, constitutionalism, a strongly independent judiciary, and the primacy of political parties—into which category Wilson the politician partly falls—see Sandy-Bailey, Lonc H. 2006. "Ideological dissent in the Progressive Era: Uncovering the challengers to direct democracy reforms," Electronic Doctoral Dissertations for UMass Amherst. Paper AAI3216962. Available at: <http://scholarworks.umass.edu/dissertations/AAI3216962>.
- ¹⁷⁷ Skowronek, "The Reassociation of Ideas and Purposes," 385.
- ¹⁷⁸ Wilson, *Constitutional Government*, 57.
- ¹⁷⁹ Blum, *The Republican Roosevelt*, 147.
- ¹⁸⁰ Milkis, *Theodore Roosevelt*, 217.
- ¹⁸¹ Ibid, 218-9.
- ¹⁸² "State-by-state List of Initiative and Referendum Provisions." 2011. Initiative and Referendum Institute at the University of Southern California. Available at: http://www.iandrinstitute.org/statewide_i&r.htm.
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- ¹⁸⁶ Neustadt, *Presidential Power*, 7.
- ¹⁸⁷ Tulis, *The Rhetorical Presidency*, 18.
- ¹⁸⁸ Wilson, *Constitutional Government*, 71.
- ¹⁸⁹ Ibid, 27.
- ¹⁹⁰ Merriam, Charles E. 1920. *American Political Ideas: Studies in the Development of American Political Thought, 1865-1917*. Macmillan: New York, 288-289.
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- ¹⁹³ Sandel, Michael. 1997. *Democracy's Discontent*. Harvard University Press: Cambridge, 209.
- ¹⁹⁴ Eisenach, *The Lost Promise*, 5.
- ¹⁹⁵ Pierce, *Federal Usurpation*, 171.
- ¹⁹⁶ Eisenach, *The Lost Promise*, 7 and 18.
- ¹⁹⁷ Kloppenberg, *Uncertain Victory*, 349.
- ¹⁹⁸ Skowronek, "The Conservative Insurgency," 2095.
- ¹⁹⁹ Wilson, "The Study of Administration."
- ²⁰⁰ Wilson, *Constitutional Government*, 177.

²⁰¹ Bimes, Terri and Stephen Skowronek. 1996. "Woodrow Wilson's Critique of Popular Leadership," in *Polity*, xxix, 1. 27-63, at 59.

²⁰² See generally Lowi, *The Personal President*.

²⁰³ Skowronek, "The Conservative Insurgency," 2077.

²⁰⁴ Quoted in Rossiter, Clinton. 1960. *The American Presidency*. Harcourt Brace & Co.: New York. 52.

²⁰⁵ Skowronek, "The Conservative Insurgency," 2102.

²⁰⁶ Epstein, "Why the Modern Administrative State," 495.

²⁰⁷ Charles Eliot, quoted in Milkis, *Theodore Roosevelt*, 237-238.