THE OXFORD HANDBOOK OF

THE U.S. CONSTITUTION

Edited by

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and

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CHAPTER 4

THE GILDED AGE THROUGH THE PROGRESSIVE ERA

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THE era from the end of Reconstruction (1877) to the First World War was a seminal period in which the United States grappled with fundamental questions about the relationship of the country's eighteenth-century Constitution to a rapidly and radically transforming country. A shift was underway from a rural, agrarian "proprietary-competitive" order in which individuals worked mostly for themselves or small businesses to an industrialized, interconnected, and bureaucratized "corporate-administrative" order in which power was large-scale, remote, and depersonalized, exercised through managerial imperatives as determined by new organizational sciences.[1] Breakneck technological change; territorial expansion; rapid industrialization; revolutions in production, communications, and transportation; the rise of great fortunes; urbanization; a new class of dependent wage laborers; mass immigration from new regions; the emergence of a comfortable middle-class and a mass consumer society generated a cascade a novel dilemmas, tensions, problems—and newly proposed solutions.

While antebellum America was roiled by intense contests between competing constitutional visions, most arguments were over interpretations of an assumedly fixed framework. After the Civil War, the debate was increasingly about whether that initial framework still existed or had any contemporary relevance. Was the old order still in place, or had the Union victory, in effect, inaugurated a regime change, a constitutional revolution—"a new birth of freedom"?[2]

[1] Sklar, M, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (1988); Chandler, A, *The Visible Hand: The Managerial Revolution in American Business* (1977); McCraw, T, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (1986).

[2] Ackerman argues that the Civil War inaugurated a new constitutional regime. Ackerman, B, *We the People: Foundations* (1991) Ackerman, *We the People: Transformations* (1998). Most (conservative) originalists insist, both historically and normatively, on foundational continuities from the eighteenth-century Founding to the present. But some Straussians such as Jaffa also hold the Civil War to have entailed a renewed national commitment to the natural rights principles of the Declaration of Independence. Jaffa, H, *Crisis of the House Divided* (1959).

Three "Civil War Amendments" were adopted, the Thirteenth (1865) outlawing slavery or involuntary servitude; the Fourteenth (1868) providing for birthright citizenship, barring state infringements of fundamental rights (rights of persons to due process, the equal protection of the law, and the privileges and immunities of citizens of the United States), and seeking to structure postwar politics to ensure the hegemony of the Constitution-saving Republican Party; and the Fifteenth prohibiting the denial of the right to vote on account of race (1870). The Republican Party, driven by a powerful political and constitutional vision, dominated the postbellum political landscape. The Republican consolidation and control of this party-state was near total at the outset.[3] Over time, however, that hegemony was increasingly contested. The post-Reconstruction political parties became more ideologically pluralistic, and one sector of the Democrats, armed with their own countervailing constitutional vision, re-established one-party "home rule" in the South (and saw successes elsewhere as well, even nationally).[4] The restive dispossessed launched a series of outsider social movements (Granger, Populist, Labor, Progressive, and First Wave Feminist) and third-party bids (Greenback, Populist (People's), Progressive, Socialist), rattling the polity and challenging the parties.[5] As a consequence of the Republican domination of the White House and the Senate, the federal courts (including the Supreme Court) remained under near total Republican control. Their judges were increasingly asked to pass on the constitutionality of laws passed (or actions taken) by either the "redeemed" Southern states or at the behest of the insurgent social movements and, subsequently, of a new set of institutionalizing advocacy, interest, and professional groups (whether in the states or, increasingly, at the national level as they began to reshape the commitments of the national parties).[6] These movements and groups ultimately succeeded in amending the Constitution itself by securing the "Progressive Amendments," the Sixteenth (1913) giving Congress the power to enact an income tax without apportionment among the states, the Seventeenth (1913) providing for the direct election of U.S. senators, and the Eighteenth (1919) outlawing the sale, manufacture, and transportation of intoxicating liquors.[7]

[3] Bensel describes the ways the Republicans used this dominance to coordinate and promote economic development in an otherwise inhibiting constitutional/institutional environment. Bensel, R, *The Political Economy of American Industrialization, 1877-1900* (2000).

[4] See Foner, E, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988); Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (1970) (leading account of the Republican Party's formative ideology). See Mickey, R, *Paths out of Dixie: The Democratization of Authoritarian Enclaves in America's Deep South, 1944-1972* (2015) (conceptualizing these regions from 1890 on as peripheral enclaves within a national federal constitutional system requiring democratization and constitutionalization by the nation's core).

[5] On, e.g., the political and constitutional vision of the Populists, see Sanders, M, *The Roots of Reform: Farmers, Workers, and the State, 1877-1917* (1999) (emphasizing the rule-based, anti-bureaucratic nature of the Populist left as a distinctive, influential framework); Postel, C, *The Populist Vision* (2009) (arguing that, far from being backward-looking and nostalgic, the Populists offered a modern alternative vision for the United States); Magliocca, G, *The Tragedy of William Jennings Bryan: Constitutional Law and the Politics of Backlash* (2011).

[6] Clemens, E, *The People's Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890-1925* (1997); Tichenor, D and Harris, R, 'Organized Interests and American Political Development' (Winter 2002-2003) 4 *Political Science Quarterly* 587–612.

[7] Amar, A, *America's Constitution: A Biography* (2005); Kyvig, D, *Explicit and Authentic Acts: Amending the U.S. Constitution 1776-1995* (1996).

I. Reorienting Constitutional Government

1. From Neutral to Purposive Government

Traditional accounts of the prior period hold that it was an era of minimal government in which the autonomous individual reigned supreme. Outside of a few select purposes (as enumerated in Article I, Section 8), the role of the federal government was sharply limited both constitutionally and in practice. States and localities, to be sure, were understood to hold all the residual police powers to legislate and regulate to advance the public health, safety, and morals. But these too governed lightly. Government was conceived of not as an aspiring, purposive, policymaking instrument, but as a Lockean neutral arbiter whose chief function was to guarantee rights (chiefly those of property) and settle disputes between individuals concerning them.[8]

If this (disputed) characterization of the traditional order is accurate, then both the thinking about and the practice of government in the United States underwent a revolution in the Gilded Age through the Progressive Era. It was now apparent that interdependence and inter-connectedness, and not the atomized, autonomous individual, was the foundational social fact,[9] and that the power relationship between employers—now large national corporations—and their employees, now wage laborers, had changed. Thinkers such as the sociologist Lester Ward, condemning "this baseless prejudice" against government that insists "[t]his vast theater of woe is regarded as wholly outside [its] jurisdiction," began to argue that it was imperative that government move actively and purposively to solve collective social problems and advance the common good.[10] In *The Promise of American Life* (1909), the Progressive journalist Herbert Croly challenged the self-understandings of Americans as inhabiting a Jeffersonian idyll comprised of free and equal individuals with a harmony of individual interests. If this had once been true, in an increasingly stratified, hierarchical, class-based society premised on new forms of power, it was true no more. Croly looked hopefully to a waxing understanding of an ideal of "social justice . . . which must be consciously willed by society and efficiently realized." Under new conditions, Hamiltonian means were needed to preserve Jeffersonian ends.[11] The theory of government power as sharply limited by the Constitution's structural checks and balances (what Madison, in Federalist 51, had called the "compound republic") and by an emergent (property) rights consciousness, of government as largely passive, and, on principle, neutral, had, in practice, allowed private power to triumph, in disregard of society's collective interests. It is possible, many Progressives said, that this had been the intention of the (conservative, property-holding, only warily democratic) Founders. Nevertheless, modern conditions sparked a reconsideration of life under this order.

[8] Hartz, L, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (1955). But see Smith, R, 'Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America' (September 1993) 3 *American Political Science Review* 549–566.

[9] Haskell, T, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth Century Crisis of Authority* (1977).

[10] Ward, L, *The Psychic Factors of Civilization* (1893).

[11] Croly, H, *The Promise of American Life* (1909).

Progressivism, which was both a political movement (like Populism) and a major intellectual movement as well, became the chief vehicle for such thinking. It was fed by many streams, including: (1) civic republicanism (long-standing in the United States) de-emphasizing public-private distinctions and celebrating the bonds of community, the collective pursuit of the common good, and patriotic duty, sacrifice, and service; (2) evangelical Christianity (most explicit in Social Gospel proponents such as Walter Rauchenbusch) that looked to a newly empowered purposive state as a redemptive, morally aspirational vehicle for realizing the teachings of Christ on earth;[12] (3) the newly Darwinian biological sciences emphasizing organic growth and development; (4) Hegelian theory positing the state as the engine of and site for the realization of society's organic and philosophical ideals; and (5) homegrown philosophical pragmatism (in the work, for example, of Charles Sanders Pierce, William James, and John Dewey) positing a inextricable connection between thought (ideas) and efforts to solve concrete, real-world problems. In all this, Eldon Eisenach has emphasized, Progressives told stories that appealed to the "moral energies of Americans."

2. From Republic to a "New Democracy"

While Progressivism was a diverse movement, rich in tensions, contradictions, and synergies, recent scholarship has emphasized the vigorous commitment of many Progressives to forging a "new democracy" comprised of an active, engaged citizenry ranking duty over rights and the common good over private interest.[13] They hoped the age's interdependence would give birth to a dawning social consciousness, tutored and elevated by cooperative and collaborative forms of education grounded not in rote learning of foundational principles but in collective endeavors to understand society and solve its problems. This would truly be an education for democratic citizenship, transforming the "Great Society" into the "Great Community."[14]

Whereas (as many conservatives emphasize)[15] the nation's founders, in a reflection of their concern about the shortcomings and dangers of democracy, deliberately insisted they were creating not a democracy but a "republic," key Progressives campaigned for a robust democratization of the American political order.[16] The nation's path, they warned, was now being set by industrial titans and corporate interests of previously unimagined wealth and influence who had effectively bought politicians and turned them to their own personal and

[12] See Eisenach, E, *The Lost Promise of Progressivism* (1994); Eisenach, *The Next Religious Establishment: National Identity and Political Theology in Post-Protestant America* (2000); Vorenberg, M, 'Bringing the Constitution Back In: Amendment, Innovation, and Popular Democracy during the Civil War Era' in Jacobs, M, Novak, W and Zelizer, J (eds), *The Democratic Experiment: New Directions in American Political History* (2003); Hartog, H, 'The Constitutionalization of Aspiration and "The Rights That Belong to Us All,"' (December 1987) 74 *Journal of American History* 1013–1034.

[13] See Johnston, R, 'Re-democratizing the Progressive Era' (January 2002) 1 *Journal of the Gilded Age and Progressive Era* 68–92.

[14] Dewey, J, *The Public and Its Problems* (1927); Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (1916).

[15] See, e.g., Diamond, M, 'The Declaration and the Constitution: Liberty, Democracy, and the Founders' (Fall 1975) 41 *The Public Interest* 39–55; Diamond, 'Conservatives, Liberals, and the Constitution' (Fall 1965) 1 *The Public Interest* 96–109.

[16] See, e.g., Croly, H, *Progressive Democracy* (1914); see also Milkis, S, *Theodore Roosevelt, The Progressive Party, and the Transformation of American Democracy* (2009).

corporate purposes (in ways that, at the time, were still legal). Reformers, soon reinforced by "muckraking" journalistic exposes and lurid realist novels, condemned plutocracy and "the money power," and pushed for change.

At the top of their list of targets were political parties—sandboxes of patronage, spoils, self-seeking, special interests, horse-trading, and deal-making (if not outright bribery), with some calling for their banishment from politics. More commonly, critics focused on reforming or purifying them. The Australian (secret) ballot and literacy tests for voting were adopted, and direct primaries established. The new League of Women Voters promoted a system of informed, non-coerced, candidate and issue-centered voting.[17] Progressives fought to remove key policymaking responsibilities from partisan control, either through instrumentalities of direct democracy (such as initiative and referendum) or in the lap of (ostensibly) dispassionate, public-spirited, and expert civil servants. "Public opinion" itself was newly valued as vehicle for responsiveness and accountability. Candidates for president, once considered the creatures of parties, fashioned themselves stewards of the collective national interest, appealing directly to the people in issue-oriented, candidate-focused national campaigns. Some characterize these changes as so fundamental as to have inaugurated a new, modern constitutional order (with its own set of failings and problems).[18]

3. New Policies, the New State, and the "Living" Constitution

The era's industrial capitalist takeoff generated vast, often ostentatiously displayed, fortunes in the hands of relatively few, which many believed ill-gotten and pernicious in their social, political, and economic effects. The market power they exercised stifled competition and shafted consumers. The working conditions they instituted exploited and endangered the lives and health of workers. The political power they wielded was creating an incipient plutocracy. Reform was pursued aggressively on all three fronts. Conditions once considered irremediable features of the natural order—as destiny, fate, or God's will—were newly imagined as subject to human control. Misfortunes, such as poverty, if not accounted as simple bad luck, had once been traced to individual (moral) failings. The new social sciences, however, were now mapping their social causes.[19] The dawning sense that risk and misfortune were subject to human management and manipulation foregrounded the concerns of community, social causation, and collective responsibility, and buoyed confidence in regulation—in social and public policy.[20]

Availing themselves of direct action, political organizing, and votes, radicals and reformers in this era fought sometimes for the overthrow of capitalism, but more commonly for

[17] Keyssar, A, *The Right to Vote: The Contested History of Democracy in the United States* (2009).

[18] See Milkis, S and Mileur, J (eds), *Progressivism and the New Democracy* (1999).

[19] Ross, D, *The Origins of American Social Science* (1991). See Willrich, M, *City of Courts: Socializing Justice in Progressive Era Chicago* (2003).

[20] See Zelizer, V, *Morals and Markets: The Development of Life Insurance in the United States* (1979); Witt, J, *Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (2006); Levy, J, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (2012); Lowi, T, 'The Welfare State: Ethical Foundations and Constitutional Remedies' (1986) 101 *Political Science Quarterly* 197–220; McCraw, n 1 above; Benedict, M, 'Victorian Morals and Civil Liberty in the

workplace health and safety regulations, bans on child labor, compensation for workplace injuries, reasonable work hours, a living wage, and rights to unionize. Women sought workplace protective legislation and aid to mothers and children. Federal income and estate taxes, the first struck down as unconstitutional in *Pollack v. Farmers' Loan & Trust*, 157 U.S. 429 (1895) (subsequently reversed by the Sixteenth Amendment (1913)) targeted economic inequality. State legislatures and Congress responded by passing unprecedented amounts of substantively innovative reform legislation.[21] Increasingly dependent on (monopoly) railroads for shipping and storage, and on distant creditors and suppliers of tools, equipment, and household goods, farmers and small businessmen seeking to break the stranglehold of concentrated market power looked to government to bar price discrimination between large and small shippers, break up monopolies, and regulate rates. The Sherman Antitrust Act (1890) prohibited all combinations "in restraint of trade" (generating significant litigation over whether that language was to be interpreted literally or under a more forgiving "reasonableness" standard, and whether it should be held to apply equally to labor unions, and their strikes and boycotts).[22] The Hepburn and Elkins Acts regulated the railroads.[23]

The emerging reform agenda abraded against preexisting constitutional strictures and understandings, sparking heated disputes over the Constitution's relevance to modern America. In demanding measures such as the nationalization of the railroads, a graduated income tax, and term limits, Populists invoked the principles of liberty and "popular sovereignty" of the Declaration of Independence, insisting both that the power to regulate corporations followed ineluctably from their (legal) creation by the people themselves and that the power to regulate them in the public interest was plenary, perpetual, and inalienable—a concomitant of sovereignty. In testimony before legislatures and in briefs submitted to courts, Progressives cited social scientific studies to justify the era's pioneering legislation within constitutional law's prevailing doctrinal framework as reasonably calculated to achieve a legitimate public purpose.

In departing from the more common American practice of venerating the Founding and the Constitution and claiming its mantle while leveling charges of corruption and treachery against one's opponents, some leading Populists, socialists, and Progressives, however, inveiged loudly against Founder veneration and constitutional piety.[24] While the charge that the Constitution was being read in ways that benefitted a wealthy elite has a long history in the United States, Charles A. Beard's *An Economic Interpretation of the Constitution*

Nineteenth Century United States' in Nieman, D (ed), *The Constitution, Law, and American Life: Critical Aspects of the Nineteenth Century Experience* (1992).

[21] On the birth of the "legislative," "statutory," or "policy" state, see Orren, K, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (1992); Novak, W, 'Making the Modern American Legislative State' and Mayhew, D, 'Lawmaking as a Cognitive Enterprise' in Jenkins, J and Patashnik, E (eds), *Living Legislation: Durability, Change, and the Politics of American Lawmaking* (2012).

[22] Key antitrust decisions by the Supreme Court broadened understandings of Congress's commerce powers and breathed life into the Sherman Act. But, acting within the dual federalist framework, the Court began to hold these laws to be efforts to regulate the conditions of (local) manufacture. At the same time, in a pincer movement, the Court provocatively read its restraint-of-trade provisions to apply to labor union conduct. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

[23] See Berk, G, *Alternative Tracks: The Constitution of American Industrial Order, 1865-1917* (1997); Skowronek, S, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982).

[24] See, e.g., Dewey, *Public and Its Problems*, n 14 above.

of the United States (1913) blamed not the misreadings and corruptions of contemporaries but the Founders themselves, who, he argued, had deliberately designed the Constitution to protect the material interests, not of average Americans, but of elites like themselves. Appealing to the principle of democracy, best-selling jeremiads by journalist-scholars such as J. Allen Smith struck similar themes.[25] Croly scorned the "monarchy of the Constitution." Beard later critically dissected prevailing metaphors characterizing the Constitution as a "sheet anchor," an "ark of the covenant," or even "fundamental law," which he called "sheer animism"—"mere poetic images that correspond to no reality at all."[26] Croly and Beard condemned Constitution worship and the "cult of constitutional certitude" as a cynical evasion of political responsibility. Some Populists, socialists, and Progressives called for a constitutional convention to significantly revise the Constitution, or to write a new one from scratch.[27]

Beard, however, took a different tack. Many of the Constitution's "commands are unequivocal," he readily conceded. But, he continued, "around this core is a huge shadow in which the good and wise can wander indefinitely without ever coming to any agreement respecting the command made by the 'law.'" And, indeed, from the framing forward, he argued, these disputes had constituted the axis of American politics. Accordingly, rather than repudiating the Constitution, Beard, echoing a deeply rooted (Federalist) broad constructionism, united with other leading Progressives in newly describing the Constitution as "a living thing." In this, he was joined by Woodrow Wilson who, championing the sovereignty of the people, at liberty to make their own laws to advance their own collective good, described the Constitution as being "accountable to Darwin, not Newton."[28] Focusing on the role of judges in interpreting the Constitution's text, Beard argued that "since most of the words and phrases dealing with the power and the limits of government are vague and must be interpreted by human beings, it follows that the Constitution as practice" is inevitably given meaning in its own time. The belief in "the fiction of mechanical and unhuman certitude" (including, most prominently, on the Supreme Court) was bogus. Far from being "an element of instability," "the flexible character of many constitutional provisions" was a means of stabilizing the political order and ensuring its longevity, just as the Founders intended (and conservatives, when in power, recognized).[29] Roscoe Pound and Louis Brandeis emphasized similar themes.[30] As such, the Constitution could be interpreted in line with what the era's social movements wanted. Rather than repudiating the Constitution, many Progressives thus saw themselves as restoring, redeeming, democratizing it—whether through the addition of new amendments, or by new understandings by

[25] Croly, n 16 above. See also Smith, J, *The Spirit of American Government* (1907); Smith, *The Growth and Decadence of Constitutional Government* (1930).

[26] Croly, n 16 above, 20–21, 145–146, 148–149; Beard, C, 'The Living Constitution' (May 1936) 185 *Annals of the American Academy of Political and Social Science* 29–34, 29.

[27] Rana, A, 'Progressivism and the Disenchanted Constitution,' in Skowronek, S, Engel, S and Ackerman, B (eds), *The Progressives' Century: Democratic Reform and Constitutional Government in the United States* (2016).

[28] Wilson, W, *The New Freedom* (1913). See Gillman, H, 'The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building' (Fall 1997) 2 *Studies in American Political Development* 191–247.

[29] Beard, n 26, 30–31, 34.

[30] Pound, R, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 14 *American Law Review* 445; Brandeis, L, 'The Living Law' (1916) 10 *Illinois Law Review* 461.

legal and political actors alike of the powers of government and the nature and role of the nation's extant (and newly created) constitutional institutions.

These arguments for an instrumental living constitutionalism ran up against more formalist understandings of federalism and the separation of powers policed by an increasingly aggressive Republican-dominated federal judiciary that, with the wind of the Civil War Amendments in its sails, came to see itself as the polity's preeminent bulwark of rights protection (chiefly rights of property and contract) and limited government. As reformist appeals to popular sovereignty (democracy) and the common good were met with adamant opposition by judges issuing thunderous appeals to rights, some reformers answered with bold assertions that "the individual has reigned long enough" (Ward) and condemned the entire concept of individual and "natural" rights (provoked, Brandeis went so far as to call for the Fourteenth Amendment's repeal).

Other reformers such as Woodrow Wilson, however, accepted the place of rights in the U.S. constitutional order, but insisted that the substantive content of those rights be filled in socially and instrumentally with an eye to an unfolding apprehension of the public good. If law (including legislation) must be understood instrumentally, as means to an end—the new view being advanced by legal theorists such as Oliver Wendell Holmes Jr., Roscoe Pound, Learned Hand, and Benjamin Cardozo, under the rubric of the "sociological" or "realistic" jurisprudence (and later "legal realism")—then rights should be understood in the same spirit.[31] Under this emergent view offering a demystified account of law as being (and as always having been) not a system of formal, abstract rules, but purposive, ends-oriented, and instrumental—of being a tool society used pragmatically to solve concrete social problems and achieve collective public ends—legislatures were justified in innovating, and judges were justified in interpreting rights protections in the context of modern conditions and imperatives, making law, and doing policy (interstitially, and inevitably) with a view to the achievement of collective public objectives.[32] Conservatives answered these new departures with a cascade of arguments of their own from figures such as Elihu Root, Henry Cabot Lodge Sr., and William Howard Taft, Herbert Hoover, Calvin Coolidge, Charles Evans Hughes, Rufus Choate, William D. Guthrie, James M. Beck, David Brewer, and Stephen Field.[33] Some of these constitutionalists (with outlooks some have attributed to a lagged Jacksonianism)[34] were passionately rights-conscious and fervent proponents of judicial power. Others were "stand-patter" reactionaries. Still others believed that incremental, moderate reform was necessary given new conditions but that it should be undertaken in ways consistent with the Founders' Constitution, which still

[31] Holmes, O, Jr. 'The Path of the Law' (1897) 10 *Harvard Law Review* 457; Pound, n 30 above. Purcell finds foundational contestation between a secular, scientific legal postitivism and a teleological natural law understanding. Purcell Jr., E, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973). See also Alschuler, A, *Law without Values: The Life, Work, and Legacy of Justice Holmes* (2000).

[32] Holmes n 31 above, 457; Pound, R, 'The Scope and Purpose of Sociological Jurisprudence (Part 1)' (1911) 24 *Harvard Law Review* 591; Pound, 'The Scope and Purpose of Sociological Jurisprudence (Part 3)' (1912) 25 *Harvard Law Review* 489; Cardozo, B, *The Nature of the Judicial Process* (1921).

[33] See, e.g., Postell, J and O'Neill Jr., J (eds), *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era* (2013); Ernst, D, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* (1995).

[34] Gillman, H, *The Constitution Besieged: The Rise and Demise of* Lochner *Era Police Powers Jurisprudence* (1993).

provided the best means of guaranteeing "ordered liberty."[35] Most insisted that, on the whole or in part, the era's new departures in legislation, regulation, and administration were unwisely and illegitimately subverting traditional forms of common law governance and the Constitution itself—both were committed to limiting and checking the government rather than empowering it to act at the behest of either an aggrieved and inflamed populace or the promptings of a university-based, reform-minded expert, social scientific elite. Conservatives (including leaders of the nation's bench and bar) insisted that the only relevant acts of the people as constitutional sovereigns were to be found in the Constitution itself, which reflected the commitments and understandings made through stipulated, formal institutional channels, binding and anchoring all who came after. They insisted that the Constitution—including the Civil War Amendments (added by Republicans)—had been deliberately engineered to withstand the gales of popular movements—democracy—whose sails were now being filled by the billows of passion, emotion, and interest. Mass democracy, conservatives charged, was subverting law.

Condemning "class warfare," "socialism," and contraventions of constitutional and God-given natural rights, conservatives also argued that, besides being unlawful and un-American, these initiatives would kill the goose that had laid the golden eggs of growth, wealth, jobs, productivity, and innovation—all in the collective public interest. These battles set the stage for the later 1930s confrontation between the inheritor of the era's reform agenda, Franklin Delano Roosevelt, and the conservative Supreme Court.

4. A New State: Continuity or Break?

This era's defining economic battles transcended debates over individual laws and policies to implicate foundational questions about the nature of the American state. Since the mid-twentieth century, "Wisconsin School" legal historians have emphasized the active, policymaking role of the judiciary under a system of common law governance—particularly involving economic development.[36] A lively revisionist literature in political science, history, and, most recently, law, is now challenging the view of the predecessor period as one of minimal government. Stephen Skowronek posited a preexisting but distinctive and largely invisible "state of courts and parties." Morton Keller and William Novak argued that the earlier period's relatively involved governance had been overlooked because it took place at the local level. Others have insisted that the national government had long been doing state-like things (such as aiding the poor, providing, disaster relief, and even bureaucratic

[35] See, e.g., Brewer, D, 'The Nation's Safeguard' in Proceedings of the New York State Bar Association, Sixteenth Annual Meeting (New York Bar Association, 1893); Field, S, 'The Centenary of the Supreme Court of the United States' (1890) 24 *American Law Review* 351; Choate, R, 'The Position and Functions of the American Bar, as an Element of Conservatism in the State' in Miller, P (ed), *The Legal Mind in America* (1962).

[36] See Hurst, J, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956); Schweber, H, *The Creation of American Common Law, 1850-1880: Technology, Politics, and the Construction of Citizenship* (2004); Posner, R, *Economic Analysis of Law* (1972); Horwitz, M, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992).

administration) that had been overlooked or minimized.[37] The implication is that the presumed institutional innovations of the late nineteenth and early twentieth centuries were less innovative than has been supposed. Although this work has illuminated many previous dark corners of U.S. political development, it is nevertheless undeniable that this era witnessed major transformations in the nature, activity, and scale of government.

II. The Tranformation of Constitutional Structures

1. The Expansion of Federal Judicial Power

The power and reach of the federal courts grew exponentially in this period. If construed broadly, the Civil War Amendments can be read to have conferred expansive new powers on both Congress and the federal courts to protect liberty, equality, and the prerogatives of political membership. Congress significantly expanded the reach of the federal judiciary and the laws by augmenting the numbers of courts and judges and their budgets and expanding their jurisdiction.[38] Scholars debate the causes of the judiciary's increasingly powerful and assertive role. While some emphasize Congress's role, others give greater weight to "political entrepreneurship" by the judges themselves, working to expand their budgets and autonomy. Still others focus on new, empowering norms arising out of this period's professionalization of bench and bar,[39] some on functional necessity (more regulation, more disputes, requiring more judges), some on Republican efforts to advance policy agendas through the judiciary,[40] and some on efforts by parties to entrench their partisans on the bench as they are leaving office after losing elections. Although an important corrective, this literature has perhaps understated the degree to which judges expanded their own authority through constitutional interpretation. Whatever their causes, these developments set the stage for a struggle for institutional primacy between the courts and the nation's legislatures and new administrative agencies.

[37] See Keller, M, *Affairs of State: Public Life in Late Nineteenth Century America* (1977); Novak, W, *The People's Welfare: Law and Regulation in Nineteenth Century America* (1996); Skowronek, n 23 above; Balogh, B, *A Government Out of Sight: The Mystery of National Authority in Nineteenth Century America* (2009); Skocpol, T, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (1995); Dauber, M, *The Sympathetic State; Disaster Relief and the Origins of the American Welfare State* (2012); Mashaw, J, *Creating the Administrative Constitution: The Lost One Hundred Years of Administrative Law* (2012).

[38] See Kutler, S, *Judicial Power and Reconstruction Politics* (1968); Crowe, J, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (2012).

[39] See Kammen, M, *A Machine That Would Go of Itself: The Constitution in American Culture* (1986); Stevens, R, *Law School: Legal Education in America from the 1850s to the 1980s* (1983).

[40] See Bensel, n 3 above; Gillman, H, 'How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891' (2002) 96 *American Political Science Review* 511–524.

2. Executive Power and Administration

The modern presidency and modern administration emerged in this period, arising out of and leading to new departures in constitutional understandings of the separation of powers and executive power. If the United States did not have a Weberian national "state" before this period, it got one then—albeit one, many have noted and lamented, mediated by the nation's unique set of countervailing institutions and power centers (Skowronek called it a "patchwork" state).[41]

Most agree the modern presidency was born at this time, generated by Progressives advancing broad readings of Article's II's vesting clause, take care clause, and oath provision. Theodore Roosevelt insisted the president was a "steward of the people" with "not only [the] right but [the] duty to do anything the needs of the nation demanded unless such action was [specifically] forbidden by the Constitution or by the laws." In acting "for the public welfare," he insisted the executive possessed broad, implied powers.[42] This sweeping vision of executive power was challenged by Roosevelt's one-time ally (but now rival), William Howard Taft. "The true view of the executive function," Taft wrote, "is . . . that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included with such express grant as proper and necessary to its exercise. . . ." "There is," he underlined, "no undefined residuum of power which he can exercise because it seems to him to be in the public interest."[43] A fan of Roosevelt's views—and his "leadership" while in office—Woodrow Wilson noted that "we have grown more and more inclined from generation to generation to look to the President as the unifying force in our complex system" structured, traditionally, by federalism and the separation of powers. Today, he proclaimed, "the President is at liberty, both in law and conscience, to be as big a man as he can. . . ." After all, "[T]he President [by unique virtue of his election by the entire people] has the nation behind him, and Congress has not."[44] For Progressives, this understanding promised to unshackle the president from partisan and special interests, freeing him to move aggressively and proactively to advance the broader public good. In this, the president would be answerable directly to the (mass) democratic majority.[45]

This democratic vision of the modern executive, Sidney Milkis observed, existed in interesting tension with another strain of Progressive thought that sought to transcend parties and special interests not through democratic appeals to mass publics but through dispassionate, expert administration, informed by the new social sciences created to serve the purposive and programmatic state. Legislatures appealed to social scientific studies as evidence that innovative legislation governing the workplace (and other areas) was both rational and—in the face of claims that it was arbitrary and partial ("class legislation") and thus violated the Constitution's due process and equal protection guarantees—in the broader public interest. Appeals to technical and scientific expertise

[41] Skowronek, n 23 above.

[42] Roosevelt, T, *An Autobiography* (1913).

[43] Taft, W, *Our Chief Magistrate and His Powers* (1916).

[44] Wilson, W, *Constitutional Government in the United States* (1908).

[45] See Wilson, W, 'Leaders of Men' (1890). See Tulis, J, *The Rhetorical Presidency* (1988); Lowi, T, *The Personal President: Power Invested, Promise Unfulfilled* (1985); Milkis, S, 'The Progressive Party and the Rise of Executive-Centered Partisanship' in Skowronek, Engel and Ackerman, n 27 above.

were also used to justify the delegation of rulemaking power to new and constitutionally innovative independent regulatory commissions that blended legislative, executive, and judicial powers and functions.[46] "Government by Commission" began with the creation of the Interstate Commerce Commission (ICC) (1886), regulating railroads. Court challenges proliferated alleging that the rates adopted by the agency (experts) were not "reasonable," or deprived the proprietors of their rights to control their private businesses or reap a reasonable rate of return. At the heart of many of these cases were questions of the scope of the discretion to be afforded expert rulemakers. Nevertheless, the administrative state continued to expand, setting the stage for the later New Deal explosion of administrative government.

The rise of expert administration coincided with a steady decline in political participation through voting—"political demobilization." Scholars debate whether there is a causal relationship between these two major political developments, for example because of the declining significance of parties—the traditional instruments of voter mobilization—in an expert, administrative state.[47]

3. Courts versus the People: Judicial Review as a Problem and the Birth of (Contemporary) Constitutional Theory

The charge of judicial hostility to progressive reform galvanized the era.[48] Although hardly the first time that American political actors had inveighed against judges, judicial review, and judicial supremacy, the popular pushback against the courts in this period was widespread, sustained, and formally innovative. Novel means of reasserting popular control over the judiciary—the recall of judges and decisions, judicial term limits, referenda on court decisions, supermajority requirements for voiding laws as unconstitutional, provisions for the election of federal judges, revisions of Article V making it easier to overrule Supreme Court decisions, and even the elimination of judicial review altogether—were threatened, bruited in popular, scholarly, and semi-scholarly jeremiads, and enacted in states where such measures confronted fewer constitutional roadblocks. Theodore Roosevelt grew increasingly outspoken in advocating court-curbing measures, showcasing

[46] See Carpenter, D, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (2001).

[47] See, e.g., Wolfinger, R and Rosenstone, S, *Who Votes?* (1980); McCormick, R, *The Party Period and Public Policy: American Politics from the Age of Jackson to the Progressive Era* (1986); Piven, F, *Why Americans Don't Vote* (1989); Crenson, M and Ginsberg, B, *Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public* (2004); McGerr, M, *The Decline of Popular Politics: The American North, 1865-1928* (1988).

[48] Scholars have long argued that the era's courts upheld the vast majority of its reform initiatives. Warren, C, 'The Progressiveness of the United States Supreme Court' (1913) 13 *Columbia Law Review* 294, 295; Urofsky, M, 'Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era' (1983) *Supreme Court Historical Society Yearbook* 53, 61–62; Willrich, M, 'The Case for Courts: Law and Political Development in the Progressive Era' in Jacobs, Novak, and Zelizer, n 12 above; Siegel, S, '*Lochner* Era Jurisprudence and the American Constitutional Tradition' (1991) 70 *North Carolina Law Review* 1.

them during his 1912 "Bull Moose" run for the White House.[49] These initiatives were underwritten by Populist, Progressive, and Pragmatist thought that re-conceptualized the relationship among law, democracy, and the state.[50]

It was in this context that James Bradley Thayer, Thomas Reed Powell, Oliver Wendell Holmes Jr., and other founders of modern constitutional theory argued that judges were bound by a duty of judicial restraint. Thayer contended that, given that many of the Constitution's provisions are open to a variety of legitimate interpretations and that American politics had always involved spirited, legitimate argument about which was appropriate or best, courts were justified in voiding only plainly unconstitutional laws (the "clear mistake" rule).[51]

Scholars have debated the causes of the behavior of this era's judges. Traditional accounts were structured around an opposition between a swelling chorus for reform and obstructionist laissez faire courts, characterized as either the minions of business interests or the conduits for their ideologies.[52] Others emphasized the degree to which the era's judges were prisoners of an a priori, deductive "formalist" legal ideology, inculcated, perhaps, by the supposedly "scientific" case method training launched at Harvard Law School by Christopher Columbus Langdell. In changing times requiring pragmatic adjustment, this stalwart formalism, although not designed to advance business interests, had precisely that effect.[53] Revisionists have argued that rather than acting as corporate, right-wing, or Republican Party shills or vessels ("judicial activists"), this era's ostensibly conservative judges were enforcing the law as they genuinely understood it—doing law, that is, not politics (conservative defenders of the "Old Court," of course, had argued this all along).[54]

[49] Roosevelt, T, *The New Nationalism* (1910) See Ross, W, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (1994).

[50] See Roe, G, *Our Judicial Oligarchy* (1912); Benson, A, *Our Dishonest Constitution* (1914); Myers, G, *History of the Supreme Court of the United States* (1912); Boudin, L, *Government by Judiciary* (1932).

[51] Thayer, J, *The Origin and Scope of the American Doctrine of Constitutional Law* (1893); Powell, T, *Vagaries and Varieties of Constitutional Interpretation* (1956); *Lochner v. New York*, 198 U.S. 45 (1905) (J. Holmes, dissenting).

[52] See, e.g., Twiss, B, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (1942); Wright, B, *The Growth of American Constitutional Law* (1942); Fine, S, *Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901* (1956); Paul, A, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (1960); McCloskey, R, *American Conservatism in the Age of Enterprise: A Study of William Graham Sumner, Stephen J. Field, and Andrew Carnegie* (1951); McCloskey, *The American Supreme Court* (1960); Beth, L, *The Development of the American Constitution, 1877-1917* (1971); Forbath, W, *Law and the Shaping of the American Labor Movement* (1991).

[53] See White, M, *Social Thought in America: The Revolt against Formalism* (1949); Horwitz, M, 'The Rise of Legal Formalism' (October 1975) 19(4) *The American Journal of Legal History* 251–264; Wiecek, W, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (1998); Tamanaha, B, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010) (denying that formalism characterized the era's jurisprudence).

[54] See, e.g., Ely Jr., J, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3 edn, 2007); Gillman, n 34 above.

4. The Relation of National Government to the States (Federalism)

Although many Progressives were open to the view that social problems should be solved at whatever level of government was most practical (including state, local, and municipal),[55] and the movement harbored strains emphasizing decentralization and the states as "laboratories of democracy" (such as Brandeis and Wilson's "New Freedom), its vision was foundationally nationalist; it was forged out of a incipient conviction articulated in classic statements such as Croly's *Promise of American Life* and Roosevelt's *New Nationalism* that new social and economic conditions had rendered the political community inherently national.[56]

Many new forms of economic regulation were first enacted by states, who justified their regulatory powers by appeals to their traditional police powers, as underwritten by principles of popular sovereignty and self-government authorizing the regulation of publicly chartered businesses affecting the public interest—a position sustained by the Supreme Court in *Munn v. Illinois*, 94 U.S. 113 (1877). Expanding upon his statements in *The Slaughterhouse Cases*, 83 U.S. 36 (1873), however, Justice Field's *Munn* dissent insisted that the Fourteenth Amendment had made fundamental rights national (here, the rights of grain elevator owners to charge whatever they wanted for the use of their property), and that courts were obligated to vindicate those rights by voiding such laws. Field's dissent proved a harbinger of the Court's future Fourteenth (and Fifth) Amendment rights jurisprudence. Soon, business lawyers were challenging both state and federal legislation on the grounds that it transgressed (state and federal) constitutional guarantees of due process, equal protection, or foundational rule-of-law principles. Allegations that the new laws were arbitrary, unreasonable, lacking a plausible or generalizable public purpose, or impermissibly discriminatory (by promoting the interest of a single class—such as labor—instead of the general public interest) became routine. Scholars debate whether these arguments were new departures or a continuation of prewar understandings as old as *Magna Carta* (1215).[57]

The Court availed itself of other constitutional provisions to similar ends. It held under the contracts clause that the freedom to fix charges was an implied part of their corporate charter understood as a contract, and that denying this freedom defeated the charter's essential object.[58] Hurling charges of "socialism" or "communism," Field argued that

[55] See Nackenoff, C and Novkov, J (eds), *Statebuilding from the Margins: Between Reconstruction and the New Deal* (2014).

[56] See Eisenach, E, 'A Progressive Conundrum: Federal Constitution, National State, and Popular Sovereignty' in Skowronek, Engel and Ackerman, n 27 above.

[57] See *The Slaughterhouse Cases*, 83 U.S. 36 (1873) (J. Field and J. Bradley, dissenting). In some cases, the Court held that the Fourteenth (or Fifth) Amendment's broadly worded rights protections (or the parallel provisions of state constitutions) vouchsafed an articulable substantive natural or positive right such as the right to pursue a lawful occupation or a "liberty of contract," or the right of parents to direct the upbringing of their children. See *In re Jacobs*, 98 N.Y. 98 (1885); *Godcharles v. Wigeman*, 113 Pa. 431 (1886); *Lochner v. New York*, 198 U.S. 45 (1905); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[58] But see *Stone v. Mississippi*, 101 U.S. 814 (1880) (rejecting contract clause challenge to repeal of a charter to run a lottery).

state rate regulations involved the confiscation of property. Government initiatives to collect information about corporations as a prerequisite to regulating them were resisted by appeals to the privacy rights inherent in the Fourth Amendment's protections against unreasonable searches and seizures and the Fifth Amendment's protections against self-incrimination.[59] The practical effects of this new jurisprudence of rights were profound once the Court newly held that corporations were constitutional persons.[60]

State laws and regulations in this period, moreover, ran a "dual federalist" gauntlet entailing a one-two punch: in an interconnected, national economy, state-level efforts to regulate business frequently met with the countercharge that their regulations not only transgressed a fundamental right but interfered with interstate commerce.[61] Dual federalism—allegedly implicit in Article I's enumeration of the powers of Congress and the Tenth Amendment's reservation of all residual governing powers to the states—held the national and state governments to comprise separate spheres, each with unique, categorical, and (in its sphere) exclusive and supreme powers. The Court began to draw categorical distinctions between regulation of the conditions of manufacture and production (held inherently local) and the regulation of commerce (trade, held inherently national). The Court used this framework to void a wide array of both state and federal economic regulations.[62] As support for reform gained momentum and collided with the strictures of this framework, reformist lawyers argued that, under modern conditions, matters once of only state and local concern now "affected" interstate commerce, or were part of its "stream," and thus were newly subject to federal control. Others argued that the general welfare clause, when read in conjunction with Congress's enumerated powers, conferred broad federal regulatory powers, including, in some cases, the power to regulate interstate commerce to protect protect public morals, a traditional province of state-level police powers.[63]

III. Constructing Modern Citizenship: Civil Rights and Civil Liberties

1. Inclusion and Exclusion: Constitutional Equality

Following the military withdrawal ending Reconstruction, Republican support for racial equality dissipated, and an ambiguous interregnum followed in which white Southerners

[59] See Kersch, K, 'The Reconstruction of Constitutional Privacy Rights and the New American State' (Spring 2002) 16 *Studies in American Political Development* 61–87; Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (2004).

[60] *Santa Clara v. Southern Pacific Railroad*, 118 U.S. 394 (1886); *Hale v. Henkel*, 201 U.S. 43 (1906).

[61] *Wabash, St. Louis, and Pacific Railway Company v. Illinois*, 118 U.S. 557 (1886). Reformers countered the Court's *Wabash* decision by creating the nation's first independent regulatory commission, the Interstate Commerce Commission (ICC).

[62] See Corwin, E, 'The Passing of Dual Federalism' (1950) 36 *Virginia Law Review* 1.

[63] *Champion v. Ames*, 118 U.S. 321 (1903). See Compton, J, *The Evangelical Origins of the Living Constitution* (2014) (arguing that the constitutionalization of national morals regulation played a key role in the development of notions of a "living" constitution).

moved to "redeem" their region by recreating, if not slavery itself, then an order premised upon white domination and rule enforced by statutes (including those imposing "Jim Crow" segregation"), disenfranchisement, threats, and violence.[64] While they controlled the national government in the war's immediate aftermath, Radical Republicans sought to protect fundamental rights in the South by enacting the nation's first civil rights acts. As time went on, however, the Supreme Court struck down some of these acts as unconstitutional, and narrowed the effects of others through interpretation, ratifying the foundations of the South's emergent Jim Crow racial order while setting a few outer metes and bounds.[65]

The nation's western territories, home to many Indians and Mexicans, were being aggressively settled in this period by whites, raising a host of legal and constitutional issues. The nation's victory in the Spanish-American War (1898), and the annexation of the Philippines (1900) and Hawaii (1893) occasioned additional expansion abroad. Continental expansion raised questions about the validity of rival land claims, the rights and powers of Indian tribes (including issues of sovereignty), the substance and status of constitutional rights in the territories, and the requirements and conditions for admission to statehood. Overseas expansion raised additional questions about the constitutional status of these possessions and their inhabitants as well as their eligibility for statehood.[66]

Major demographic transformations were also underway. Territorial conquest and settlement, mass immigration from new regions such as Asia and southern and eastern Europe, and emancipation, were creating a nation of unprecedented racial, religious, and ethnic diversity when many were insisting that the Civil War's chief legacy entailed "a new birth of freedom"—a recommitment to the nation's founding principles of liberty, democracy, and equality. This meant that for many the era's concrete legal and constitutional questions concerning citizenship, participation, equal treatment under law, and individual rights resonated with foundational questions of political values and principles.[67] As whites and immigrants[68] migrated westward, and, later, blacks migrated northward, moreover, and as first-wave feminists demanded (among other things) the right to vote, the composition of the nation's parties and their understanding of their electoral interests were also changing. Principles and interests involving issues of inclusion transformed the political

[64] Hahn, S, *A Nation beneath Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* (2004); Valelly, R, *The Two Reconstructions: The Struggle for Black Enfranchisement* (2004); Klarman, M, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2006).

[65] Klarman, n 64 above; Brandwein, P, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (1999).

[66] See Sparrow, B, *The Insular Cases and the Emergence of American Empire* (2006); Levinson, S and Sparrow, B (eds), *The Louisiana Purchase and American Expansion, 1803-1898* (2005); Lawson, G, *The Constitution of Empire: Territorial Expansion and American Legal History* (2004); Rana, A, *Two Faces of American Freedom* (2010).

[67] See Greenstone, J, *The Lincoln Persuasion: Remaking American Liberalism* (1993) (positing the rise of a "reform liberalism" at this time in American political thought that was available to serve, not to limit government and government-led reform, but as a vehicle for significant social change); Vorenberg, n 12 above; Jaffa, n 2 above; Rana, n 66 above; Smith, R, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997).

[68] See Lopez, I, *White by Law: The Legal Construction of Race* (1996).

understandings and policy agendas of the nation's party and social movement actors concerning the Constitution's foundational requirements and commitments.[69]

Concrete disputes involving questions of exclusion and inclusion raised questions about how, in its various provisions, the Constitution would be read to impose "borders of belonging." Scholars have mapped the many ways in which the era's laws of personhood and citizenship enforced a caste-based order premised on domination and subordination, with white Protestant males on top, and "the other," as marked by race, sex, gender, ethnicity, or minority religion, on the bottom, as not ruling but ruled.[70] Otherness, incapacity, defectiveness, weakness, and uncooperativeness were taken as threats to the communal and political unity held prerequisites to social and political progress. "Americanization" became a watchword in the schools, "good government" (anti-machine reform) in elections, Prohibition in taverns and homes, and immigration restriction at the nation's borders. Spurred by the era's new faith in science in service to an enlightened and empowered state, some went so far as to seek the genetic improvement of the populace through eugenics (blessed by the Supreme Court in *Buck v. Bell* (1927)).[71] The biologically derived "difference" feminism of some first-wave feminists such as Charlotte Perkins Gilman and Jane Addams underwrote the call for women's protective legislation and (sometimes insisting that women were the more evolved, and socially conscious sex) contributed to the prevailing gendering of much of the era's discussion of questions of citizenship and public policy.[72]

Many Progressives were either indifferent or hostile to the plight of African Americans, hewing either to the broader white culture's reflexive, predominating white supremicism, or to a cresting nationalism that held American principles of liberty under law to be an ethnocultural Anglo-Saxon inheritance (and responsibility), or to scientific racism.[73] Racist and sexist assumptions suffused innumerable judicial opinions—hardly limited to those written by the bench's relatively few judicial progressives. Libertarian scholars have celebrated in an otherwise dark time a handful of pro-civil rights opinions that were rooted in classical liberal frameworks entailing commitments to limited government and rights of property and contract.[74]

[69] See Tichenor, D, *Dividing Lines: The Politics of Immigration Control in America* (2002).

[70] Welke, B, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (2010); Smith, n 67 above; Novkov, J, *Racial Union: Law, Intimacy, and the White State in Alabama, 1865-1954* (2008); Gordon, S, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (2001); Hamburger, P, *Separation of Church and State* (2004).

[71] Mellow, N, 'The Wrong Fit: Eugenics and the Limits of the Progressive Idea of Party' Skowronek, Engel and Ackerman, n 27 above.

[72] See, e.g., Gilman, C, *Women and Economics* (1898); Addams, J, 'If Men Were Seeking the Franchise' (June 1913) 30 *Ladies Home Journal* 21. See Novkov, J, *Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal* (2001).

[73] See generally Southern, D, *The Progressive Era and Race: Reaction and Reform, 1900-1917* (2005); Kersch, K, 'Constitutional Conservatives Remember the Progressive Era' in Skowronek, Engel and Ackerman, n 27 above.; McDonagh, E, 'Race, Class, and Gender in the Progressive Era: Restructuring State and Society' in Milkis and Mileur, n 18 above; McDonagh, 'The "Welfare Rights State" and the "Civil Rights State": Policy Paradox and State Building in the Progressive Era' (Fall 1993) 7 *Studies in American Political Development* 225–274.

[74] *Civil Rights Cases*, 109 U.S. 3(1883) (J. Harlan, dissenting); *Buchanan v.Warley*, 245 U.S. 60 (1917). See Bernstein, D, *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* (2001); Bernstein, 'Philip Sober Restraining Philip Drunk: *Buchanan v. Warley* in Historical Perspective' (1998) 51 *Vanderbilt Law Review* 799.

Later progress toward equality and inclusion can be traced to seeds planted in this period. The modern civil rights vision was already being formulated by W.E.B. Du Bois and the Niagara Movement he helped launch with other Progressives such as Jane Addams and Florence Kelley as a rebuttal and rebuke to Booker T. Washington's relatively depoliticized, individualist, self-help vision for equality, which harmonized with the business conservatism of the era's Republican Party. The Niagara Movement precipitated the founding of the NAACP, which would launch the modern fight for civil rights through legislation and litigation.[75] This new thinking was of a piece with nascent pluralist challenges to the Progressive "Americanization" ethos that sought to manage diversity through inclusive but coercive programs emphasizing erasure through tutelage—education, training, and indoctrination in the dominant culture and values.[76] While acknowledging a core of shared political ideals, pluralists recognized and celebrated group identities as both vital and fully compatible with a healthy civic life.[77]

2. The New Civil Libertarian Freedom

Although Supreme Court majorities did not until after the New Deal commonly void laws for violating the Bill of Rights, both the institutional preconditions (a powerful, assertive, rights-protecting federal judiciary) and the legal and political thought that underwrote their doing so (the constitutionalization and nationalization of rights, and the individualization of the rights-bearing subject) were forged in this period. The constitutionalism of modern civil liberties emerged from a confluence of developmental tensions and intercurrences involving, among other things, the intersection of a waxing public-spirited, anti-individualist, statist Progressivism on the left with a rights-conscious, individualist, anti-statist free-market conservatism on the right. Neither the era's conservatives nor (most of) its Progressives were much interested in the "personal" rights we today associate with "civil liberties."

Today, those who favor more extensive economic regulation and more expansive social welfare provisions support more latitudinarian views on "personal" liberties such as the right to privacy and freedom of speech. This was mostly not the case in the Gilded Age and Progressive Era. Many reformers were men and women of deep Christian convictions whose commitment to moral uplift encompassed both the economic and personal spheres.[78] Standard accounts hold that modern civil libertarianism was born in reaction to the Wilson administration's egregious civil liberties violations, particularly during World

[75] DuBois, W, 'The Immediate Program of the American Negro' (April 1915) 9 *The Crisis* 310–312; Thomas, M, *Civil Rights and the Making of the Modern American State* (2014); Tushnet, M, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (1987).

[76] See Fisher, M, Nackenoff, C and Chmielewski, W (eds), *Jane Addams and the Practice of Democracy* (2009); McGerr, M, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (2003).

[77] Kallen, H, *Culture and Democracy in the United States* (1924); Dubois, W, *The Souls of Black Folk* (1903); Nackenoff, C, 'Constitutionalizing the Terms of Inclusion: Friends of the Indian and Citizenship for Native Americans, 1880s-1930s' in Kahn, R and Kersch, K, *The Supreme Court and American Political Development* (2006).

[78] See McWilliams, W, 'Standing at Armageddon: Morality and Religion in Progressive Thought' in Milkis and Mileur, n 18 above; Morone, J, *Hellfire Nation: The Politics of Sin in American History* (2004).

War I and the subsequent "Red Scare" crackdown on political radicals. This prompted some Progressives, notably Harvard Law School professor Zechariah Chafee Jr. and future American Civil Liberties Union founder Roger Baldwin, to rethink the value of civil liberties, and to fashion new theories of why they warranted special protections in free, democratic governments. These views influenced two key Supreme Court justices, Oliver Wendell Holmes Jr. and Louis Brandeis, who, in turn, began, in dissent, to argue vigorously for an active role for the Court in protecting civil liberties.[79]

In recent years, however, penetrating scholarship has complicated this picture. Christine Stansell, Rochelle Gurstein, and Michael Les Benedict have emphasized the degree to which contemporary civil libertarianism was shaped, beginning in this period, by deep intellectual and cultural currents repudiating the then-hegemonic Victorian worldview, which, Benedict explained, "stressed the constant struggle between people's animal needs and passions and their higher qualitites." The mission of moral men and women, individually, and collectively—in a struggle held analogous to Christ's sacrifice—with the help of law, was to transcend their selfish, indulgent, base, animal desires, the fount of vice, by subduing these passions and leading lives of sacrifice, moderation, and restraint. This outlook underwrote both legislation and common law prescribing restraint and promoting virtue to make men and women moral. State and federal laws and common law doctrine regulating obscenity, polygamy, lotteries, "white slavery" (i.e., prostitution) and the production, use, and sale of alcohol were all part of this framework, as were laws that promoted Protestant Christianity (Roman Catholicism, Mormonism, and "oriental" religions, to say nothing of atheism, were held to lack essential elements of individual moral agency and superintending restraints). Prevailing constitutional doctrine accommodated such regulation as a legitimate exercise of the police powers to protect health, safety, and morals—a foundational power of sovereignty. Government had the full power to regulate conduct that had a "bad tendency," that debased and corrupted rather than elevated and improved. Within this framework, criminals were taken as responsible moral agents who had spurned society's moral strictures, rendering them outcasts: some traditional legal baselines aside, there was thus no special solicitude for how they were treated by the criminal justice system or the police. The criminal procedure provisions of the Bill of Rights—the majority of its provisions—were thus, by contemporary standards, under-enforced.[80]

In this period, the underlying framework changed. Recent scholarship has documented a robust late nineteenth and early twentieth concern for "personal" liberties by both "conservative libertarians" such as Christopher Tiedemann and Thomas Cooley, who considered them coequals of economic rights (Graber), and a vital cohort of "left-wing" radicals such as the legal scholar and activist Theodore Schroeder, first-wave feminists advocating "free love" such as Victoria Woodhull, Greenwich Village Bohemian political and sex radicals such as Emma Goldman and Margaret Sanger, and labor radicals (such as the Industrial

[79] See, e.g., Murphy, P, *World War I and the Origins of Civil Liberties in the United States* (1979); Walker, S, *In Defense of American Liberties: A History of the ACLU* (1999); Polenberg, R, *Fighting Faiths: The* Abrams *Case, the Supreme Court, and Free Speech* (1987); Stone, G, *Perilous Times: Free Speech in Wartime* (2004). See *Abrams v. United States*, 250 U.S. 616 (1919) (J. Holmes, dissenting).

[80] Stansell, C, *American Moderns: Bohemian New York and the Creation of a New Century* (2000); Gurstein, R, *The Repeal of Reticence: A History of America's Cultural and Legal Struggles over Free Speech, Obscenity, Sexual Liberation, and Modern Art* (1996); Benedict, n 20 above.

Workers of the World or "Wobblies" who pushed the fringes of individual autonomy, some to the point of anarchism (Rabban).[81] The emergent modern worldview held that consciousness was constituted by power (e.g., Marx), that repression deformed (e.g., Freud), and that traditional habits, values, and claims of authority ought to be continually interrogated and questioned (e.g., Dewey). Over time, these theories about—and political commitment to—individual autonomy, and even personal liberation, were mixed with an emergent philosophical pragmatism and new democratic theory (most prominently, John Dewey's) in an alchemy that placed new, and arguably surpassing, value on free speech—which came, for many, to supplant property rights as the first, foundational freedom.[82] In this process, science (empirical study, data collection, and experiment), deliberation, and (public/democratic) debate, understood in significant part on the model of science, assumed new—indeed, foundational—value. Tradition and morals became suspect as justifications for law, and crime and other newly defined social "problems" such as poverty were understood not as part of the law of nature, or the damage wrought by morally defective individuals, but as having social causes and being remediable by the application of new scientific knowledge about society. Modern understandings of civil liberties—including the frameworks later adopted by the Supreme Court in interpreting due process liberties, equal protection, and the Bill of Rights—reflect these broad cultural and conceptual shifts.

IV. Conclusion

For generations, scholarly understandings of the constitutionalism of this transformative period in American history followed a Whiggish modernization script fashioned by the victors that held the enlightened, modern constitutional understandings of the liberal, post–New Deal Democratic Party-dominated regime (underwriting an activist social welfare/administrative state and contemporary (liberal) understandings of civil rights and civil liberties) to have been won by this era's reformers—their progenitors—against its black-hatted, Republican-conservative forces of reaction who had substituted political ideology for fundamental law. The unraveling of the New Deal liberal consensus since the late 1960s has opened up space for a wide-ranging re-thinking of the nature and trajectory of this period's constitutionalism by scholars of a wide range of political and intellectual starting points.[83] Contemporary scholars present a much more complicated, conflictual picture of the era's constitutionalism and of its trajectory and subsequent legacy. We can see today that the constitutional lifeworld we currently inhabit is—for ill and for good—the product of a complex institutional and ideational interplay of this period's diverse political and constitutional visions. As such, far from being old-hat, the constitutionalism of the Gilded Age through the Progressive Era is now the

[81] Graber, M, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991); Rabban, D, *Free Speech in Its Forgotten Years, 1870-1920* (1997); Kersch, *Constructing Civil Liberties*, n 59 above; Stansell, n 80 above; Gurstein, n 80 above.

[82] See *Palko v. Connecticut*, 302 U.S. 319 (1937) ("the lynchpin, the nexus, of every other freedom" (J. Cardozo)). See also Judge Learned Hand's opinion in *Masses Publishing v. Patten*, 244 F. 535 (S.D.N.Y., 1917); Chafee, Z, Jr. 'Freedom of Speech' (Nov. 16, 1918) 17 *The New Republic* 66; Eugene V. Debs, 'Speech to the Jury' (Canton, Ohio, 1918).

[83] See Kersch, *Constructing Civil Liberties*, n 59 above.

subject of some of the most vibrant and original constitutional scholarship. Debates over this era's meaning and legacy, moreover, are also at the center of a high-stakes political fight in which contemporary actors explicitly recur to the period in vying to clear divergent paths forward for the nation's decidedly unsettled constitutional future.

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CHAPTER 5

FROM THE NEW DEAL THROUGH THE REAGAN REVOLUTION

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THE fifty-plus years from the New Deal through the Reagan Revolution encompass the three seminal constitutional events of the twentieth century: President Franklin D. Roosevelt's Court-packing plan, *Brown v. Board of Education*,[1] and the Senate's rejection of President Ronald Reagan's nomination of the conservative's favorite, Robert Bork, to the Supreme Court. Although the Court-packing plan failed, it convinced the Court, even prior to the transformative appointments that FDR was able to make beginning in 1937, that justices could not block government attempts to regulate the economy. *Brown*, with its implicit attack on the entire Southern "way of life," suggested to many, rightly or wrongly, that with the right Court anything was possible. (Later political scientists, most prominently Gerald Rosenberg,[2] argued that the Court's ability to change the political order, especially when such change required the acquiescence of many low-visibility public officials, whether elected officials or bureaucrats, was minimal.) The rejection of Bork prevented an immediate hard right turn by the Court but also politicized, seemingly permanently, the appointments process not only to the Court but to the lower federal courts as well. Appointments to what the Constitution calls the "inferior" federal courts were increasingly used, as in Bork's case, to place potential nominees to the Supreme Court on the appellate bench for what became de-facto "auditions" for the starring role. The history of this period only underscores the extent to which the judiciary—and thus American constitutional development inasmuch as that is a product of judicial decisions—is invariably enmeshed in the overall political process.

[1] 347 U.S. 483 (1954). [2] Rosenberg, G, *The Hollow Hope* (1991).