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The Strange Death of American Democracy: Judicial Supremacy and the New Constitutional Politics, 1910-1916

Logan Istre

THE STRANGE DEATH OF AMERICAN DEMOCRACY: JUDICIAL SUPREMACY AND THE NEW CONSTITUTIONAL POLITICS, 1910-1916

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Logan Stagg Istre
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ABSTRACT

American constitutional politics reached a crisis point during the Progressive Era. At the center of the crisis was the question as to what the Constitution meant and who had the final word in interpreting it: The Supreme Court or the People of the United States. That fundamental question came to a head in the presidential election of 1912. The result of that contest was the confirmation of judicial supremacy in constitutional interpretation and a mortal blow the nation's traditional popular constitutional politics. The ensuring consensus of judicial supremacy has defined the nation's constitutional politics since, which has resulted in the meaning of the Constitution being determined by battles over judicial appointments and the individual wills of the nation's judges. This study examines the causes that led to the crisis in constitutional politics, the chief players and their views on American constitutionalism at the height of the Progressive Era, and the dawn of the era of judicial supremacy that is still regnant. The result is a history that pits the advocates of a popular Constitution, men like Theodore Roosevelt and William Jennings Bryan, against the advocates of a judge-defined Constitution, men as diverse in temperament as William Howard Taft and Woodrow Wilson. Special attention is paid to the traditionalist advocates of an independent judiciary who prevailed in the short term by securing judicial supremacy but whose success was ultimately doomed by the Wilsonian-progressive vision of an active and supreme high court. In short, this study offers a revision of the traditional narrative of Progressive Era politics and presents the unexpected discovery of "The Strange Death of American Democracy."

INTRODUCTION

The election of 1912 was the last great public contest over the fundamental nature of American constitutional government. Of the four significant candidates vying for the presidency, three had levelled open challenges against the constitutional status quo. "That damned cowboy," Theodore Roosevelt, sought an unprecedented third term under the banner of the Progressive "Bull Moose" Party after bolting the Republican National Convention.[1] Col. Roosevelt advocated a novel "pure democracy;" a new political settlement that included a more expedient constitutional amendment process, the use of the popular initiative and referendum, and the popular recall of judges and judicial decisions, referring to constitutional limitations on democracy as "fetters."[2] Woodrow Wilson, who thought that America's foundational texts "read now like documents taken out of a forgotten age," carried the Democratic nomination and planned on consolidating power under executive authority.[3] Eugene Debs, an ardent socialist and "Wobbly," stood atop a platform that called for a convention to rewrite the Constitution and made war on the capitalist system.[4] Only the incumbent president, William Howard Taft, and the rump of the bruised Republican Party defended an "independent judiciary" and a reverence for the Constitution, under which "the United States has grown to be one of the great civilized and civilizing powers of the earth."[5]

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[1] Mark Hanna famously referred to Roosevelt as "that damned cowboy" in remarking of the latter's succession to the presidency.

[2] For the Progressive agenda, see *Progressive Party Platform*, 1912; Roosevelt's full quotation, referring to constitutional limitations as enforced by the present judiciary, reads, "We cannot permanently go on dancing in fetters." Theodore Roosevelt to Herbert Croly, February 29, 1912, found in Stephen Stagner, "The Recall of Judicial Decisions and the Due Process Debate," *The American Journal of Legal History*, Vol. 24, No. 3 (July 1980), 257.

[3] Woodrow Wilson, "Chapter I: The Old Order Changeth," *The New Freedom*, 1913.

[4] *The Socialist Party's Platform*, 1912.

[5] *Republican National Platform*, 1912.

What had happened? Never had the state of constitutional government itself met such frustration. In fact, one of the few things that remained above reproach throughout the tumultuous nineteenth century was the Constitution itself. Citizens and their elected representatives had always debated what the document really meant, but, barring a few radicals, the public man ever sought to identify himself and his beliefs as faithful to the framers' legacy.[6] Given this fundamental agreement, the politically suitable disposition was conservative. The proper statesman was "sane," "safe," and "conservative," and sought to maintain and safeguard traditional rights, whatever those happened to be.[7] Cultural elites thought in conservative terms. Prudent conservatism was preached in the leading newspapers and journals, from the *Times* to *Harper's* or *The Nation.* This broad conservatism contained many separate traditions, which varied by geography and party, but there was general agreement on the virtue of government under the Constitution. Law and order were sacred. Anarchy was the bugbear. But this agreement depended upon ambiguity. By century's end large cracks emerged in this conservative consensus. People were asking questions. First populists in the West and South, labor in the cities, and then progressives across the nation, asserted that the old forms and strictures of government were no longer adequate to meet the needs of an industrialized economy. The law and Constitution established to make the American people free now seemed to imprison them.[8]

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[6] Gilded Age politics depended on associating one's beliefs with constitutional authenticity, see Michael Les Benedict, "Constitutional Politics in the Gilded Age," *The Journal of the Gilded Age and Progressive Era,* Vol. 9, No. 1 (Jan. 2010), 7-35; for a study of the "language of conservatism" in the mid-nineteenth century, see Adam I.P. Smith, *The Stormy Present: Conservatism and the Problem of Slavery in Northern Politics, 1846-1865* (Chapel Hill, NC: The University Press of North Carolina, 2017).

[7] Words like "safe," "sane," "moderation," and "conservative" were invoked throughout the turn of the century to appeal to conservative candidates. For a few examples, see C. Vey Holman to Alton B. Parker, June 26, 1912, Alton B. Parker Papers, Box 3, Library of Congress Manuscript Division; or the Udo Keppler cartoon, "Landed," from *Puck*, July 27, 1904, Library of Congress, Prints and Photographs division.

[8] For a picture of the disdain for stock-phrase constitutional reverence, see William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton University Press, 1994), 23-26.

Old school conservatives were flummoxed. "The foundations upon which we builded are questioned," lamented the venerable statesman, Elihu Root.[9] By 1912, it was clear that both the traditional Republican and Democratic parties were divided between progressive and conservative factions, or "radical" and "reactionary" elements, in a way that threatened to upend the existing political order.

Chief among the causes of this polarization were the nation's courts. No single institution polarized conservatives and progressives in either party as profoundly as did the nation's judiciary. Judges owed their importance to their role in interpreting the nation's laws—including the highest law, the Constitution. Because of its inseparable connection with "legislation and with the administration of justice," as one conservative jurist put it in 1909, "it may truly be said that the science of law is in a large measure, in this country, the science of government."[10] To make a claim about the authority and function of judges in the United States was to make a fundamental claim about the nature of American constitutional government. But the precise meaning of this sacred task had never been sharply defined in the nineteenth century. Most constitutional battles were fought in the political arena, or even "in the high court of war," as President Garfield called it, "a decree from which there is no appeal."[11] The federal judge's power of judicial review—the power to strike down unconstitutional laws—remained seldom exercised and only partly articulated since the days of Chief Justice Marshall. This vague distribution of interpretive authority that hovered between the ballot and the bench had left the question as to a judge's full power untried and unanswered.

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[9] Elihu Root, "The Lawyer of Today," *Addresses on Government and Citizenship* (Harvard University Press, 1916), 506.
[10] John F. Dillon, "Address of Welcome," *Addresses at the Banquet Given by The New York County Lawyers' Association in Honor of the Justices of the Appellate Division at the Waldorf-Astoria Hotel* (New York: Mar. 20, 1909), 6, as found in the Parker Papers, Box 13.
[11] *Inaugural Address of James A. Garfield*, March 4, 1881.

Judicial deference to popular verdicts declined throughout the Gilded Age, however, as the people and their legislators began to demand more economically responsive government and as judges took to interpreting the vague provisions of the Fourteenth Amendment. Rather than the constitutional vetoes of Presidents Jackson or Cleveland, the people began to encounter the vetoes of Justices Field, Fuller, and Peckham. To many observers at the turn of the century, it seemed clear that the federal courts were interpreting the Constitution in a decidedly pro-business, pro-wealth direction—a perception given loathsome shape in the decisions of *Pollock v. Farmers' Loan & Trust Co.* in 1895, which struck down the first federal income tax, or *Lochner v. New York* in 1905, which struck down a state's power to set limits on working hours for bakers and lent its name to the *Lochner* Era. Increasingly, populist and progressive politicians began to raise the long-dodged question: whose word is final on the Constitution, the Court's or the people's?

The decisive difference that emerged between constitutional conservatives and progressives was their understanding of judicial authority—a matter that only became relevant and divisive as the Court became more assertive in the late Gilded Age and early Progressive Era. Though populists and progressives had been developing a critique of the federal judiciary for some time, progressive attacks on the courts reached their zenith with the movement in favor of the recall of judges and judicial decisions by popular vote from 1910 to 1912. Many progressives had come to regard the federal judiciary's ability to rule laws unconstitutional as a perversion of democratic principles and an obstacle to national progress. Thus, they conceived of making judges subject to popular review as a means of making them responsive to "the people," and as necessary to secure popular government—an argument many Anti-Federalists of 1788

might have recognized.[12] To conservatives, the threat of judicial recall represented an attack on the rule of law and the road to the sort of majoritarian tyranny described by James Madison in *Federalist* 10. The conservative image of the federal judge was the Hamiltonian judge of *Federalist* 78. If a judge could be removed for an unpopular opinion, or his ability to enforce constitutional limitations be subjected to popular will, then constitutionally-limited government—a government of laws, not of men—ceased to exist. The question was not merely over whether a judge could review a law—all parties vaguely agreed on this—the question was whether the judge's verdict was final or if the people could challenge his judgment, not merely correct it by amendment. The question raised by judicial recall was between judicial and popular supremacy over the matter of constitutional interpretation.

The fight over judicial supremacy in 1912 shattered whatever remained of the vague nineteenth-century constitutional consensus and upended the uneasy balance between conservatives and progressives in the Republican and Democratic parties. Push was coming to shove, and the judge's power under the American Constitution demanded a clear definition. This study will illustrate how the fight over the judiciary divided the two major parties into conservative and progressive factions over their view of judges and the Constitution; how decisions in both parties, capped by the victory of Woodrow Wilson, resulted in the triumph of judicial supremacy in 1912; and how the debate between progressives and conservatives changed from one over the validity of judicial review to one over the power's proper exercise in either a progressive-liberal or conservative direction. Neither of the groups generally labelled "conservative" or "progressive" were monolithic, and both retained deeply consequential

[12] See *Brutus* XI, Jan. 31, 1788, as found in *The Anti-Federalist: Writings by the Opponents of the Constitution*, ed. Herbert J. Storing, selected by Murray Dry from *The Complete Anti-Federalist* (University of Chicago Press, 1985), 162-67.

differences within their ranks that this study will explore. Understanding the various constitutional views of men like Roosevelt, Taft, and Wilson, for instance, will be essential in understanding just how fateful the events of 1912 were. Specifically, though, the present work looks at the conservatives of both parties who, bewildered by the perceived heresy of judicial recall, struggled to change targets in the wake of Woodrow Wilson's ascent to the presidency, and whose perceived successes amounted to leaping from a present frying pan into a future fire. Additionally, on a more niche level, this paper brings much needed emphasis to the constitutional battle within the Democratic Party. While the story of Taft's stand for Republican conservatism is well-documented, the long defeat of constitutionally conservative Democrats is often forgotten.[13]

The events of 1912 represent the climax of a tragedy still unfolding. Though all parties to the contest knew they were fighting for something important, almost none of them would live to realize the full consequences of their efforts. The immediate losers, tragic heroes of a kind, were the populist-progressive advocates of popular review, whose bold stand for popular sovereignty was strangled in the cradle between the fists of Taftian conservatism and Wilsonian progressivism. Wilson, the nominal victor of the day, would die a broken, debilitated man before ever seeing a court in his own image. It is the conservatives who defended the ideal of the independent judiciary, however, who are the truly tragic figures. A generally older cohort, they spent their last energies defending a power that, in time, would be used by their progressive successors to destroy the very jurisprudence they hoped to preserve. Of the main characters, only

[13] For a sample of the work on conservative Republicans, see Johnathan O'Neill, "The Idea of Constitutional Conservatism in the Early Twentieth Century," *Constitutionalism in the Approach and Aftermath of the Civil War* (New York: Fordham University Press, 2013); William Schambra, "The Election of 1912 and the Origins of Constitutional Conservatism," *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era*, ed. Joseph Postell and Johnathan O'Neill (New York: Palgrave Macmillan, 2013), 95- 120; Sidney M. Milkis, "William Howard Taft and the Struggle for the Soul of the Constitution," *Toward an American Conservatism*, 63-94.

a wizened Elihu Root would live to see the court-packing controversy of 1937 in his final year, while Charles Evans Hughes, more of a secondary character, would be the first Chief Justice forced to deal with the nightmare of the new constitutional politics. Many commentators, both popular and scholarly, have emphasized the role of the 1912 election as a beginning; the beginning of modern politics. I believe this emphasis is misplaced. 1912 was an end; the end of a great democratic tradition in American constitutional politics in which people sought to answer constitutional debates at the ballot box. 1912 provided an answer to the central constitutional question of the Progressive Era. That question was not what the Constitution meant, but who had the right to decide it. The answer? Judges. "We are under a Constitution," Hughes had said in 1907, "but the Constitution is what the judges say it is."[14] The new consensus would ensure that what the Constitution meant did not necessarily reflect popular belief and understanding. 1912 was an end to a democratic era—albeit one with a bang. 1916, on the other hand, was a beginning. It was the beginning of a new constitutional politics that existed within the consensus of judicial supremacy and that revolved not around popular will but judicial will.

At the outset, I think it necessary to delineate the terms and scope of this paper's purview. First, this is a study of the role that judicial power played in shaping the politics of the Progressive Era and how divergent understandings of the American judge's function and its relation to constitutional government drew lines that remain familiar today. This is a study in constitutional politics, not a discussion of jurisprudence, but it must be read with some basic understanding of the jurisprudential climate at the turn of the century, a brief outline of which shall be provided. Second, my use of the term "judicial review" refers broadly to the power of a

[14] Charles Evans Hughes, speech delivered to the Chamber of Commerce at Elmira, New York, May 3, 1907, as found in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906-1908* (1908), 139. Though Hughes is counted among the moderate conservatives of the bench, his words here could be confused for the words of Justice Oliver Wendell Holmes, Jr.

judge or court to assess the constitutionality of a law or act, which itself was a contentious matter in the Progressive Era. Third, the use of the terms "conservative" and "progressive" must be understood in the context of the time. The labels "conservative" and "progressive" were not inherently contradictory, as shall be discussed. More than anything, they are here used to express an individual's primary attitude toward political change. Conservatives tended to view themselves as sharing the philosophical perspective of the founders and strived to apply constant principles to changing material circumstances. Human nature, for a conservative, was unchanging and political principles were, too.[15] Progressives tended to be pragmatists who did not consider the law in constant, absolute terms. Political principles, like biological organisms, evolved and adapted to new conditions—success was the test of truth.[16]

Still, almost everyone I call a "conservative" would have affirmed their belief in "progress," though usually only in terms of efficiency or material progress, and "progressive" figures like Wilson or Roosevelt would have preferred to be called "conservative," not "radical." But whereas in the nineteenth century any respectable politician had to be "conservative," that is, they had to argue that their beliefs were the correct interpretation of the founders' vision, many politicians in the Progressive Era felt emboldened to speak of "progress" beyond the founders' Constitution rather than continuity with it.[17] One important auxiliary contention of this study is that the events of the Progressive Era were formative in creating a false dichotomy between

[15] Belief in an essential human nature and the existence of natural law are commonly accepted as fundamental to the conservative disposition, see Russell Kirk, "Chapter I: The Idea of Conservatism," *The Conservative Mind: From Burke to Santayana* (1953); Clinton Rossiter, "Chapter II: The Conservative Tradition, or Down the Road from Burke to Kirk," *Conservatism in America: The Thankless Persuasion*, second ed. (New York: Random House, 1962); William R. Harbour, *The Foundations of Conservative Thought: An Anglo-American Tradition in Perspective* (University of Notre Dame Press, 1982).

[16] For a superb exploration of the pragmatic, progressive mind, see Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus, and Giroux, 2001.

[17] For a concise explanation of the progressive mindset, see Ronald J. Pestritto, "Introduction," *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, Maryland: Rowman & Littlefield, 2005).

progress and conservation, and much attention is paid to expanding our understanding of the words "conservative" and "progressive." Lastly, upon considering the figures discussed below, it must be said that there has hardly ever been a finer public debate between men with sincerely held convictions than that at the height of the Progressive Era. Certainly, there has not been one since. Though I maintain that the constitutional result of 1912 was an American tragedy, I do not believe that such an outcome was the design of any participant; in most cases, the long-term result was the exact opposite of what everyone hoped for. And so, as far as the story is a tragedy, it is also a black comedy. We would be terrible prudes if, surveying the vastness of man's folly, we could not laugh as much as we wept.

Brass Tacks

The turn of the twentieth century was a transitional time in constitutional law. At the center of this transition were competing notions of what the power of judicial review entailed and what it meant for constitutional government. The traditional view among the legal elite, which was the view of much of the founding generation and the view of most of the conservatives discussed below, was that the power of judicial review, as theorized (if not named) by Alexander Hamilton in *Federalist* 78 and applied by Chief Justice Marshall in *Marbury v. Madison* (1803), was a simple power of interpretation that upheld a law or act if it was in conformity with constitutional limitations and struck a law or act down if it violated them. The judge's task was to "discover" the law, not "make" it. This view also presumed the existence of a natural law—a law independent of human contrivance—which meant that first principles, and law predicated on them, did not change over time.[18] The Constitution was the supreme rule

[18] Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (Lanham, Maryland: Rowman & Littlefield, 1994), 1-5.

against which acts were tested, but interpretation through the common law tradition of "discovered" law gave meaning to concepts like "due process," "trial by jury," or "*ex post facto*."[19] Traditional jurisprudence, however, tended to be deferential to the democratic process except in extreme cases, as when courts would be asked to enforce a law, like the repudiation of existing contracts, that would cause it to assume unconstitutional authority. When a traditionalist judge struck down a law as unconstitutional, he understood himself as defending the people's law from the usurpations of a hot-headed and temporary majority. The people's law had to be changed through the amendment process. This view could be regarded as the most traditionally conservative in attitude.

The next view, which one might call the "natural law activist" view, believed that the judge's job was to "discover" the law, but did not feel confined to constitutional language or common law tradition to make judgments. Increasingly, these judges believed they could interpret the natural law itself and incorporate it into the Constitution. During the Progressive Era, this view often held a narrow majority on the Supreme Court and interpreted the due process clause of the Fourteenth Amendment to protect the "liberty of contract." The natural law activist view is the one which most angered reformers and earned federal courts a reputation for "laissez-faire" jurisprudence. Many would call this view "conservative" because of its belief in natural law and commitment to property rights, but its development of economic substantive due process was highly innovative and controversial. It may, however, be unfair to categorize their thinking as laissez-faire. Their thought was more a refined version of the free labor ideology common in America in the latter-mid nineteenth century. When a natural law activist judge struck down a law as unconstitutional, he understood himself as defending the natural rights of the individual,

[19] James R. Stoner, "Natural Law, Common Law, and the Constitution," *Common Law Theory*, ed. Douglas E. Edlin (Cambridge University Press, 2007).

as protected in the Fifth and Fourteenth Amendments, against majority tyranny. The tragic irony of constitutional politics in the Progressive Era was that judicial traditionalists were pressed to defend the power of judicial review against progressive criticism despite their mutual agreement that it was being misused, or at least misinterpreted, by natural law activists.

The emergent progressive view, which became influential in law schools by the turn of the century, was the "realist" or "positivist" school. Realists believed that judges "made" law through their judgments, did not believe in a natural law, and believed the law should adapt to the needs of the times. Law did not exist separate from its applied interpretation.[20] "The life of the law," as Oliver Wendell Holmes, Jr., famously stated in *The Common Law* (1881), "has not been logic: it has been experience."[21] Law in the realist tradition, like humanity, was an evolutionary enterprise. Some realist progressives of a more democratic kind, like William Jennings Bryan or Theodore Roosevelt, argued in favor of a popular check on judicial decisions, while others, including figures both on and off the court, urged a broader power of judicial review in the progressive direction; one that could be used to regularly reinterpret the Constitution to suit the needs of the day. In practice, of course, distinctions in progressive thought were often blurred in the heat of battle. The commonality among all realists was that they did not believe there were eternal legal principles that could be discovered and defended but that law and its purposes were experiential and pragmatic.

Admitting such ambiguities, jurisprudential debate in the Progressive Era took place between at least three broad factions: traditionalists, natural law activists, and realists, both

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[20] Wolfe, *Rise of Modern Judicial Review*, 4-7; for the classic treatment of the two conservative schools of thought, see Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Ithaca, New York: Cornell University Press, 1960); for a progressive take on the jurisprudential conflicts at the turn of the century, see Edward A. Purcell, Jr., "Chapter I: The Premise of an Age: Law, Politics, and the Federal Courts, 1877-1937," *Brandeis and the Progressive Constitution:* Erie*, the Judicial Power, and the Federal Courts in Twentieth-Century America* (New Haven: Yale University Press, 2000), 11-38.

[21] Oliver Wendell Holmes, Jr., *The Common Law*, (Boston: Little, Brown, and Co., 1881), 1.

deferential-popular and activist-elite. But, as all know, arcane legal theories seldom feature prominently in public debate, and the finer points of jurisprudential conflict were lost in political contests. A key feature of practical political conflict was that prominent politicians only argued from traditionalist or realist positions. None of the figures discussed below defended the natural law activist interpretation represented in *Lochner* or like decisions. Instead, until 1912, they argued about whether it was wiser to permit the people to right judicial wrongs directly through recall or to let the battle take place in the courtroom. As this paper argues, in the era that followed 1912, debate over constitutional problems shifted to a dialogue between traditionalists and realists who agreed on the principle of judicial supremacy but disagreed on whether judicial review ought to be a progressive or conservative instrument. While all factions party to the great constitutional debate of the Progressive Era are important, the present study expressly seeks to mark the efforts and the fates of those traditionalist conservatives in both parties as they struggled to defend in the public square those principles that they had always taken for granted. In part, this focus is meant to illustrate to modern constitutional conservatives and traditionalists just how unintentionally suicidal their faith in judicial supremacy was and is. The intentions of judicial conservatives were noble. But, then, so were those of Lord Cardigan and the Light Brigade.

The story is broken into three chapters, which roughly reflect the rising action, the climax, and the denouement of the triumph of judicial supremacy. Chapter I will illustrate the development of the political situation to 1910. Specifically, the chapter will outline the various ways the federal courts became controversial and more prominent in the public consciousness, as well as how the court became a divisive issue in presidential politics. Chapter II describes the key moments of the story where the fateful decisions were made. The chapter spans from 1910 to

1912 and explains the intricate forces at work that made the judiciary the critical issue of 1912 and helped to decide its fate, as well as the fate of the nation's politics. Chapter III offers a close analysis of the importance of the decisions of 1912 for constitutional politics and its fallout. The chapter carries on to 1916 and describes it as the first election to establish the new paradigm of constitutional politics within a framework of judicial supremacy. The conclusion does some recapitulatory work in identifying the core conclusions, but also offers my own reasons for viewing 1912 as a tragedy and some observations on the "New Constitutional Politics."

CHAPTER I. COURTING DISASTER

The central focus of this study is to explain how the question of a judge's power was answered in favor of judicial supremacy during the Progressive Era. But before that work can commence, it should be shown how the question was raised in the first place. How did there come to be a tension between popular and judicial sovereignty? When populist-progressives challenged the authority of the Court in 1912, they, like the Patriots of 1776, did so with a wrath incurred not by any one specific event but by a perceived "long train of abuses." To its turn-of-the-century critics, it seemed that the federal judiciary consistently twisted the law and the Constitution to benefit the interests of wealth and capital, usually to the detriment of labor or the common people. Though this study argues that by 1912 the question of court power became one of fundamental constitutional theory, it did not begin so clearly. The people of the United States have long held a reverence for the nation's courts, and it took a sustained pattern of court rulings against the popular will before any direct theoretical question of authority was raised in public. This chapter will proceed, first, by identifying three specific behavioral patterns that brought the federal judiciary into conflict with popular opinion, and, second, by illustrating briefly how these tensions developed in the national political system. Three broad points should become clear to the reader: one, that legal-economic conflicts at the end of the nineteenth century raised political questions reminiscent of those raised around the time of the drafting of the United States Constitution; two, that the three main currents of court action flowed together into a larger stream wherein the judiciary asserted a greater, more authoritative and visible role in dictating the terms of American constitutional life; and three, that the painful "search for order" in a new industrialized society split parties apart over fundamental issues of constitutional interpretation

and opened the way for a realignment of the American political system.[22] For generations Americans had shared a reverence for the sacrosanct Constitution. The rigors of an industrializing economy, however, worked as a solvent to this alabaster edifice and revealed that it housed two competing understandings of the same Constitution; the Constitution understood and actively defended by the people at large, and the Constitution interpreted and defended by a powerful judiciary. When both parties insisted on moving their erstwhile birthright in opposite directions, a reckoning was in order.

The Federal Injunction

By 1910, anti-court sentiment was strong and broad in its appeal. This appeal reached to at least three basic political blocs: organized labor (sometimes socialist, sometimes not), rural, small-holding farmers (populists), and middle-class professionals with reformist attitudes (model progressives). Though all their concerns ran together at various junctures, the federal judiciary asserted itself in three distinct ways that frustrated each group. The common feeling was that the interests of the many were overridden by courts to protect the interests of the wealthy few, even if members of "the many" did not always find common cause with others who claimed to be part of the many. The first of these court actions, which was the most concrete and immediate in its effects, was the use of the injunction power against labor agitation. An injunction is a court order to cease the planning or performance of unlawful activity that, in the simple case of criminal conspiracy, has long common law precedent. Until the 1890s, nearly all injunctions occurred at the state level and were ordered to forestall or stop the damage of property. The injunction power saw an unprecedented rate of use during the tumultuous 1880s, particularly in the "Great

[22] My broad framework and interpretation of economic tensions during the Gilded Age and Progressive Era is indebted to Robert H. Wiebe, see Wiebe, *The Search for Order, 1877-1920* (Hill and Wang, 1967).

Upheaval" of 1886. In line with the jurisprudence of the day, courts generally interpreted the rights of property broadly, which, combined with the renewed zeal of labor activists, resulted in frequent use of court-backed militias to subdue strikes. It was only toward the end of the 1880s, however, that the federal courts became increasingly involved in labor disputes.[23]

Just as they worked to nationalize so many other socio-economic phenomena, railroads were the route taken by the federal judiciary into the realm of labor unrest. Almost by their nature, railroads were an interstate business, a fact that invited the possibility of federal intervention. The first such case was that of the Great Southwest railroad strike of 1886, which involved employees of two railroads owned by Jay Gould across five states. After a month of striking, Gould had refused to meet any demands. Strikers grew restive and turned to bouts of violence. Federal injunctions were sought and served, and US Marshalls were called to pacify the strike.[24] Violence erupted in the Chicago Haymarket just as the strike was winding down, knee-capping the Knights of Labor, and raising national concerns about an assertive labor movement. The trend accelerated into the 1890s and was defined by a pattern of business owners generally rejecting and undermining labor's demands, which was often met with labor violence that, in turn, resulted in injunctions and the use of forceful coercion to put down strikes.

Capitalists, laborers, and judges were dealing with disputes of an extraordinary scope and scale brought about by the rapidly industrializing economy. It was not clear where the common law rights of property ended and those of labor, itself a kind of property, began. While it is easy to look back and see only the greed of Robber Barons and the plight of workers, judges were in a

[23] "The Use of Injunctions in Labor Disputes," *Editorial Research Reports 1928*, Vol. 1 (Washington, DC: CQ Press, 1928).
[24] *Weekly Atchison Champion* (KS), Mar. 27, 1886; *Official History of the Great Strike of 1886 on the Southwestern Railway System*, compiled by the Bureau of Labor Statistics and Inspection of Missouri (Jefferson City: Tribune Printing Co., 1886); Theresa A. Case, *The Great Southwest Railroad Strike and Free Labor* (College Station: Texas A&M University Press, 2010).

very tricky position. They had to fill out a hitherto undefined portion of law to resolve disputes and ensure order. While courts vaguely recognized the right of union workers to strike and control their labor, they usually drew a sharp line when labor threatened to damage property or intimidate "scab" labor. Strikebreakers, after all, were thought to possess their own right to control their own labor. Judges did not see one mass of "labor" seeking redress, but one party of laborers seeking a better arrangement for themselves as a set or class, often at the expense of other laborers or business-owners. The ideals of a free labor economy were encountering the realities of an economy that did not permit free labor ideals. There were no easy answers.[25] It is worth noting that William Howard Taft, who was a state judge in Cincinnati at the end of the 1880s, and then a federal judge on the Sixth Circuit in the 1890s, was influential in establishing precedent for dealing with labor disputes and issued a goodly sum of injunctions in addition to his regular trial work.[26]

Mounting frustrations grew to outrage in 1894. Though labor had lost to wealth and bayonets for years, the pacification of the Pullman strike involved new levels of federal involvement that came with the blessing of the Supreme Court. Unlike many other failed strikes in the Gilded Age, the outcome of the Pullman strike was pivotal in cementing establishment legal thinking, not to mention much of public opinion, over the next decade. The upshot of the confrontation was the proliferation of the federal injunction and the radicalization of Eugene V. Debs, but the unique conditions of the struggle offer a window into both the legal thinking and the economic realities of the day.

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[25] Leon Fink, "The American Ideology," *The Long Gilded Age: American Capitalism and the Lessons of a New World Order* (University of Pennsylvania Press, 2015), 14-17.
[26] Alpheus T. Mason, "The Labor Decisions of Chief Justice Taft," *University of Pennsylvania Law Review and American Law Register*, Vol. 78, No. 5 (Mar. 1930), 585-625.

As with so many labor disturbances before it, the Pullman imbroglio was sparked by an economic downturn followed by wage cuts, this time at the Pullman Palace Car factory. But, unlike in most other labor scraps, Pullman workers largely resided in the company town of Pullman on the outskirts of Chicago. George Pullman, an entrepreneur of railway cars, believed that neat and healthy living conditions were key to a contented and productive work force, thus he built Pullman to ameliorate the worst aspects of industrialization under a sort of industrial feudalism. Pullman, however, did not cut rents when he cut wages, which prompted many of his unskilled workers who were members of the American Railway Union to strike. Debs, the national leader of the ARU, called a general sympathy strike and boycott of all rail lines using Pullman cars, which pit the ARU against the united railroads under the General Managers Association. Rail traffic across the Midwest was paralyzed. Attempts to bring in strikebreakers and run Pullman cars resulted in the destruction of rail property across multiple states. President Grover Cleveland, a man of firm conservative temperament, leapt to action. Cleveland instructed his Attorney General, Richard Olney (a former rail attorney) to seek federal injunctions against the strikers as part of his constitutional duty to ensure mail deliveries. Most cunningly, Olney cited the 1890 Sherman Antitrust Act against the strikers who, the administration claimed, were conspiring in restraint of trade and commerce. Several injunctions were granted, and soldiers arrived to quash the insurrection. Thus, the federal judiciary signed off on using antitrust legislation to warrant the military suppression of one of the nation's largest labor strikes. Topping it all, Debs was held in contempt of court for resisting the injunction. His conviction was upheld unanimously by the Supreme Court in *In re Debs* in 1895, granting the use of the federal injunction the supreme seal of approval.[27]

[27] Fink, *The Long Gilded Age*, 47-50; *In re Debs*, 158 U.S. 564 (1895).

The immediate judicial consequence of the Pullman strike's conclusion was the expansion of the injunction power against labor agitation that would not abate until the Norris-LaGuardia Act of 1932 prohibited its use. Over the next few years a slew of law review articles with the same title complained of "Government by Injunction," and the issue became a recurring theme in partisan debate.[28] But the legal and constitutional implications went further. The reasoning that antitrust legislation could be used to prohibit the use of the secondary boycott, which was literally a conspiracy to restrict trade, would linger and be bolstered by a unanimous court—including the more progressive Justices William H. Moody and Oliver Wendell Holmes, Jr.—in *Loewe v. Lawlor* (1908).[29] This situation would only be altered by the Clayton Antitrust Act in 1914, which prevented the use of antitrust law against unions. But the second half of the story more fully reveals legal thinking at the time. Many observers blamed Pullman's paternalism for the incident and considered his company town model un-American. The Illinois supreme court stripped Pullman of his namesake municipality in the wake of the strike. Conservative opinion was not merely hostile toward the coercive power of combined labor, but also toward the admission of any sort of paternalistic, dependent relationship in the economy.[30] The free labor beliefs of many in the legal and political conservative establishment insisted on viewing the nation as a body of equals who could not be coerced and must be allowed to associate freely. To admit any other sort of economic relationships, let alone to encourage them, flew in the face of the faith that fought and won the Civil War, so the thinking went. But the

[28] See William G. Peterkin, "Government by Injunction," *The Virginia Law Register*, Vol. 3, No. 8 (Dec. 1897), 549-63; S. S. P. Patteson, "Government by Injunction," *The Virginia Law Register*, Vol. 3, No. 9 (Jan. 1898), 625-35; Charles Noble Gregory, "Government by Injunction," *Harvard Law Review*, Vol. 11, No. 8 (Mar. 1898), 487-511.
[29] *Loewe v. Lawlor*, 208 U.S. 274 (1908).
[30] Fink, *The Long Gilded Age*, 49-50.

people at the bottom of the economic ladder were stirred to ask a question: whose interest was the Constitution meant to serve? That of the individual or of the commons?

Populists and Repudiation

When, at the 1893 Chicago World's Fair, Frederick Jackson Turner marked the disappearance of an open, unsettled western frontier as "the closing of a great historic movement," he might also have noted that it seemed the entire West had burst open in revolt.[31] Over the past few years, farmers across the South and West had formed into organizations like the Farmer's Alliance and, most recently, the People's Party, or Populist Party, in protest against the new economy where farmers seemed always and everywhere to come dead last. Most recently, in 1892, former congressman James B. Weaver had carried several western states running as the People's Party candidate for president. With the excited frenzy of western expansion and empire building now chilled, disgruntled farmers noted three depressing trends: agricultural prices kept falling, the money supply kept shrinking, and the railroads haunted their livelihoods at every turn. Successful railroads seemed to charge whatever prices they wished and harried the small farmer's access to markets, while failed railroad investments left western municipalities and states saddled with debt and no road to show for it. To make matters worse, city folk appeared to be enjoying the finest luxuries that modern industrial civilization could afford. Railroad barons and cosmopolitan bankers seemed to split their time evenly between having their way with Poor Richard's life savings and sipping French champagne. These

[31] Frederick Jackson Turner, "The Significance of the Frontier in American History," *Frontier and Section: Selected Essays of Frederick Jackson Turner*, ed. Ray Allen Billington (New Jersey: Prentice-Hall, 1961), 37.

untenable conditions turned the humble farmer into one of the country's pioneering economic critics and set the Populists on a collision course with the nation's judiciary.[32]

As has been well-noted by historians, the Populists introduced a bevy of political proposals that included many ideas later taken up and implemented by progressives.[33] These reforms included the direct election of senators, the federal graduated income tax, ballot initiative and referendum, immigration restriction, and labor laws like the eight-hour day. They also expressed sympathy with the organized labor of the country.[34] A large part of their frustration with the status quo involved the courts. The year he ran for president, James B. Weaver published *A Call to Action*, in which he warned against the growth of judicial power that he said, "dethrones the people who should be Sovereign and enthrones an oligarchy." Weaver argued that there needed to be restraints placed on judicial power to restore confidence in the institution but demurred from specific proposals and no mention of his scheme found its way into the Omaha Platform.[35] Beyond their broader constitutional proposals, however, the Populists had aims specific to their own situation that drove their political activities. Their central and immediate concern was debt relief. Two ways in which they sought such relief was to increase the money supply by the free coinage of silver, thus raising the prices of their goods in relation to their existing debts, and to seek the repudiation of municipal and state-level debts incurred by

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[32] John D. Hicks offered one of the earliest and most comprehensive studies of the Populist movement, see Hicks "The Grievances," *The Populist Revolt: A History of the Farmers' Alliance and the People's Party* (University of Minnesota Press, 1931), 54-95.

[33] This is the traditional interpretation of the Populist contribution as offered by Hicks in *The Populist Revolt*. Richard Hofstadter, in *The Age of Reform* (1955), began an alternate tradition of casting Populists as backward and atavistic losers. Many scholars since have identified the Populists as champions of American democracy. Some, like Lawrence Goodwyn in *Democratic Promise: The Populist Movement in America* (1976) and Christopher Lasch in *The True and Only Heaven: Progress and its Critics* (1991) have positioned Populists as democrats against encroaching modernity, while most recently Charles Postel, in *The Populist Vision* (2007), has portrayed them as forward-looking progressives with an alternate vision of a capitalist economy.

[34] "People's Party Platform," *Omaha Morning World-Herald*, Jul. 5, 1892.

[35] James B. Weaver, "Supreme Court," *A Call to Action: An Interpretation of the Great Uprising, Its Source and Causes* (Des Moines: Iowa Printing Co., 1892), 67-135; quote and context found in Ross, *A Muted Fury*, 27.

scam railway promotions. While both earned the scorn of more conservative observers in the East, it was the latter strategy that brought them into direct conflict with the federal courts.

Following the Civil War, the United States underwent an economic explosion that, among various other forms of industrialization, involved large scale westward migration and settlement as well as a massive railroad boom. Railroads in the 1870s and '80s, like canals half a century before them, were the national speculative mania. Numerous rural municipalities were persuaded by means fair and foul to sell bonds to railroad developers in exchange for company stock. In many cases, legislators and newspaper editors were bribed to endorse the bond sales, while in others the out-of-state developers simply lied. Railroads either did not materialize or were built elsewhere, thus depriving the municipalities of the added population and business that was touted to promote the sale and cover the compensatory taxes. Farmers bore the brunt of taxation to pay for nonexistent railroads while agricultural prices fell, and chronic monetary deflation inflated their debt burdens. States across the plains and Midwest passed laws repudiating the debts or forbidding the levee of taxes to pay for them. These cases rose to federal courts and, ultimately, the Supreme Court. Federal courts uniformly took the side of bondholders, finding holders "innocent" and pronouncing the sales to be *bona fide*. From 1870 to 1896 the Supreme Court held bonds to be enforceable in over three hundred and fifty cases.[36] Unlike some of their more infamous rulings later in the *Lochner* Era, the Court felt quite secure in these judgments. Though one Justice privately accused his colleagues of being "if not monomaniacs, as much bigots and fanatics on that subject as is the most unhesitating Mahemodan in regard to his religion," members of the Court could look back to a long heritage

[36] Alan Furman Westin, "The Supreme Court, the Populist Movement, and the Campaign of 1896," *The Journal of Politics*, Vol. 15, No. 1 (Feb. 1953), 4-7.

in the enforcement of contracts and debt payment.[37] Thwarting debt-evasion efforts by popular movements like Shays' Rebellion was one of the proximate motivations for revising the Articles of Confederation, and Justice Marshall himself had begun a tradition of firmly upholding the Contracts Clause against state legislatures, even in the case of bribery allegations.[38]

Though the stance of the Supreme Court in the debt repudiation cases was not so much a theoretical innovation or assertion of new court power, the scale of the legal confrontation was unprecedented, and it created the impression that federal justice really was blind in the worst way possible. Not only was the Court ignoring the economic devastation of communities across rural America, it was tying the hands of those communities behind their own backs as they attempted to defend themselves. While many commentators dismissed the Populists as cranks, their plight also solicited sympathy from many observers and, combined with their aptitude in proposing thoughtful constitutional reforms, played a sort of John the Baptist role in clearing the way for the arrival of a new social gospel. The economic plunge in 1893, combined with President Cleveland's refusal to budge on the gold standard despite Democratic catastrophe in the 1894 midterm elections, set the stage for the absorption of anti-court sentiment into mainstream politics. Events further heated the iron when, in 1895, the Supreme Court struck down the first federal income tax passed the previous year in *Pollock v. Farmers' Loan and Trust Company* on what seemed a technicality. When, at the Democratic National Convention in 1896, William Jennings Bryan told his audience that "you shall not crucify mankind upon a cross of gold," and called attention to the role of the Supreme Court in exacerbating the present crisis, listeners

[37] Justice Samuel F. Miller confiding to his brother-in-law, quoted from Paul A. Freund, *On Understanding the Supreme Court* (Boston: Little Brown, and Co., 1950), 4-5, and Westin, "The Supreme Court, the Populist Movement, and the Campaign of 1896," 5-7.

[38] *Fletcher v. Peck*, 10 U.S. 87 (1810), a unanimous decision under Marshall in 1810 upheld the sanctity of contracts under the Contracts Clause, even in the event of bribe-induced legislation, and set the precedent of striking down state attempts to void them. *Dartmouth College v. Woodward*, 17 U.S. 518 (1819) further bolstered the Contracts Clause that opened the way for the growth of American corporations.

might have been forgiven for wondering if the Supreme Justices did not play the part of Pontius Pilate.[39] It was in such a spirit of populist discontent and righteous indignation, in large part against the Court, that the Commoner seized control of the world's oldest political party.

Judges Block the Road to Progress

Injunctions and draconian contract enforcement did much to fuel widespread suspicion of the federal court system, but they did not lie at the heart of the constitutional struggle in 1912. Instead, that war would be waged against two related concerns: one, that the Court was interpreting constitutional provisions in a way that contradicted popular and traditional understanding, and two, that the Court was asserting its absolute right to pass judgment on the Constitution in a way that endangered the integrity of popular, democratic government. The two behaviors had to be combined over an elongated period for the issue to rise to the critical level that it did and for it to present itself as a burning constitutional question. To understand the forces at play in 1912 on an intellectual level, then, three basic questions need answering: how did the natural law activists who dominated the Supreme Court understand the Constitution and the rights of Americans; how did they come to gradually assert this view on the American polity; and what was the broad theoretical criticism offered by their most direct opponents, the progressives?

By far the most common characterization of the jurisprudence that came to be identified with the *Lochner* Era is "laissez-faire." Admittedly, this paper at times invokes the term loosely to denote anti-regulatory attitudes. But it is perhaps not fair on a technical level to ascribe to the pro-*Lochner* justices that slur, unless, of course, one is also prepared to charge many judges in

[39] *Official Proceedings of the Democratic National Convention Held in Chicago, Illinois, July 7, 8, 9, 10, and 11, 1896* (Logansport, Indiana, 1896), 226-234.

the second half of the twentieth century as being socially laissez-faire. Indeed, despite Justice Holmes' barbed dissent in *Lochner*, or any of the personal preferences of the justices in the majority, none of the justices derived their legal arguments from the economic precepts of William Graham Sumner or Herbert Spencer.[40] Surely, *Lochner* and like decisions were the result of ideology, but it would be far more accurate to say that conservative opinion was wed to a belief in free labor individualism and equality, which the pro-*Lochner* justices felt required substantive due process protections.[41] Fifty or sixty years earlier, their beliefs might have constituted a radical fighting faith. As it was, their views struck the public as the height of reaction. If one considers the situation in purely mechanical terms, judicially-enforced individualism is exactly what one should expect to be the cause of democratic tension. If the judges had been more deferential to common, majoritarian—in a word, democratic—decision making, there could have been no tension with "the people." Functionally, judicial review of legislation must always strike down a majoritarian statute in the favor of individual or minority rights and interests. For the pro-*Lochner* justices, as for modern constitutional individualists, those paramount individual rights found protection in the due process clauses of the then-recent Fourteenth Amendment and, somewhat secondarily, the ancient Fifth Amendment. The

[40] Famously, Justice Holmes accused his colleagues in the majority of imposing "an economic theory which a large part of the country does not entertain," going on the state that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*," and that "a constitution is not intended to embody a particular economic theory," *Lochner v. New York*, 198 U.S. 45.

[41] For a feisty revisionist take on Lochnerian liberty of contract, see David N. Mayer, "The Myth of 'Laissez-Faire Constitutionalism': Liberty of Contract during the *Lochner* Era," *Hastings Constitutional Law Quarterly*, Vol. 36, No. 2 (2009), 217-84. I take issue with Mayer's treatment of Holmes and the extent of his seemingly pro-*Lochner* position, but his overall analysis is highly fruitful, and he provides an overview of several revisionist stances on the reasoning behind liberty of contract. I find the free labor interpretation most convincing. Probably the best exploration of Lochnerian jurisprudence comes from Howard Gillman, *The Constitution Besieged: The Rise and Demise of* Lochner *Era Police Powers Jurisprudence* (Duke University Press, 1993). Gillman illustrates that *Lochner* judges took as foundational a belief that the United States formed a nation of equals and thus insisted on what they believed was strict legal neutrality—blind justice. Class interests and legislation represented the death of equal laws among equal men.

economic individualism that had marked the path to liberation at mid-century now trapped the public under crushing and uncaring economic forces.

Ironically, considering the Supreme Court's decision in *Plessy v. Ferguson* (1896), the free labor ideology that drove the *Lochner* court's infamous "liberty of contract" doctrine was the same that powered many abolitionist arguments before and during the Civil War. The basic liberal (in the classic sense) rationale was that, because all men are equal and have natural ownership over their bodies and their labor, a man's labor was his own to dispose of however he wished. That a man had a right to employ his labor however he saw fit was the crux of the practical side of the anti-slavery argument. In fact, one of the primary tasks of the Freedmen's Bureau during Reconstruction was to ensure that former slaves contracted their labor out as "free men" were supposed to do. Bureau devotion to contracts could be fanatical, sometimes forcing freedmen to enter contracts, like marriage, simply for the sake of making the freedman's life a contractual one. That this was a violation of the freedman's liberty of contract did not seem to occur to the Bureau. The goal of the free labor Reconstruction Congress was to create a labor and legal system that was blind and treated parties as free equals.[42] The system of southern slavery that subjugated an entire black minority under a white majority was the text-book case violation of a man's natural liberty. Other antebellum applications of the argument, by people like the radical "Loco-foco" Democrats, saw it employed against state-chartered monopolies. Equal rights for all, special privileges for none, and all the rest. As it happened, the jurisprudential reasoning that would eventually grow into the *Lochner* majority began its career on the supreme bench as a dissenting tradition with the *Slaughter-House Cases* in 1873, shortly after the

[42] Rebecca E. Zietlow, "Slavery, Liberty, and the Right to Contract," *Nevada Law Journal*, Vol. 19, No. 2 (2018), 467-73.

ratification of the Reconstruction Amendments. Just as free labor was losing its grip on Congress, the faith was taking up hold on the Court for a new stage in its strange career.

The broad, sweeping language of the first section of the Fourteenth Amendment, establishing national birthright citizenship, protecting the "privileges or immunities of citizens of the United States," as well as any person's "life, liberty, or property" with the "due process of law," and promising any person "the equal protection of the laws," makes it perhaps the most consequential amendment to the United States Constitution. It has come to mean many things to many people and was the main path taken toward incorporation of the Bill of Rights in the twentieth century. But one of its earliest tests, in the *Slaughter-House Cases*, narrowed its possibilities for individual liberty. The *Slaughter-House Cases* decision combined two cases filed by New Orleans slaughterhouses against the state of Louisiana and a New Orleans regulatory board. The Crescent City had sought to limit the locations of the slaughterhouses, whose upriver position had badly polluted the city's water supply. The slaughterhouses argued that the state's actions violated their "privileges and immunities" under the Fourteenth Amendment to employ their labor as they saw fit. In a 5-4 decision, the Court sided with the state, ruling that the state's action did not violate the Fourteenth Amendment because the amendment only protected their rights as U.S. citizens, like running for federal office. The decision neutered the Fourteenth Amendment's power to protect individual rights but upheld the ability of state police power to pursue the common good, more in line with how later progressives would think. The roots of *Lochner*, however, are to be found in the minority. Justice Stephen J. Field's dissent said the decision made the amendment a "vain and idle enactment," and spoke in favor of "the right to pursue a lawful employment in a lawful manner" and "the

right of free labor" alongside the "equality of rights in the lawful pursuits of life."[43] Nor were the dissenters a band of fuddy-duddy conservatives; they included both Chief Justice Salmon P. Chase and Justice Noah H. Swayne, who had both been strident opponents of slavery and early Republicans. Chase had been a leading figure on the radical wing of the Republican Party and posed an inconvenience to the more moderate Lincoln.[44] Their faith and hope lay in an American ideal predicated on a free-labor, liberal individualism as defended by a powerful federal judiciary. They saw the Fourteenth Amendment as the sword and shield of man's natural rights against the encroachment of popular tyranny.

The minority opinion of yesterday, however, is often the majority opinion of tomorrow, and the free labor ideology of the *Slaughterhouse* dissenters would grow on the Court until it became the voice of the *Lochner* deciders. Indeed, the free labor doctrine became a prevailing post-bellum legal and political attitude. Before the war, it had been an iconoclastic appeal to first principles, after the war, it was the heart of conservative political iconography. As shown above, the federal judiciary's willingness to wade into political conflicts increased throughout the 1880s and '90s. Over that time, both state and federal courts had developed a substantive due process defense of the liberty of contract, which meant that legislation could not take away a man's liberty of contract without the due process of law. At the federal level, this defense could be found in the due process clauses of the Fifth and Fourteenth Amendments, while many state constitutions contained similar clauses. Before the war, Chief Justice Roger B. Taney had infamously used substantive due process reasoning to strike down the Missouri Compromise in

[43] Mayer, "The Myth of 'Laissez-Faire Constitutionalism,'" 263-64; Zietlow, "Slavery, Liberty, and the Right to Contract," 469-70; *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).
[44] For an extended look at Chase's radical role in anti-slavery Republicanism, see Eric Foner, "Salmon P. Chase: The Constitution and the Slave Power," *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (Oxford University Press, 1970), 73-102. Chase helped to craft the "slave power" narrative to create a conservative basis for a radical cause.

Dred Scott v. Sandford (1857). Meanwhile, abolitionists had invoked similar due process arguments against slavery itself, as in the Booth Cases controversy of Wisconsin from 1854 to 1859. In all cases, the argument ran that individual rights and liberties could not be abridged by popular legislation, and, in all cases, court decisions along such lines were controversial.[45]

The behavior that would bring the Court under the greatest and most sustained theoretical criticism emerged in the mid-1890s, when the proto-*Lochner* majority had reached maturity. The Court embarked on a path of interpreting both the Fourteenth Amendment, as well as regular federal statues, in a way that frustrated state and federal attempts at economic regulation. While much of this trend was characterized by a defense of the "liberty of contract," that argument was by no means the only source of controversy. The decision in *United States v. E.C. Knight Co.* (1895), for instance, interpreted the Sherman Antitrust Act in such a way as to outrage reformers across the country. In 1894, riding his success against the Pullman strikers, President Cleveland brought an anti-trust case against the absorption of several sugar refineries by the American Sugar Refining Company that would grant the trust a 98% hold on the country's sugar refining industry. The next year, the Court ruled in an 8-1 decision that the Antitrust Act did not empower the federal government to regulate manufacturers, as their combination was not considered an effort to restrain commerce and trade, only production.[46] To observers, it looked that the Antitrust Act could be used freely against striking labor but not against an industrial monopoly, courtesy of the Supreme Court. The decision would only be moderated in 1905, with the decision of *Swift & Co. v. United States*. In that case, brought on by Theodore Roosevelt's wrangle with the Beef Trust, a unanimous court, with membership not vastly changed since 1895, held that the

[45] Mayer, "The Myth of 'Laissez-Faire Constitutionalism,'" 231-32.
[46] *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

federal government could regulate manufacturing if it affected interstate commerce under the Commerce Clause.[47]

The real free labor effrontery, however, began where it had met its first defeat in *Slaughter-House*: Louisiana. In *Allgeyer v. Louisiana* (1897), the Supreme Court struck down a Louisiana statute that forbade companies from obtaining insurance from providers without an agent in the state. The statute was intended to prevent insurance fraud. The opinion, delivered by Justice Rufus Wheeler Peckham for a unanimous court, formally established a substantive due process defense of the liberty of contract, arguing that the "liberty" protected by the Fourteenth Amendment extended "into all contracts which may be proper, necessary, and essential" in a man's "enjoyment of all his faculties." Furthermore, Peckham described the liberty of contract with the words of Justice Joseph P. Bradley's dissent in the *Slaughter-House Cases* as "an inalienable right," covered in the Declaration of Independence as the "pursuit of happiness." Speaking for the entire court, Peckham quoted Bradley that "the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."[48] With these words the Court formally adopted the liberty of contract as a fundamental right of U.S. citizens, which scholars would retrospectively mark as the beginning of the *Lochner* Era. While *Allgeyer* itself was not itself as immediately controversial as decisions like *Pollock*—the law it struck down was a restriction on interstate commerce and came from a unanimous court, after all—but it set the Court on a collision course with the advocates of popular sovereignty. Increasingly, the freshly coronated liberty of contract would be employed by bare majorities to strike down all sorts of state regulations, the most famous example of which would be *Lochner v. New York* in 1905.

[47] *Swift & Co. v. United States*, 196 U.S. 375 (1905).
[48] *Allgeyer v. Louisiana*, 165 U.S. 589-90 (1897).

Oddly enough, this constitutional dynamic was an inversion of the fears of many Anti-Federalists during the debates over constitutional ratification. Instead of granting the state too much power, the federal courts were castrating state power in the name of individual liberty. But this was not the cacophonous, pell-mell liberty of states' rights, this was an oppressive, top-down national liberty imposed by an omnipotent, supreme voice. The radical Declaration of Independence had spoken of "inalienable rights," while the more conservative Constitution sought to "promote the general Welfare." The "progressive" good of the commons was now prisoner to the "conservative" right of the individual. The real debate was not between conservative and liberal or progressive attitudes, it was between those who saw society as a contractual bundle of individuals and those who saw it as a common, shared enterprise. Beyond the political questions of right and wrong, good policy or bad, however, rose the greater constitutional question: who ought to decide the matter? Progressives, as it happened, had a far different answer to that question than conservatives did. The scholarly progressive response to Lochnerian jurisprudence emerged, as so many other variants of progressivism did, in tandem with the new professionalization of academic disciplines in the post-Civil War era. To gain a sense of their criticisms, one would do well to look at two leading progressive jurists: Oliver Wendell Holmes, Jr., and Louis Brandeis.

Holmes and Brandeis make excellent examples of the new progressive, realist jurisprudence both because of their contributions to the reshaping of the direction of legal thought and Supreme Court decisions, and because their personal outlooks on society were almost comically different. Both men were democrats committed to legislative primacy. But Holmes, a legal giant before his appointment to the Supreme Court in 1902 for his work *The Common Law* in 1881 and his time on the Massachusetts Supreme Court, held a cool, sardonic

view of democratic society flavored by a dark sense of humor. As mentioned above, Holmes believed that the law reflected "experience," not eternal, logical precepts, and famously called the Constitution, "an experiment, as all life is an experiment."[49] He thought of human morality in historicist and evolutionary terms with ideas being battled out, rising and falling over time. The law was pragmatic and functioned to meet social needs and ends. Belief was contextual. More than most, he ruled indifferently to his own preferred policy outcomes; though he held Captains of Industry in high esteem, the people had a right to try and regulate them. Thus, while Holmes was a defender of First Amendment rights as necessary to the experiment of ideas, he took a softer view of most individual rights in their relation to the common will. As he infamously said in his 8-1 majority opinion for *Buck v. Bell* (1927), that upheld a state law enabling the state sterilization of imbeciles, "we have seen more than once that the public welfare may call upon the best citizens for their lives," as in wartime service, "it would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices." If Holmes was laissez-faire, it was a prescription for the Court, not the legislature. "It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind … three generations of imbeciles are enough."[50] The public good could demand sacrifices from individuals, and the popular will should not be restrained by the imposition of absolutist principles of individual rights from the bench. Regardless of what was right or wrong, in a democracy that answer had to come from the people at large.

[49] Holmes, *The Common Law*, 1; *Abrams v. United States*, 250 U.S. 630 (1919).
[50] *Buck v. Bell*, 274 U.S. 207 (1927). For an excellent character sketch of Holmes, as well as his legal thinking, see Menand, *The Metaphysical Club*, *61*-69.

Brandeis, on the other hand, was a more conventional believer in the democratic faith. Every bit the legal pioneer as Holmes, albeit in far different venues, Brandeis, the son of Czech Jewish immigrants, built a prosperous private law practice in Boston. He used this position to pursue a wide array of progressive causes, often working *pro bono*. He effectively established the modern model of the activist attorney, earning the nickname the "People's Lawyer," and made contributions to legal thought, like the right to privacy, and legal practice, like the use of expert testimony. Democracy and social justice were his watchwords. In 1916, he became the first Jewish member of the Supreme Court, a position from which he would eventually preside over the demise of the *Lochner* Era in 1937.[51] Like Holmes, he believed that popular decision making through the legislature was the engine of American government. "In America, as in England," he said in one dissenting opinion, "the conviction prevailed [during the founding] that the people must look to representative assemblies for the protection of their liberties."[52] The people's needs should be met by the people's representatives and the common understanding of fundamental rights ought to prevail. Thus, Brandeis was an opponent of the nationalizing tendency of conservative judges at the time who were using a strong interpretation of individual rights from the federal Constitution and using it as a bludgeon against state legislation aimed at meeting popular needs. In this vein, Brandeis' career culminated in his majority opinion in *Erie Railroad Co. v. Tompkins* (1938), which severely limited the scope of federal jurisdiction and gave state decisions more deference—a change the Populists would have welcomed fifty years earlier. But with the basic contours of the legal debate outlined, as well as the sources of court

[51] One of the best accounts of Brandeis' legal life and importance comes from Edward A. Purcell, Jr. For an extended look at Brandeis' constitutional views, see Purcell "'Defects, Political': The Progressive as Constitutional Architect," *Brandeis and the Progressive Constitution*, 165-91.
[52] *Myers v. United States*, 272 U.S. 294-95, as found in Purcell, *Brandeis and the Progressive Constitution*, 165.

frustration identified, what was the practical process by which anti-court sentiment entered mainstream politics and came to be the defining issue from 1910 to 1912?

The Bench takes the Stump

More than any other man, William Jennings Bryan, the Commoner, was instrumental in injecting populist, anti-court sentiment into mainstream politics. His appeal to court skeptics was twofold. First, Bryan was a plainsman from Nebraska who understood the debt-inflicted pain of his farmer constituents. He brought Populist arguments out of the third-party wilderness and into Democratic Party politics. Second, it was Representative Bryan who had introduced the first federal income tax to the House of Representatives that was ultimately passed and struck down by the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.* in 1895. Thus, when Bryan seized control of the Democratic National Convention in 1896 with his electric "Cross of Gold" speech, it brought court power to the front of political debate. The Commoner introduced complaints against the federal judiciary alongside his other populist reforms and indirectly challenged the judge-made Constitution. The Democratic platform of 1896 alluded to the possible future composition of the Supreme Court and national papers, presuming a court-packing scheme, warned of a "Bryanized Supreme Court."[53] Though he enjoyed a cult of personality unlike any Democrat since the days of Jackson, Bryan led his party to spectacular defeat against William McKinley in both 1896 and 1900. Bryan bought the Democrats a reputation for radicalism against both the courts and business, which stood in stark contrast to the conservative policies of his predecessor as party leader, Grover Cleveland. But Bryan had kicked off the political dialectic, both within the Democratic Party and in mainstream politics generally,

[53] *Chicago Tribune*, Sept. 17, 1896.

that would tear down the nineteenth century constitutional consensus and gradually move judicial supremacy to the front of political debate.

In 1904, following Bryan's two decisive defeats, conservative Democrats wrested control over the Democratic Convention and looked to reaffirm the party's old creed. In 1896, for instance, a number of these conservatives had split to form the "National Democratic Party" on old classical liberal principles. In their platform, the National Democrats vaunted Cleveland-style values, accusing the Bryanites of attacking "the independence of the judiciary," among other charges.[54] Now, in 1904, seeking to regain a reputation of "sane" and "stable" leadership and to get young Theodore Roosevelt out of the White House, the conservative-held convention drafted the Chief Judge of the New York Court of Appeals, Alton Parker, into service.

Though all but forgotten in the historical record, Judge Parker was a leading figure in Democratic politics for much of the Progressive Era.[55] As a judge, he is notable for having written the state-level decision upholding the Bakeshop Act in *Lochner v. New York* in 1904 that was reversed by the Supreme Court in 1905.[56] His 1904 campaign aimed to "save the Constitution" from Roosevelt's perceived effort to break down the separation of powers in favor of executive authority.[57] Parker lost in a landslide and there history has left him. No treatment of

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[54] *National Democratic Party Platform*, adopted at the Indianapolis Convention, Sep. 1896; for more on the brief life of the National Democratic Party, see David T. Beito and Linda Royster Beito, "Gold Democrats and the Decline of Classical Liberalism, 1896-1900," *The Independent Review*, Vol. 4, No. 4 (Spring, 2000), 555-575.

[55] The lengthiest scholarly treatment of Parker, a master's thesis from 1983, sought to explain why he was forgotten. Though it made much of his obscurity, it restrained its coverage to his 1904 candidacy and recreated the progressive image of a man out of step with his times, see Fred C. Shoemaker, "Alton B. Parker: The Images of a Gilded Age Statesman in an Era of Progressive Politics," M.A. thesis, The Ohio State University, June 10, 1983; the most recent study of Parker occurred in a law journal and dwelt on the novelty of his candidacy, his obscurity, and the significance of his court decisions, see Leslie Southwick, "A Judge Runs for President: Alton Parker's Road to Oblivion," *Green Bag*, Vol. 5 (2001-02), 37-50.

[56] He would later defend himself against charges of reaction with his decision, see Speech at the New York State Democratic Convention as Permanent Chairman, Saratoga, NY, Oct. 2, 1912, Parker Papers, Box 13.

[57] Parker's campaign was remembered years later as a conservative effort by a judge to "save the Constitution," see *The Day Book*, Nov. 2, 1916; illustrative of the 1904 contest were its political cartoons. One depicted Roosevelt as a "militarist" stepping on the Constitution, while Parker, in judge's robes, held it aloft, see "Take Your Choice, Gentlemen" from *Puck* (Oct. 12, 1904), available from Library of Congress Prints and Photographs Division.

him as ventured beyond 1904. To his contemporaries in 1912, however, Parker was regarded as a leading conservative Democrat and as a possible presidential contender or Supreme Court nominee. Shortly after his defeat in 1904, he began private practice as an attorney in New York City, was made President of the American Bar Association from 1906 to 1907 and was president of the National Civic Federation from 1919 till his death. He was a prominent leader of the conservative faction at both the 1908 and 1912 Democratic National Conventions and bore an active role in campaigning for the party in the elections of 1908 and 1910. Though he would remain a committed Democrat for the rest of his life, which ended in 1926, Parker's civic preoccupations retained a highly bi-partisan character, especially after the events of 1912.[58]

The symbolism of Parker as nominee was poignant: he was from New York (then widely considered a conservative state), he had made some pro-labor rulings (not the least of which was his *Lochner* decision), and, most importantly, he was a judge. Like a plaintiff seeking redress, conservative Democrats appealed to the Court of Appeals for aid. His boosters needed not make the judiciary an open issue, his lauded "judicial temperament" was a shorthand that said it all.[59] Parker's embrace of old-school Cleveland principles infuriated Bryan and his supporters, while his campaign strived to "save the Constitution" from what it perceived as the demagogy of President Roosevelt. Political cartoons during the campaign emphasized the contrast. One, entitled "Take Your Choice, Gentlemen," depicted Roosevelt, the "militarist" in Rough Rider attire trampling the Constitution while Parker, dressed in judge's robes, held the document

[58] Morgan J. O'Brien, "Alton Brooks Parker," *American Bar Association Journal*, Vol. 12, No. 7 (July 1926), 453-455; Mandelbaum, Robert M., "Alton Brooks Parker," *The Judges of the New York Court of Appeals: A Biographical History*, (Fordham University Press, 2007).

[59] "Judicial temperament" came to be seen among progressives as a euphemism for a conservative candidate loyal to Wall Street interests. Judge Parker was regarded this way, as was Judson Harmon of Ohio, who was considered a conservative favorite for the 1912 Democratic nomination. Progressives compared him to Parker directly, as well as men like Taft, see *The Spokane Press* (WA), Nov. 11, 1910.

aloft.[60] But, to mix the metaphors, the Judge was trying to shut Pandora's Box. When the Democratic base clamored for government aid, Parker offered restraint. His task was to sell counter-majoritarian institutions to a party named for and animated by "democracy." Garnering only 38% of the vote, Parker lost in a landslide, falling short of Bryan's 1900 performance by over a million votes. Though Parker was not done fighting (he continued to advocate "a government of laws, not of men" for years to come), his brand of judicious restraint—so successful for Cleveland just twelve years earlier—had few buyers left in an increasingly progressive Democratic caucus.[61]

When the Democratic Convention nominated Bryan for the third time in 1908, the party returned to the Commoner's perennial question: "Shall the people rule?" The 1908 platform restated old criticisms against interference by the federal judiciary, but this time it included a controversial plank in favor of restricting the scope of the court's injunction power.[62] Parker, then chairman of the New York delegation, sparred with Bryan at that year's convention and rejected the anti-injunction plank, though he still supported the party overall. Despite this caveat, national papers linked his stance to the position adopted by the Republican Party that year, which mostly defended the courts and injunction power as necessary for constitutional government.[63] More interestingly, the New York Bar Association, of which Parker was a leading member, had lobbied the Republicans to include a platform plank announcing confidence in the judiciary.[64]

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[60] *The Day Book*, Nov. 2, 1916; "Take Your Choice Gentlemen," from *Puck* (Oct. 12, 1904), available from the Library of Congress Prints and Photographs Division; the editor of *Puck* sent Parker the regards of the artist, Udo Keppler, and hoped he would "appreciate the significance of the thought," see John Kendrick Bangs to Alton B. Parker, Oct. 11, 1904, Parker Papers.

[61] Parker consistently invoked the phrase, "a government of laws, not of men," at least after the year 1906, when he became president of the American Bar Association, see Alton B. Parker, responding to the toast, "The Importance of the Judiciary in Our System of Government," at a dinner of the New Jersey Bar Association, Jan. 19, 1907, Alton B. Parker Papers, Box 12, Library of Congress, Manuscripts Division.

[62] *Democratic Party Platform*, 1908.

[63] *Chicago Tribune*, July 4, 1908, 2; *Pine Bluff Daily Graphic* (AR), July 7, 1908.

[64] *New York Times*, June 16, 1908, 3.

The Republican Party further supported the judiciary with its nominee, William Howard Taft, who, during his tenure on the Sixth Circuit of the U.S. Court of Appeals, had denounced Populist agitation against the federal courts and had been referenced for years in national papers as "Judge Taft."[65] Taft's selection was important in keeping his party united because, by 1908, insurgent progressive attitudes were just as prevalent in the caucus of Republican Party as they were in the Democratic. Roosevelt had at times terrified the party's Old Guard, even as he endeared himself to a younger generation of progressives. Taft, secure in his judicious reputation and the endorsement of his progressive predecessor, President Roosevelt, could appeal to both factions and won a knockout victory.

Though Taft managed to unite both the progressive and conservative wings of the GOP behind his reputation for judicial restraint and reformist inclinations in 1908, his short-lived coalition was about to be dashed on the same rocks that had repeatedly scuttled Bryan and Parker's Democracy. Where Roosevelt, a man of deep progressive and conservative convictions, had energetically done his best at "making an old party progressive" and bullied his divided congress into order, President Taft was more comfortable respecting the separation of powers as he saw them.[66] In practice, this meant that he usually deferred to the wisdom of the party Old Guard and congress to the dismay of his one-time progressive supporters. His most famous setbacks were the disappointing Payne-Aldrich Tariff of 1909, which failed to deliver meaningful tariff reform, and the kerfuffle over the dismissal of Gifford Pinchot from the Forest Service for insubordination, which infuriated Roosevelt.[67] Overall, by 1910, it seemed that the

[65] William Howard Taft, "Recent Criticism of the Federal Judiciary," *The American Law Register and Review*, Vol. 43, No. 9 (Sep. 1895), 576-610.
[66] "Making an Old Party Progressive" is how Roosevelt described his presidency in later life, see Roosevelt, Chapter X, *Theodore Roosevelt: An Autobiography* (1913).
[67] The accounts of the split between Taft and Roosevelt are numerous, but for a detailed account of the political intricacies, see Horace Samuel Merrill and Marion Galbraith Merrill, *The Republican Command, 1897-1913* (University Press of Kentucky, 1971), 277-313.

progressive hopes raised by Roosevelt's presidency were being smothered under the nation's largest president. When the Colonel returned from his African hunting expedition in 1910, he had a new beast in his sights that would cause misery for his erstwhile friend and successor: fossilized judges.

CHAPTER II. THE FIGHT FOR THE CONSTITUTION

On August 29, 1910, two days before his more famous "New Nationalism" address in Osawatomie, Kansas, Col. Roosevelt delivered five speeches in Denver to "wild" crowds. At one of the speeches, before the Colorado State Legislature in the state capitol, Roosevelt commenced an attack on the actions of the Supreme Court that foreshadowed the tone of political debate over the next few years. In reference to the court's decision in *Lochner v. New York* (1905), which denied the police power of the state of New York to regulate working hours for bakers, he stated that the regulation had been declared unconstitutional by the Court on the grounds that "men must not be denied their 'liberty' to work under unhealthy conditions." The former president found this reasoning absurd and related that all reformers "know the type of mind (it may be perfectly honest, but is absolutely fossilized) which declines to allow us to work for the betterment" of social conditions. The speech was well received, and its logic would animate progressive rhetoric in the next several election cycles. In progressive circles, "fossilized judges" became common objects of scorn and the motivation behind efforts to implement the recall of judges and their decisions over the next several years.[68]

Over the next two years Roosevelt further developed his position and tested its political viability in the public sphere. His critique of the fossilized judiciary reached its fullest expression in his famous speech before the Ohio Constitutional Convention on February 21, 1912, entitled "A Charter of Democracy." In it, while ostensibly making recommendations to the delegates at the Columbus convention, he advocated his brand of "pure democracy" while identifying his own beliefs with Lincoln and the Constitution. "I am emphatically a believer in

[68] "Denver Shouts Wild Welcome for Roosevelt," *Los Angeles Herald* (Aug. 30, 1910); "The Law's Delays," *The Outlook*, Vol. 100, No. 1 (Jan. 6, 1912), 13-15; *Lochner v. New York*, 198 U.S. 45 (1905).

constitutionalism," he asserted, "and because of this fact I no less emphatically protest against any theory that would make of the Constitution a means of thwarting instead of securing the absolute right of the people to rule themselves." Roosevelt felt that it was "a false constitutionalism, a false statesmanship, to endeavor by the exercise of a perverted ingenuity to seem to give the people full power and at the same time to trick them out of it." But, as he had earlier made clear through an article in *The Outlook*, a progressive New York weekly magazine for which Roosevelt was an associate editor, he took issue not with the "ordinary judicial function as performed by judges in all lands," but with the "peculiar function of the American judge, the function of no other judge in the world, the function of declaring whether or not the people have the right to make laws for themselves on matters which they deem of vital concern." Roosevelt's position, which he branded "the highest and wisest kind of conservatism," was against judicial supremacy—the power of judges, not the people, to define the Constitution.[69]

While Roosevelt remains the most famous speaker at the Columbus convention, he was by no means alone. A few weeks later, the old populist prophet and staunch Democrat William Jennings Bryan delivered a speech to the convention entitled "The People's Law." Bryan echoed many of Roosevelt's concerns, an alignment which would have been unimaginable just four years earlier. Though he upheld a "written constitution" as "an American institution" and believed that "its hold upon the people is not likely to be shaken," Bryan bemoaned the lengths the federal Constitution took toward "restraining the public will and in compelling a majority to submit to the rule of the minority." Amendments required an overwhelming majority for

[69] Theodore Roosevelt, "A Charter of Democracy," delivered at Columbus, Ohio, Feb. 21, 1912 and Theodore Roosevelt, "Judges and Progress," *The Outlook*, Vol. 100, No. 1 (January 6, 1912), 40-48. In a March speech, titled "The Right of the People to Rule," Roosevelt criticized warnings of "tyranny of the majority" and decried judicial overemphasis of property rights, see Roosevelt, "The Right of the People to Rule," *The Outlook*, Vol. 100, No. 12 (March 23, 1912), 618-626.

ratification and the entire mechanism was geared against change. Accordingly, he endorsed an amendment "making it easier for a majority to change the Constitution." In the meantime, however, the Commoner hoped that the Ohio delegates would make their own constitution more responsive to the people's will. He urged the implementation of the popular initiative, referendum, and the recall as methods for securing democratic government. In defending the recall, which he regarded as "an evolution rather than a revolution," Bryan saw no reason to make a distinction between the recall of a standard political official and a judge. In response to concerns that judges might be wrongfully removed, he maintained that "society can better afford to risk such occasional injustice than to put the judge beyond the reach of the people." In Bryan's America, the law was to submit to the people, not the inverse.[70]

Though Roosevelt took efforts not to offend the jurisprudential community, insisting that "I have the very highest regard, the highest respect and admiration, for the judiciary," and attempted to cast his position as part of a moderate, common sense, all-American tradition, more orthodox Republicans like President Taft and Senator Root were troubled. Anxious curiosity first struck following Roosevelt's Denver and Osawatomie speeches in 1910. Root, who had worked with Taft in Roosevelt's administration and maintained an admiration for the Colonel and his policies, was at first only bothered by Roosevelt's use of "new" in his newly branded "New Nationalism." Root considered himself and the Republican Party as loyal to a longstanding nationalist tradition reaching back to Alexander Hamilton; what could be wrong with the old faith? Perhaps owing to his friendship, he tried to rationalize Roosevelt's remarks about the Court, hoping that the ex-president had "said more than he really meant." Root did not fault Roosevelt for disagreeing with Supreme Court decisions like *Lochner*, he felt the same. But he

[70] William Jennings Bryan, *The People's Law*, as delivered on Mar. 12, 1912 (New York: Funk & Wagnalls Company, 1914), 6-8, 19-25, 55.

trusted that the Court would work the matter out over time and was uneasy about a figure of authority criticizing it in public. Still, Root wanted "to know whether [Roosevelt] really meant that he would, if he could, deprive the Courts" of the power of judicial review. Root had "always considered that the most valuable contribution of America to political science."[71]

Taft was less optimistic. He agreed that the Court had made poor rulings at times, but detected that Roosevelt was exploiting a regional "bitterness of feeling against the Federal Courts." When Roosevelt attacked the Court's "power to set aside statutes," Taft felt that it "was an attack upon our system at the very point where I think it is the strongest" and further suspected that the Colonel "simply spoke the truth as to his own view."[72] When Roosevelt commenced his campaign for the Republican nomination in 1912, Taft and his fellow Republicans were disturbed. Longtime Roosevelt allies like Root, and even his lifelong friend, Senator Henry Cabot Lodge, were compelled to disavow the Colonel's new direction. Of the judicial recall, Lodge said that "no graver question has ever confronted the American people."[73] In a Princeton address, he argued in favor of the American system of "ordered freedom," reminded his audience that "mere progress is not necessarily good" if not aimed in the right direction, and he illustrated that calls for direct democracy were as old as ancient Athens or Rome and led to despotism.[74] Despite the gravity of the situation, the president's brother, Henry "Harry" W. Taft, assured Taft that Roosevelt's bid for the nomination was having "an effect far different than that which his advocates expected." Harry also shared an excerpt from *The Federalist* with his brother to connect the warnings of the founders with the troubles of present

[71] Elihu Root to William Howard Taft, Oct. 14, 1910, Elihu Root Papers, Library of Congress, Manuscript Division.
[72] William Howard Taft to Elihu Root, Oct. 15, 1910, Root Papers.
[73] *Springville Journal* (NY), Mar. 21, 1912.
[74] Richard W. Leopold, *Elihu Root and the Conservative Tradition* (Boston: Little, Brown and Company, 1954), 83-85; Henry Cabot Lodge, "The Compulsory Initiative, Referendum, and Recall of Judges," delivered at Princeton, NJ, Mar. 8, 1912, available in the Library of Congress; Lodge was also a prominent historian who had published an edition of *The Federalist* in 1889 and written a biography of Alexander Hamilton.

times, which Taft enjoyed, remarking that "a few of our people appear to have forgotten that we are living under a republican form of government." As temperatures rose with the advance of summer, however, tensions followed suit.[75]

In early May, feeling a need to "unload" his thoughts, Harry Taft wrote a lengthy diagnosis of the Roosevelt problem to the president. They had to "consider ... the plight of the party if it nominates Mr. Roosevelt." If Roosevelt was nominated, on what platform could he run? He had "repudiated the most important features" of his own presidency along with Taft's. "How can the Republican party expect to succeed ... if its candidate is to be selected because he has condemned its policies and accomplishments?" Harry deemed it "suicidal." In his view, Roosevelt's candidacy stood on one plank alone: "the promise of the great benefits to flow from the Recall of Judicial Decisions." He believed the recall movement to represent "the most dangerous proposition ever enunciated by a public man since the days of nullification." Roosevelt's "dramatic instinct" had likely seized the issue to "attract attention," but such a stand was irrepressible once it had been made, no matter what "apologies and qualifications" came after. Such a radical step "is not and never has been the doctrine of" either major party. Its logic threatened "inevitably to sweep away our entire judicial system." Harry feared neither "socialism" nor "anarchism," but "monarchical" government, tyranny. History was clear on the matter. "When laws and constitutions become unstable and courts become subservient to any other power in the state the next step is unregulated government by the people which is the forerunner of despotism." The difference of thinking between Roosevelt and his conservative opponents was fundamental; it was not a matter of policy but conceptions of the function of constitutional government that divided them. Should Taft win the nomination, it was "impossible

[75] Henry W. Taft to William H. Taft, William Howard Taft Papers, Library of Congress, Manuscripts Division; William H. Taft to Henry W. Taft, Mar. 23, 1912, Taft Papers.

for [Roosevelt] to be true to himself and to support you as the Republican candidate." Harry's words were prescient.[76]

The Colonel viewed his position much differently. Roosevelt considered himself deeply loyal to the legacy of the Lincoln Republicans and strove to chart a middle course between "the progressive of the Robespierre type and the conservative of the Bourbon type." He argued that a poor judge, like "a Chief Justice Taney," was far more damaging to the nation than "a President like Pierce or Buchanan." He reminded fellow New York Republican Henry L. Stimson that Lincoln himself had attacked "those two Presidents and the Chief Justice" as being disloyal to the people and the Constitution. Stimson, a member of the New York bar and later the U.S. Secretary of War during World War II, firmly disagreed.[77] The trouble for legalistic conservatives, from Taft to Root or Stimson, was that Roosevelt's "conservatism" could invoke the sober wisdom of the founders one moment, then castigate the legitimacy of the Supreme Court and its decisions the next. Roosevelt not only challenged elite Republican opinion on the nature of constitutional government, but also on the nature of proper conservatism.

Outrage against Roosevelt's court criticism was not restricted to conservative Republicans. In a withering speech before the South Carolina Bar Association shortly after the start of Roosevelt's 1910 offensive, Judge Alton Brooks Parker, Roosevelt's Democratic opponent from 1904, opined that "never before, I think, in the history of civilization has any blind leader of the blind advocated as progressive a return to the chaotic conditions inherent in administration of justice by caprice rather than by the rules of law." Roosevelt's policies, if carried to their "inevitable conclusion," would result in the "substitution of popular opinion for

[76] Henry W. Taft to William H. Taft, May 8, 1912, Taft Papers.
[77] Theodore Roosevelt to Henry L. Stimson, Feb. 5, 1912, as found in *The Letters of Theodore Roosevelt*, ed. Elting E. Morison, Vol. II (Harvard University Press, 1954), 494-95.

legal procedure," thus making "public sentiment" the final arbiter of justice. Though part of Parker's criticism was partisan (he felt Roosevelt was scapegoating the courts for the plutocratic state of the economy when Republican policy was the real culprit), his central thrust was that demagogues and "would-be usurpers of power," like Roosevelt, were attempting to delegitimize the Court's role in enforcing the Constitution under the nearsighted guise of the "'needs of the times.'"[78] To constitutional conservatives, the counter-majoritarian function of the Court, whether it ruled rightly at all times or not, was essential in preserving liberty against the passions of momentary majorities.

By 1907 Judge Parker had found the language he would carry into battle in 1912. "A government of laws, not of men," he often said in reference to John Adams' words in the 1780 Constitution of Massachusetts, "was the shibboleth of the fathers of this republic." The Constitution that the "fathers" had given the nation was the culmination of a long tradition that began with "that palladium of English liberty, the Magna Charta" and that prized "a love of the liberty and of the equality before the law." Their goal was to secure for themselves and their posterity "the full benefit of that vast treasure-house of legal principles and precedents of both common law and equity ... principles upon which they erected a system of law that protected alike the rich and the poor ... and secured both against official tyranny." The judiciary was tasked with "preventing violations of constitutional provisions," and Parker praised Chief Justice John Marshall, "the great expounder of the Constitution," for his opinion in *Marbury v. Madison* that granted "firm foundations" to "the supremacy of the law and the people as the source of the law." For Parker, as it was for Taft and Root, the power of judicial review was the Court's greatest power in enforcing constitutional limitations. What was legal could not be determined ad

[78] "Flays Teddy," *The Manning Times*, SC, Jan. 31, 1912.

hoc by the popular will, or even a judge's will; rather, it must follow careful, prescribed rules and not violate protected rights, lest the "ligament which binds civilized beings and civilized nations together" be torn. Parker felt that recent progressive attacks, from Republicans and Democrats alike, endangered this constitutional inheritance—long before conservative Republicans identified Roosevelt as a danger.[79]

Roosevelt's bold new stance against the independence of the judiciary in 1910 spurred Judge Parker to more sustained action. Parker spoke out against Roosevelt throughout the 1910 midterm election season, in one speech holding that Roosevelt desired that "the government of laws should give way to a government of strong men ... with the executive as steward of the public's welfare," stressing the importance of an independent judiciary in precluding tyranny. Parker was a leader of the Democratic campaign in New York that year, presiding as temporary chairman of the Democratic state convention while Roosevelt was the temporary chairman of the Republican convention just two days earlier. Parker went off script to call Roosevelt an "usurper" who, with his "progressive" allies, had suppressed all dissent in his party.[80] Leading conservative Democrats, like Norman E. Mack, considered Parker a senatorial possibility in 1910 and a presidential one in 1912, feeling "that a man taken from the bench would make a strong candidate" because New York was a conservative state. The platform would emphasize that "this is a government of law" and that "denunciation of the courts and disregard of the Constitution," as Roosevelt had promoted, "breed disrespect for the law" and weaken "democratic institutions."[81]

[79] Alton B. Parker, responding to the toast, "The Importance of the Judiciary in Our System of Government," at a dinner of the New Jersey Bar Association, Jan. 19, 1907, Parker Papers, Box 12.
[80] *The Vinita Daily Chieftain* (OK), Oct. 28, 1910.
[81] *Democrat and Chronicle*, Rochester (NY), Sep. 30, 1910.

Ultimately, Parker was not selected as a gubernatorial candidate, but he did manage the campaign of the actual nominee, John A. Dix. Parker stumped across the state and, when Democrats stormed into control of the New York legislature and governor's mansion, much of the credit went to the once-failed candidate of 1904.[82] With the statehouse in Democratic hands, Parker was congratulated on the "magnificent democratic [sic] victory" and widely considered the obvious choice for the state's vacant U.S. Senate seat at a time when senators were selected by state legislatures.[83] "[Roosevelt's] 'New Nationalism' is smashed," wrote one Georgia Democrat, "you are avenged!"[84] Parker declined to seek the seat, citing familial concerns, much to the disappointment of his friends and admirers.[85] One "old-time" friend understood Parker's choice to "voluntarily renounce" the opportunity, but nonetheless wished to see him become a "Senator, Governor, or President," and observed that "your action is tantamount to a waiver of that leadership in favor of Woodrow Wilson," who had only gained prominence that year with his "brilliant campaign" for the New Jersey governorship.[86] Though it seems more likely that Parker was angling for a seat on the Supreme Court, to which at least one of his judge friends hoped President Taft would appoint him, it is important to appreciate that, to many of his Democratic contemporaries, Parker seemed a conservative alternative to the likes of a Bryan or Wilson heading into 1912.[87]

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[82] The Democratic State Committee had Parker open the campaign and then placed him on a busy speaking tour, see Chairman of Democratic Speakers' Bureau to Alton B. Parker, Oct. 12, 1910, Parker Papers, Box 3.
[83] T.E. Gibbons to Alton B. Parker, Nov. 10, 1910, Parker Papers, Box 3
[84] James Galloway to Alton B. Parker, Nov. 9, 1910, Parker Papers, Box 3.
[85] Norman E. Mack to Alton B. Parker, Nov. 12, 1910, Parker Papers, Box 3.
[86] William Vanamee to Alton B. Parker, Nov. 22, 1910, Parker Papers, Box 3; in 1910 Wilson was still viewed as somewhat conservative, though he was rapidly becoming more progressive.
[87] Judge Charles B. Howry to Alton B. Parker, Nov. 14, 1910, Parker Papers, Box 3; there was a boom among New York Democrats in early 1912 to nominate Parker for the presidency, see *The Buffalo Commercial* (Buffalo, NY), Jan. 19, 1912.

The Meaning of Conservative Progress

With the existence of prominent conservative factions in both parties during the struggle of 1912 established, it is important to identify two factors beyond opposition to the recall movement that linked conservatives across party lines: philosophical outlook and organizational comity. Each major conservative figure discussed above would not only have described himself as "conservative," but also as "progressive." Taft plainly called himself a "progressive conservative."[88] Even Roosevelt, though few but himself have given him credit as a conservative, positioned himself between Jacobin progressivism and Bourbon conservatism. More often, such progressive conservatives referred to "constructive progress" or "conservation" and "progress."[89] "Progress," as Senator Lodge noted in one Princeton address, was a vague, abstract word that, while most men agreed that it was a good thing, few men could agree on what it meant.[90] Conservative Democrats and Republicans alike labored to articulate their own sort of "progress."[91]

Taft argued from a progressive conservative position throughout the 1912 primary season. Rather than pitting conservation against progress, he believed that "progress" was only real if it conserved what was tested and good in society and built upon it. In addressing the full-blown progressivism that was everywhere ascendant in 1912, Taft attacked those who would "pull down those things which have been regarded as the pillars of the temple of freedom and

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[88] Jonathan Lurie, *William Howard Taft: The Travails of a Progressive Conservative* (Cambridge University Press, 2012), ix.; for a more obscure yet important study, see Barbara C. Steidle, "Conservative Progressives: A Study of the Attitudes and Role of Bar and Bench, 1905-1912," Ph.D. dissertation, Rutgers University, 1969.

[89] For a prime example of progressive conservative rhetoric, see Charles Evans Hughes, "Address Delivered at Youngstown Ohio, September 5, 1908," *Addresses of Charles Evans Hughes, 1906-1916*, second ed. (New York: G.P. Putnam's Sons, 1916), 299-330.

[90] Lodge, "The Compulsory Initiative, Referendum, and Recall of Judges."

[91] For a concise articulation of the values of Republican conservatives at this time, see Norman M. Wilensky, "Conservatives in the Progressive Era: The Taft Republicans of 1912," *University of Florida Monographs: Social Sciences*, No. 25 (Winter, 1965).

representative government, and to reconstruct our whole society on some new principle" that lacked any "intelligible forecast of the exact constitutional or statutory results." Their movement smacked of the French Revolution. "Such extremists," an incensed Taft charged, "are not progressives—they are political emotionalists or neurotics" who had lost touch with those who "drafted the Constitution."[92] Progress, as represented by "pure democracy," the judicial recall, and the referendum, threatened to ignore the lessons of history and to disregard the warnings and concerns of the fathers of the republic. Roosevelt, however, considered himself the true heir to "Lincoln Republicanism," while Taft was the descendant of Honest Abe's "cotton whig" opponents.[93] The irony of the death-struggle between Taft and Roosevelt in 1912 was that both men considered themselves to be both progressive and conservative. The immediate difference was that Taft viewed judicial supremacy as a traditional feature of American constitutionalism, while Roosevelt viewed it as a usurped power. History offered evidence for both positions.

Throughout 1912, though called a "reactionary" by his enemies and a "conservative" by his friends, Parker proudly called himself "a progressive Democrat." He believed, however, that there was "more than one highway" to progress. He identified Bryan and Roosevelt as progressives who attacked the wisdom and legitimacy of the Court. As for himself, Parker believed "in sane progress and in working all the while and all the time in a governmental way for the rights of the people as a whole," but he believed "in doing it under the Constitution which our fathers gave us, as we shall amend it from time to time."[94] When Parker was elected temporary chairman of the 1912 Democratic National Convention, a supporter assured him that

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[92] Henry F. Pringle, *The Life and Times of William Howard Taft*, Vol. II (New York, 1939), 765-66.
[93] Theodore Roosevelt to Augustus Everett Wilson, Feb. 14, 1912, as found in *The Letters of Theodore Roosevelt*, ed. Elting E. Morison, Vol. II (Harvard University Press, 1954), 503-04.
[94] Alton B. Parker, "Speech of Hon. Alton B. Parker as Permanent Chairman of the Convention," delivered at the Democratic State Convention, Syracuse, NY, Oct. 2, 1912, Parker Papers, Box 13.

"this is the time for safe, sane moderation of thought and speech and conservative action on the part of truly progressive Democrats."[95] The ideal statesman of conservatives like Parker was one who was "both constructive and conservative," a man who knew how to "conserve and maintain the dignity and the authority of the state."[96] The progressive conservative felt an abiding loyalty to the work of his forefathers, which was most clearly expressed in the Constitution. Progressive change was possible, but it must build on the work of the "fathers" and remain faithful to first principles. Because of man's innately flawed nature, restraints were needed on popular government; the most important restraint of which was "the supremacy of law" as safeguarded by "its proper ministers—the judges." Parker consistently emphasized that the rule of law was not to be taken for granted; it was the precious product of human striving from the "Magna Charta" to the "Constitution," which limited arbitrary and illiberal rule. All new progress must respect limits on what mortal government could do. In Parker's eyes, then, the judicial recall was not progress but a regression to ancient despotism. To enthrall the courts to the people was to unbind Prometheus.[97]

Parker's Republican counterparts like Taft and Root felt much the same. Over the course of several days in January 1912, the New York State Bar Association held its largest annual gathering on record, with at least 1,500 jurists present. Root presided over the affair. Seated beside him at the table of honor in the Grand Ballroom of the Waldorf-Astoria were President Taft and Judge Parker, as well as other notables like Governor Dix, the French Ambassador, and

[95] C. Vey Holman to Alton B. Parker, June 26, 1912, Parker Papers, Box 3.
[96] Alton B. Parker, "Address of Notification to Hon. Lewis Stuyvesant Chanler," delivered Oct. 1, 1908, Parker Papers, Box 13.
[97] Alton B. Parker, "Annual Address before the South Carolina Bar Association," delivered Jan. 25, 1912, Columbia, SC, Parker Papers, Box 13.

members of the Canadian bar and bench.[98] Root delivered several speeches. His opening address as president, on "Judicial Decisions and Public Feeling," echoed many of Parker's own views and typified the traditionalist position on the role of the judge and the supremacy of law. To Root, American judges held "a special dignity" and were warranted "respect amounting almost to reverence" because they stood above partisan squabbling and were "the guardians of the law as it is." Law as upheld by an independent court was fundamental to "the preservation of order, the prevention of anarchy, the protection of the weak against the aggression of the strong, the perpetuity of free institutions" and "the continuance of liberty and justice." If judges were subjected to popular recall, however, court authority would decline, "the independence of the judicial branch will cease, judicial decision will interpret the law always to suit the majority of the moment." Had Root stopped there, his thinking might have fit the well-intentioned but "absolutely fossilized" mind of which Roosevelt spoke. But Root did not ignore the challenges of modernity, he embraced them.[99]

"The real difficulty," Root observed, "appears to be that the new conditions incident to the extraordinary industrial development of the last half-century are continuously and progressively demanding the readjustment of the relations between great bodies of men and the establishment of new legal rights and obligations not contemplated when ... existing limitations upon the powers of government were prescribed in our Constitution." He understood that "the old individual independence of life" had given way to remarkable new kinds of social "interdependence." The new industrial economy required the "systematized cooperation of a vast number of other men" working in complicated aggregations of capital and labor, that left "each

[98] *New York Tribune*, Jan. 21, 1912, 1, 6; Elihu Root, "The Independent Bar," delivered Jan. 20, 1912, *Addresses on Government and Citizenship* (1916), 463.
[99] Elihu Root, "Judicial Decisions and Public Feeling," delivered Jan. 19, 1912, *Addresses on Government and Citizenship* (1916), 445-47.

individual quite helpless by himself." These conditions required government "intervention." In this stance, Root was a kind of progressive and hardly the sort of social Darwinist that historians have often made conservatives of this period out to be.[100] What made him a progressive conservative, however, was that he felt "such a readjustment must of necessity be a gradual process. It cannot be produced at a single blow from the mind of any one or of any group or interest or class." Careful, advance-and-consolidate, "step by step" reform to meet new circumstances was desirable. What was to be feared were "distorted and exaggerated conceptions disseminated by men of one idea or by men" obsessed with their "personal interests." Ironically, in his criticism of one-ideaism and his championing of "mature, instructed, considerate judgment," Root used much of the same language Roosevelt employed throughout his career in defense of his own policies.[101]

In another address, "The Independent Bar," Root noted that the nation's jurists were faced with "deeper and more fundamental questions" than they had "ever been accustomed to." The foundational "principles which we have thought to be postulates, or axioms, are questioned." It was insufficient for defenders of judicially limited government to make narrow, reactionary arguments about "individual rights under established laws," rather, they had to prosecute "the defense and maintenance of the fundamental principles of those laws themselves." It seemed to Root that the "advocate" was especially suited to the task because he "fears not the face of power." The advocate made it his living to appeal on behalf of his client to the "supremacy of justice." Justice did not depend on popularity, it was "dependent upon no whim or fancy of a ruler." Justice was "a power that lies beneath, that outlasts, that is superior in its control and

[100] Richard Hofstadter did much to begin the obtuse tradition of casting all conservatives in this period as laissez-faire social Darwinists, see Hofstadter, *Social Darwinism in American Thought* (1944).
[101] Root, "Judicial Decisions and Public Feeling," 448-49.

more sacred in the allegiance that it commands, than any political, or social, or personal desire among our people." The "principles of justice," as declared "in written constitutions or in customs or judicial decisions," were a "guarantee from the majority to the minority," from the mightiest to the least. Root believed, as "our fathers believed," that American government was founded upon this basic guarantee of due process and a fair hearing. Should impartial justice be replaced by public opinion, then "the liberty of our people will soon be gone."[102] Surely, Root provided a very generous portrait of the American legal system and its officers. Still, he addressed the first principles of the debate at hand and was attempting to craft a defense of a constitutional order that had not been so clearly up for debate since the Civil War. Root, like Parker, Taft, and his fellows at the bar, was trying to defend a conception of constitutionalism that rested on judicial interpretation over popular interpretation as the basis of liberty and popular government. But this faith was complicated by two facts: one, recent decisions by the Supreme Court like *Lochner* (or even older ones like *Dred Scott*), with which all three jurists disagreed, testified to the fallibility, or at least the ambiguity, of judicial decisions; two, the "supremacy of law" depended on the judgment of an arbiter, making it quite literally *arbitrary*, even if well-informed. Their confidence in the discoverable nature of common law principles echoed Edward Coke, but their submission in the face of disagreeable decisions indicated that the practiced law and the natural law may not always be the same, an admission that would lead them toward legal realism. In the long-term, the conservatives believed, an independent judiciary was the best bet for preserving liberty and the people's law.

Conservative Democrats like Parker and conservative Republicans like Root and Taft were not united in sentiment alone. Increasingly for these men in 1912, the most pressing

[102] Elihu Root, "The Independent Bar," delivered Jan. 20, 1912, *Addresses on Government and Citizenship* (1916), 463-65.

political division was not between Democrat and Republican but between constitutional conservative and constitutional progressive. Responding to progressive agitation, the lawyer-statesmen worked together in several non-partisan organizations to achieve conservative progress. Two of the most notable of these organizations were the American Bar Association (ABA), which dwelt on legal and constitutional issues, and the National Civic Federation, which focused on social and labor policy.[103] Nearly all the leading opponents of the recall movement were lawyers or judges by trade and were members of both their state bar associations and the national ABA.[104] During the Progressive Era the Association's chief efforts were channeled against the popular initiative, referendum, and the dreaded judicial recall—ideas that were finding currency among progressives in both parties—but its members also grappled with the competing theories of constitutional interpretation, which placed the Association at the nexus between the academic debates over constitutional law and the political battles for the future of the body politic.[105]

Accordingly, jurist-politicians like Taft, Root, and Parker all participated in the scholarly debate concerning the proper function of American government and the judiciary. Taft taught law and government at Yale in his post-presidency where he castigated "modern sociological jurists" who "shake the foundations of law as I have been trained to know it;" Parker warned that Americans had forgotten lessons learned centuries ago and were overlooking their common law

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[103] Another non-partisan, though more scholarly, organization was the National Association for Constitutional Government, see Johnathan O'Neill, "Constitutional Maintenance and Religious Sensibility in the 1920s: Rethinking the Constitutionalist Response to Progressivism," *Journal of Church and State*, Vol. 51, No. 1 (2009), 24-51. Parker especially played a prominent role in the National Civic Federation, which has been identified as a key organization in conservative-progressive reform and the forestalling of more radical reform efforts, see James Weinstein, "The National Civic Federation and the Concept of Consensus," *The Corporate Ideal and the Liberal State: 1900-1918* (Beacon Press, 1968), 3-39.

[104] William G. Ross, "The Judicial Recall Movement," *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton University Press, 1994), 124-25.

[105] Norbert C. Brockman, "The History of the American Bar Association: A Bibliographic Essay," *The American Journal of Legal History*, Vol. 6, No. 3 (July 1962), 270-73.

"inheritance" in the *Yale Law Journal*; Root lectured at Princeton to address the fact that Americans were "denouncing ... essential principles embodied in the Federal Constitution of 1787" and that "the wisdom of the founders of the Republic is disputed," and that "the political ideas which they repudiated are urged for approval."[106] Taft might have spoken for them all when he confided in horror that "a man named [Charles] Beard at Columbia," who championed the referendum, had "attacked the Constitution of the United States in what he calls an Economic Interpretation of the Constitution ... by muckraking the fathers."[107] Whether from the college lectern or the bully pulpit, it seemed the tide of progressive criticism was unrelenting. What the three men did not seem to consider, however, was that the law schools were filled with a new generation of legal thinkers who would come to wield the absolute judicial independence the conservatives were defending.

Beginning with a resolution in 1911, the ABA formed the Committee to Oppose Judicial Recall to "expose the fallacy" of the recall movement, which operated for the better part of the ensuing decade. Its chief goals were to conduct a national education campaign (involving many pamphlets) and to "direct or assist ... the various local campaigns, in different states and their legislatures, in opposition to these measures."[108] The new committee was formed alongside a resolution authored by six former presidents of the Association, including Parker, that categorically denounced the recall, with only three of six hundred delegates dissenting.[109]

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[106] William Howard Taft to Elihu Root, May 1, 1913, Root Papers; Alton B. Parker, "The Common Law Jurisdiction of the Courts," *The Yale Law Journal*, Vol. 17, No. 1 (Nov. 1907), 1-20; Elihu Root, "Preface to the Stafford Little Lectures at Princeton University," delivered April 15 and 16, 1913, *Addresses on Government and Citizenship* (1916), 78.

[107] Taft was referring to Charles Beard and *An Economic Interpretation of the United States Constitution* (1913), see William Howard Taft to Elihu Root, May 5, 1913, Root Papers; Taft and Root studied each other's lectures and Taft's colorful commentary on current events is a joy to read.

[108] *Report of the Committee to Oppose the Judicial Recall*, presented to the American Bar Association at Montreal, Canada, September 1-3, 1913, 1-3.

[109] Steidle, "Conservative Progressives," 342, as found in Ross, *A Muted Fury*, 124-25.

Though they were on the political back foot, constitutional conservatives in 1912 were far better organized across party lines than were their respective progressive opponents and their logic, if less popular, was more consistent. Therefore, it was with a heightened consciousness of the significance of the approaching conflict, and a keen sense of duty, that the conservatives entered the summer of 1912.

"A Tale of Two Conventions"

After the mid-summer national conventions of 1912, the Republican and Democratic parties would never be the same.[110] The caucuses of both parties had existed for some time in a state of uneasy tension between conservative and progressive factions. In the Republican Party, factional tension combined with a confidence in victory had historically manifested itself in the sort of progressive conservatism reflected in the Roosevelt and Taft presidencies, while the Democratic Party had see-sawed between Bourbons and Bryanites only to be frustrated at the polls time and again. Since the Civil War, the Republicans had viewed themselves as the only legitimate stewards of the country and found unity against an image of the Democratic Party as the "organized incapacity of the country," as Taft called it.[111] Now it appeared that the Republicans were set on tearing themselves apart while Democrats salivated over the opportunity.

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[110] Lewis L. Gould has done a fine job displaying the pivotal nature of the elections of 1912 and 1916 throughout his several books that cover the period, but has not generally dwelt upon the significance of the fight over the judiciary, see Gould, *Four Hats in the Ring: The 1912 Election and the Birth of Modern American Politics* (University Press of Kansas, 2008); Gould, *The First Clash over Federal Power: Wilson versus Hughes in the Presidential Election of 1916* (University Press of Kansas, 2016).

[111] William H. Taft to Charles Evans Hughes, Apr. 11, 1912, Charles Evans Hughes Papers, Library of Congress, Manuscript Division; Republicans had long associated Democrats with ineptitude, criminality, disunion, and "the dead past," see Lewis L. Gould, *The Republicans: A History of the Grand Old Party* (Oxford University Press, 2014), 68, 144-45; for a detailed account of the Republican reign from 1897 to 1913, see Merrill and Merrill, *The Republican Command.*

When the GOP convened at the Chicago Coliseum from June 18 to 22, conservative Republicans could only think of staving off the immediate danger. Personally, Taft had "no desire to continue as a candidate," it was only "the fear of Mr. Roosevelt's success" that compelled him to go "on the stump" and seek re-nomination. The campaign was an immense burden on the President. In private, he once wept to a reporter after a day of speeches against his old mentor, saying that "Roosevelt was my closest friend." In fact, Taft hoped that "[Root] or [Charles Evans] Hughes or a man of like conservative standing" might take his place. Root insisted that his advanced age disqualified him.[112] Hughes had been a celebrated lawyer and reformist governor of New York who earned the favor of his party when he opened Taft's 1908 campaign with a masterful address at Youngstown, Ohio. But Taft had appointed him to a vacancy on the Supreme Court in 1910 and Hughes did not wish to tarnish the "unstained integrity of the courts" with partisan rancor.[113] Despite Hughes' aloofness, Taft maintained that if he could nominate "Hughes by a withdrawal it would give me great pleasure." When there was a boom for Hughes as a compromise candidate at the convention, however, Hughes wrote to New York delegates to put a stop to it.[114] It is telling that Taft and many conservative Republicans felt a Supreme Court justice was the best man for the fight. The only reason Taft remained in the saddle was "to defeat Mr. Roosevelt, whose nomination ... would be a great danger and menace to the country," and it is under such a mentality, not one of winning a general election, that Taft's re-nomination effort must be understood.[115]

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[112] Pringle, *The Life and Times of William Howard Taft*, 782, 794-95; Gould, *Four Hats in the Ring*, 59-61.
[113] Merlo Pusey, *Charles Evans Hughes*, Vol. I (New York: Macmillan Company, 1951), 300. Taft also considered Root for the position but demurred on account of Root's advanced age.
[114] Charles E. Hughes to Elihu Root (two letters), Jun. 21, 1912, Hughes Papers; Charles E. Hughes to Frederick C. Tenner, Jun. 22, 1912, Hughes Papers.
[115] Pringle, *The Life and Times of William Howard Taft*, 794-95.

It should be emphasized, contrary to one longstanding interpretation of the 1912 Republican split as a battle of egos, that at the center of both Taft and Roosevelt's actions were two competing understandings of constitutional government.[116] Though the disputes of 1912 took place over the future of the world's mightiest democracy, not that of a fledgling and unproven republic, the battle between Roosevelt and Taft echoed the fight over constitutional ratification in 1788. In essence, Roosevelt expressed the classic Anti-Federalist concern (though now toward thoroughly nationalist ends) that under a popular government it is the people, not a few men in robes, who must have the final word on what is constitutional and unconstitutional.[117] Conversely, men like Taft and Parker believed, as Publius had expounded in *Federalist* 78, that an independent judiciary must be the final decider in what is and is not constitutional if there is to be constitutionally limited government, and that "the people" could only amend their own fundamental law through the amendment process. Taft believed that if he could save the GOP from Roosevelt it would ensure there remained a voice in defense of the founders' Constitution in the years to come.

Taft clearly understood his role in preserving the Constitution of the framers and perceived the implications of his position for party politics:

> If I run as the regular Republican nominee, I may go down to defeat if a bolt is started by Roosevelt, but I will retain the regular organization of the party as a nucleus about which the conservative people who are in favor of maintaining constitutional government can gather, both from the Democratic and Republican parties, and we will have two radicals and one conservative. I do not think that that means success, but it means one champion at least of our present system of government ... against two champions of things that are not and never will be, and who have only a nebulous theory of how to reach the glorious result that they paint to their followers.[118]

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[116] For an excellent account of the ideological nature of the Republican split, see Gary Murphy, "'Mr. Roosevelt Is Guilty': Theodore Roosevelt and the Crusade for Constitutionalism, 1910-1912," *Journal of American Studies*, Vol. 36, No. 3, Part 1 (Dec. 2002), 441-57.

[117] See *Brutus* XI, Jan. 31, 1788.

[118] William H. Taft to William Worthington, May 29, 1812, Taft Papers, as found in Murphy, "'Mr. Roosevelt is Guilty,'" 455.

Taft and his fellow constitutional conservatives believed that a victory for his progressive opponents would represent a kind of revolution against, or at least a marked departure from, the Constitution that had governed the United States for over a century. If Taft could save the GOP from Roosevelt it would ensure there remained a voice in defense of the founders' Constitution in the years to come. Furthermore, Taft anticipated a possible political realignment on a conservative-progressive partisan basis.

Beginning in mid-1911, Taft took measures to thwart a potential Roosevelt coup of the party. While some states in the North and West were adopting the direct primary, most other states had not yet done so, especially in the South. Taft ensured that these traditional caucuses were in the hands of old guard loyalists, which permitted him to silently outflank Roosevelt's frontal assault. Roosevelt won nearly every popular primary by a healthy margin, even Taft's home state of Ohio. But the Colonel's position was weakened by the candidacy of Senator Robert M. "Battle Bob" La Follette of Wisconsin, who fancied himself the party's true progressive and who managed to play quite the spoiler. All contested delegate selections were determined by the Republican National Committee, which was stacked with Taft men. Focused on his campaigning, Roosevelt forgot how the sausage was really made and was outmaneuvered by Taft before the opening of the convention. All that was left for the Colonel to do was cry "theft!" Though disgusted, Roosevelt had no intention of accepting defeat and maintained a willingness to bolt should Taft be re-nominated.[119]

Taft's choice for temporary chairman of the convention was Elihu Root. Root, out of a respect for his relationship with Roosevelt, had declined to campaign actively against the

[119] Wilensky, "Conservatives in the Progressive Era," 12-38. Wilensky observes that Roosevelt and Taft men had similar socio-economic statuses, but were divided by age, with Taft men usually being older; Gould, *Four Hats in the Ring*, 45-48, 64-69, 72-73. Gould draws well-deserved attention to the critical role La Follette played in frustrating a Roosevelt nomination.

Colonel, but agreed in saving the party from the "vital and destructive nature" of Roosevelt's constitutional views.[120] When Root won the chairmanship against the Roosevelt selection 558 votes to 501, it became clear to the progressives that the jig was up. In his address, which Taft declared "worthy of a great crisis," Root characterized the Republican Party as a fundamentally conservative party.[121] He held that "no government ... maintained by weak and fallible men can be perfect," but believed "we may justly claim for our government under the constitution that for a century and a quarter it has worked out the best results for individual liberty and progress in civilization yet achieved." Republicans would "maintain the power and honor of the nation," but they would "observe those limitations which the constitution sets up." He warned that well-intentioned lawmakers and executives must be careful not to usurp power, that "there can be no free government in which official power is not limited," which required "rigorously insisting upon" the observance of constitutional limits.[122]

In the crescendo of his address, Root identified the "solemn covenant" between the "weak individual and all the power of the people," embodied in "the limitations of the constitution," as the "chief basis of American prosperity, American progress, and American liberty." Emphasizing that, as "God-fearing people," those gathered understood "that all men are prone to error ... are led astray by impulse," Root argued that freedom from the "control of majorities" was imperative for a free society. He reminded his fellow Republicans that "our party was born in protest against the extension of a system of human slavery approved and maintained by majorities," though he excluded his party's role in opposing the judiciary that upheld slavery. Continuing with his articulation of fundamental conservative principles, Root postulated that

[120] Elihu Root to William H. Taft, May 15, 1912, Root Papers.
[121] William H. Taft to Elihu Root, Jun. 19, 1912, Root Papers.
[122] *Official Report of the Proceedings of the Fifteenth Republican National Convention*, (New York: Tenny Press, 1912), 97-98.

"there is a divine principle of justice which men cannot make or unmake, which is above all governments, all legislatures, all majorities," and that "the American people have set up this eternal law of justice as the guide for their national action." Upon conformity to this law depended "our existence as a nation," and so he implored his audience to "abide by the principles of the constitution against the days of our temptation and weakness." In so doing, Root had succinctly presented the precepts of the traditionalist jurisprudence he cherished and made the conservative case for judicial supremacy.[123]

To spell out his position, Root concluded with a firm rebuke of the recall movement. "The limitations of arbitrary power and the prohibitions of the Bill of Rights which protect liberty and insure justice," he thundered, "cannot be enforced except through the determinations of an independent and courageous judiciary." To reinforce his point and finish his speech, Root invoked the wisdom of his ideological forefathers in a series of "we stand with" statements. He quoted Alexander Hamilton in the *Federalist*: "there is no liberty where the power of judging be not separate from the legislative and executive powers." He quoted John Marshall from *Marbury v. Madison*: "to what purpose are powers limited ... if these limitations may, at any time, be passed by those intended to be restrained?" And, finally, he quoted the party's father, Abraham Lincoln, from his first inaugural: "a majority held in restraint by constitutional checks and limitations and always changing easily with deliberative changes of popular opinion and sentiment, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or despotism."[124] His piece spoken, the old man of the party retired to the chairman's seat.

[123] Ibid, 99.
[124] Ibid, 100.

The line was drawn. The Republican Party had been defined as a constitutionally conservative party and Roosevelt's signature campaign issue repudiated. In the following days Roosevelt would bolt the convention to form his own party and Taft would win the nomination of a rump party. The GOP was split between those who placed more value in Roosevelt's "New Nationalism" and those who were tied to Taft and Root's old-school constitutionalism. Ironically, the party that had best maintained a policy of "progressive conservatism" since the Civil War was broken into two parties that appeared to represent extreme progressivism and extreme conservatism, which gave the Democratic Party an unprecedented opportunity.

The Democratic Convention in Baltimore from June 25 to July 2 resulted in an upset of its own. At the start of June 1912, it seemed that moderate and conservative Democrats would carry the nomination with Champ Clark, the Speaker of the House since 1911. By the end of July 1912, the progressive Woodrow Wilson was leading the Democrats into battle under the banner of the "New Freedom." Several factors conspired to earn Wilson the nomination, among which were his own shrewdness, Democratic nomination rules, and the fact that the Republicans convened before and not after the Democrats did. Regardless of its causes, Wilson's nomination would be transformative for the Democratic Party and, combined with Taft's Republican re-nomination, decisive in shaping the dynamic of the American party system in the twentieth century.

Clark had made an alliance with the conservative Democrats. When time came to select a temporary chairman to deliver the keynote address, the conservatives nominated none other than Judge Alton Brooks Parker. William Jennings Bryan, who was no longer a viable candidate but still held great clout within the party, was outraged. Even though Parker had always bitten his tongue and supported Bryan when he was the nominee, speaking extensively for him in 1908,

Bryan now attacked him as the tool of "Wall Street" and "predatory wealth." "We know who the candidate is as well as the men behind him," Bryan declared, "he is the man chosen eight years ago when the Democratic party, beaten in two campaigns, decided it was worthwhile to try to win a campaign under the leadership of those who had defeated us in the campaigns before." Judge Parker was smeared in the papers and at the convention as a "reactionary" and called variously a "liar," "thief," and "traitor." Bryan linked Parker with the same "Wall Street" forces that controlled the Republican convention. One progressive political cartoon, entitled "The National Ventriloquist," depicted a troglodytic J. P. Morgan controlling two puppets, labelled "Root" and "Parker," thereby making "the voice of Wall Street speak through two party conventions."[125] Bryan challenged the nomination and, when his own nominee, Senator John W. Kern, stepped aside in the interest of party unity, stood himself against Parker. Though Bryan was respected, many delegates, including Kern, thought his personal attacks went too far. The Judge managed to best the Commoner in a final tally of 579 to 508, mirroring Root's victory the previous week.[126]

Early in the convention, Wilson sided with Bryan against Parker in hope of marking himself as the truly progressive candidate, though Bryan remained hesitant to bestow his endorsement. Rather than drawing a sharp line as Root had done at Chicago, however, Parker gave a conciliatory and unifying speech, even urging Bryan be elected permanent chairman. He drew attention to the raucous division of the Republican Party. He lambasted the tariff, an issue

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[125] *The Tacoma Times*, June 25, 1912; the cartoon can also be seen in *The Detroit Times*, June 26, 1912; Bryan attended both conventions and did much to link the perceived Wall Street influence in both. As for the Democratic convention, he only saw delegates as progressives or reactionaries and mocked Parker's keynote address as being written in Wall Street language unintelligible to the common Democrat, see William Jennings Bryan, *A Tale of Two Conventions*, edited by Virgil V. McNitt (New York: Funk & Wagnalls Company, 1912).

[126] "Bryan, Repulsed, to Open Bitter Fight in Democratic Convention Today," *New York Times*, June 25, 1912; Arthur S. Link, "The Baltimore Convention of 1912," *The American Historical Review*, Vol. L, No. 4 (July 1945), 693-96; *Official Report of the Proceedings of the Democratic National Convention* (Chicago: Peterson Linotyping Co., 1912), 3-19.

he had stressed since 1904 and the only one sure to arouse no dissent. But he also echoed Root. Judge Parker spoke of "the fundamental ideas that underlie our society," and stressed the need to "preserve undiminished the heritage bequeathed us and add to it those accretions without which society would perish." He prepared his fellow Democrats to "do battle against the unfaithful guardians of our constitution." Still, unity was the ticket. "There is not a reactionary among us," he insisted, "all Democrats are Progressives."[127] Why would he do anything else? It appeared likely that Clark would win the nomination and, even if someone like Wilson did win, Roosevelt was clearly the gravest threat to constitutional government from Parker's perspective. In contrast to Roosevelt, Wilson had staked out a corner as a reasonable progressive, supporting the initiative and referendum, but holding off on judicial recall.[128]

As it happened, Wilson did win the nomination. After nine rounds of balloting, Clark was the clear leader. On the tenth ballot, the New York delegation gave all its votes to him, handing the Speaker over half of the total votes. But Democratic rules required a nominee to have two-thirds of the convention's votes. Both Wilson and the third-placer, Senator Oscar Underwood of Alabama, refused to drop out and Clark's momentum stalled. Believing Tammany Hall and Clark had some sort of deal, Bryan threw his support behind Wilson on the fourteenth ballot. Balloting and bargaining continued over the next few days and, on the thirtieth ballot, Wilson was ahead of Clark, which precipitated a gradual trickle to Wilson until, on the forty-sixth ballot, he had won two-thirds, at which point he was unanimously confirmed.[129] Now the Democratic Party, which had not won a presidential election since 1892, was led by an ideological progressive against a hopelessly split field of opposition. One political cartoon issued a few

[127] *Official Report of the Proceedings*, 20-29.
[128] Gould, *Four Hats in the Ring*, 80.
[129] For an account of the protracted horse-trading that went into that victory, see Link, *The Baltimore Convention of 1912*, 697-710.

weeks after the convention, entitled “And the Waters Were Divided,” depicted Wilson as Moses leading Democrats through a parted sea. The opposite waves were labelled “Republican Split,” and the caption read “the walking is good to the Promised Land.”[130] Like its biblical inspiration, the cartoon was prophetic.

[130] Udo Keppler, “And the Waters Were Divided,” *Puck*, Jul. 31, 1912, Library of Congress, Prints and Photographs Division.

CHAPTER III. BENCH OVER BALLOT

Few at the time could appreciate the full constitutional implications of Wilson's success. After all, Wilson appeared far less revolutionary than Roosevelt at first glance, which enabled him to claim the middle ground and win an electoral landslide in November 1912. Wilson's thought was quietly revolutionary—he gave old words new meanings. When he swept into government, it was alongside solid majorities in the House and Senate composed largely of Democrats unused to power. In this way, he exercised more authority over his party than any Democrat since Andrew Jackson. Understanding Wilson, then, is essential to understanding what the Democratic Party became after 1912.

Few scholars would dispute Wilson's transformational role in American political thought. Historians have largely agreed that Wilson signaled a departure from limited nineteenth-century conceptions of American government. Though many recent scholars have developed a more critical view of Wilson's character and policies (especially regarding race), most have accepted the original assessment of his political importance.[131] Wilson's real innovation, however, was not in legislation but in his philosophy of government. For present purposes, the most important aspects of Wilson's thought to consider are his views on historical progress and the nature of constitutional government. In this process, it is important to assess not only how Wilson's progressivism distinguished him from his conservative opponents, like Taft and Parker, but also how his elitism and confidence in judicial constitutionalism set him against more democratic progressives like Roosevelt or Bryan. When the nineteenth-century constitutional consensus

[131] For an extended look at Wilson's re-segregation of the civil service, see Eric S. Yellin, *Racism in the Nation's Service: Government Workers and the Color Line in Woodrow Wilson's America* (University of North Carolina Press, 2013).

finally broke down in 1912, Wilson was essential in promoting a new progressive constitutionalism to fill at least one half of the vacuum.

Traditional American constitutionalism was founded on three basic precepts: one, that there is an eternal natural law which ascribes to men certain unalienable rights; two, that the role of government is to secure these rights; and, three, that human nature is permanent, deeply flawed, prone to violate the rights of others, and requires constant restraint to preserve a free society. In his distinguished career as a political scientist-made-statesman, Woodrow Wilson rejected each of these tenets. Wilson, like many progressives, was influenced by German historicism. This historical understanding meant that Wilson did not merely believe human institutions evolved and developed over time; rather, he believed that human morality, ethics, and political principles were dictated by their historical epoch and circumstances. Furthermore, progressive historicists thought that history and humanity were headed somewhere—that they were progressing toward some end. This end was doubtlessly harmonious and superior to the ages before. His vision, not unlike many of his fellow progressives, was something like a cross between Whig history and Darwinian evolution.[132] In short, Wilson disagreed with nearly everything the founders claimed to have believed. He rejected an abstract moral order, at least in the construction of government. Of the Declaration of Independence, he said in a 1911 speech, the "rhetorical introduction" is the least important part; "if you want to understand the real Declaration of Independence, do not repeat the preface," an odd judgment for a man who would come to be known as the father of international idealism.[133] Wilson was an idealist who rejected permanent ideas. He rejected the separation of powers. As early as the 1880s, Wilson decried the

[132] Donald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, MA: Rowman & Littlefield, 2005), 1-24.
[133] Woodrow Wilson, "An Address to the Jefferson Club in Los Angeles," May 12, 1911, as found in Pestritto, *Woodrow Wilson*, 6.

"too tight ligaments of a written fundamental law," and endorsed the "absolute supremacy" of the "representative body."[134] But it was not his merely his historicism—common enough among progressives of the age—that made Wilson's constitutionalism so consequential.

Though at the beginning of his career Wilson was content to criticize the limiting and impractical nature of the Constitution, by 1908, just before he entered politics, he had changed his tune markedly. In *Constitutional Government,* he characterized the Constitution as "a vehicle of life," or a living document. He linked it to the Magna Carta as a purely "practical" document, devoid of any "theories." It was free to grow and adapt to new historical circumstances. In a turn that would have horrified traditional conservatives like Parker or Root, Wilson identified the mechanism for constitutional change and adaptation as the courts, which were "the instruments of the nation's growth." "Each generation of statesmen," Wilson wrote, "looks to the Supreme Court to supply the interpretation which will serve the needs of the day." Ironically enough, he identified Root and Parker's hero, Justice Marshall, as the founder of this tradition. Judicial review in Wilson's constitutionalism was a tool by which judges—not the people—could adapt the meaning of the Constitution to meet present needs.[135]

In this key reconstruction of the traditional concept of judicial review, Wilson subtly took the debate over court power far beyond the bounds set by Federalist and Anti-Federalist precedent, and also beyond what was envisioned by more democratic progressive court critics. Critiques of the Court from men like Roosevelt or Bryan were primarily a reaction against the new laissez-faire jurisprudence that was itself a departure from traditional constitutional reasoning. They opposed the increased curtailment of democratic power in the name of the

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[134] Woodrow Wilson, *Congressional Government: A Study in American Politics* (1885; Boston: Houghton Mifflin Co., 1913), 311.
[135] Christopher Wolfe, "Woodrow Wilson: Interpreting the Constitution," *The Review of Politics,* Vol. 41, No. 1 (Jan. 1979), 121-142.

absolute rights of property and individuals. On this score, Taft, Root, and Parker all agreed with Bryan and Roosevelt, they merely differed on whether the people should have a direct check against the courts or if the courts should remain independent and amend their jurisprudential errors over time and with scholarly consideration.

Though the broadly democratic language of the Progressive Era might have shocked them, the basic contours of the court power-popular sovereignty debate would have been familiar to a Publius or Brutus in 1788. Brutus, an Anti-Federalist writer, felt that absolute judicial independence was dangerous, especially when combined with an unchallengeable ability to decide what was and was not constitutional. Judges thus empowered would "soon feel themselves independent of heaven itself."[136] Brutus believed there needed to be some sort of popular fail-safe against the court, whether legislative or otherwise. The Hamiltonian Publius defended judicial independence, or "the firmness of the judicial magistracy," as necessary to ensuring the Constitution, or the people's fundamental law, was obeyed. But his counter to the warning of judicial tyranny was to suggest it was improbable, perhaps impossible, because the judges would be "bound by strict rules and precedents."[137] Both constitutional configurations had their respective difficulties; one was theoretically unbound and, thus, unlimited so long as a majority endorsed a change, while the other risked the sort of judicial tyranny many progressives thought was being enacted by the *Lochner* court. There simply is no theoretical way around arbitrary law-making power; that is the nature of sovereignty. The only question is who should have the final arbitrary authority: the judges or the people?[138] One could argue that Roosevelt

[136] *Brutus* XV, Mar. 20, 1788, as found in *The Anti-Federalist*, 183.
[137] *Federalist* 78.
[138] Though generally disregarded by orthodox political philosophy, Sir Robert Filmer identified quite early (1648) that all law-making power must by its nature be arbitrary. He was especially early in identifying the power of judges as one of law-making, see Filmer, "Anarchy of a Limited or Mixed Monarchy," *Patriarcha and Other Writings*, ed. J.P. Sommerville (Cambridge University Press, 1991), 153.

and Bryan made a conservative case, though drawing on a divergent tradition, in favor of making the Court answerable to the people.

Wilson was different. Through his rejection of the judicial recall, Wilson appeared a moderate. In fact, he advocated a judiciary that held all the powers of the Federalist judge but behaved in all the ways feared by Anti-Federalists. Federal judges were to remain independent but were to understand their role as the generational re-interpreters of the Constitution. Not only did this arrangement exclude the possibility of a popular check on the Court, the Court did not need to be bound philosophically either; it was responsible for reading the Constitution to reflect the spirit of the age. In the short term, Wilson and his fellow judicial progressives sought most of the same aims as Roosevelt or Bryan in permitting democratic government to do more to meet the "needs of the times," which makes his significance more difficult to perceive. But, theoretically speaking, his construction removed constitutional interpretation from popular politics and confirmed judicial supremacy. Unbound by a traditional philosophy of restraint and textual precedent, and unthreatened by popular recall, the Wilsonian judge emerges as a sort of progressive philosopher-king. He preserved the authority and outward sanctity of the Court but reinvented its purpose and its philosophical self-understanding.

Thus, while conservative attention in 1912 was directed at Roosevelt's colorful campaign, the Democratic Party (and the federal government) came under the control of a man whose progressivism helped remove constitutional debate from the public square. Wilson's dual seizure of many progressive proposals and rejection of judicial recall robbed the Progressive Party of much of its broad appeal and left it astride its most controversial plank; the Bull Moose and the judicial recall were felled by the same bullet. Wilson's maneuver ensured that in the new era of constitutional politics, judicial supremacy would be accepted by both progressives and

conservatives alike. Conservatives were lulled into a false sense of security and only awoke to the new form of constitutional battle gradually. Debate, therefore, began a shift from a popular check on the judiciary toward the personal composition of the bench. Tension would lie less between the people and the Court and more between progressive judges, conservative judges, and their respective boosters.

In the years immediately following the 1912 election, conservatives like Taft, Root, and Parker organized to fight what remained of the judicial recall movement. Taft began teaching government at Yale, Root delivered speeches and opposed the administration in the Senate, and Parker was active in recruiting new ABA members.[139] Their efforts, coupled with the collective influence of the ABA, met with success. By October 1914, Taft, as president of the Association, could boast that "there had been a distinct falling off in the support of these fundamentally unwise and dangerous proposals." He remarked, perhaps with some glee, that while judicial recall "had been the rock on which [the Progressive Party] was founded," it now seemed to be "the rock on which it founders." Chastened by public opinion, the Progressive Party was forced to confine "its appeal to the voters to a declaration against boss rule," and no longer took up "the divine right of fossilized judges." Noting that the single state to adopt the recall of judicial decisions was Colorado, Taft wryly observed that "the present condition of that state with reference to governmental authority is not such as to commend those who have formulated its policies in the recent past."[140] Roosevelt himself was more interested in a vigorous foreign policy than domestic reform after 1914. Bryan was pigeonholed in Wilson's cabinet. By 1916, however,

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[139] *Brooklyn Daily Eagle*, Jan. 4, 1914; Elihu Root, "The Layman's Criticism of the Lawyer," *Addresses on Government* (1916), 479-97; Alton B. Parker, "Address Before the Ohio State Bar Association," delivered July 9, 1913, at Cedar Point, OH, Parker Papers; for examples of Parker's efforts to recruit ABA members, see his correspondence for 1913, Parker Papers, Box 3.

[140] "Annual Address of President Wm. H. Taft of the American Bar Association," delivered at Washington, D.C., Oct. 20, 1914, as found in Harvey S. Hoshour and Arthur O. Lee, *Vote "No (X)" on the Proposal (No. 10): First Prize Arguments by Students of Minnesota Law Schools and High Schools Against Recall of Judges* (1914), 21.

it seemed the threat to law and order came draped in the ermine itself. Conservative papers warned of new progressive judges that were calling a judge's ability to declare laws unconstitutional "an 'usurped' power."[141] The nature of the game was changing, though it would take time and defeat before conservatives realized it.

Though by 1914 it seemed to conservatives that the menace of judicial recall had subsided, they increasingly recognized Wilson and progressive judges as a threat to traditional constitutionalism. In a letter to Root, Taft cheered the Progressive Party's apparent "lapse toward conservatism" while excoriating "Wilson's paternalism and subordination to labor unions." Taft felt it was imperative that Republicans retake the House in the midterm elections to forestall "any further hysterical projects by Wilson under the academic conception that the Government can do everything and relieve everybody and make everybody happy."[142] Nor was this sentiment a merely Republican phenomenon. Parker joined Taft, Root, and other members of the ABA in opposition when, in early 1916, Wilson moved to appoint Louis Brandeis to fill the vacancy left by Justice Joseph R. Lamar on the Supreme Court.[143] In fact, Parker drew up and attempted to personally deliver a letter signed by the ABA Executive Committee to Woodrow Wilson in January 1916 that urged Wilson to appoint Taft to the vacant seat.[144] It should be noted that, while many at the time opposed Brandeis' nomination on account of his Jewishness, the challenge of Parker, Root, and Taft was ideological. Taft, for instance, shunned such personal attacks, maintained close friendships with more conservative Jews, and later developed a

[141] *The Oshkosh Northwestern* (WI), Aug. 3, 1916, 4.
[142] William H. Taft to Elihu Root, Sep. 2, 1914, Root Papers.
[143] *The Buffalo Commercial* (NY), Mar. 14, 1916.
[144] Copy of letter to Woodrow Wilson, Jan. 11, 1916, Parker Papers, Box 4.

fondness for Brandeis as a man when they worked together on the Court in the 1920s.[145] Brandeis, Wilson's friend, was a famous progressive lawyer and advocate who shared many of Wilson's constitutional beliefs. The fight over his nomination presaged the rapidly approaching nature of constitutional politics to come: a battle over court composition played out in the Senate.

Despite the cross-party opposition of conservatives to Wilson's promotion of a progressive constitutionalism though Brandeis' nomination, Wilson remained undaunted. Instead, the Democratic Party completely turned against Parker. One Democratic paper called Parker's opposition the strongest "evidence as could be cited in support of the president's nominee," while another noted that not a single Democrat had come to Parker's defense.[146] Parker still maintained his support for Wilson as president and distrusted the GOP as the party of crony capitalism—Wilson had succeeded in tearing down the tariff, after all—but the Judge's brand of conservative constitutionalism was a dead letter in the party he had stood for not twelve years earlier. It was becoming clear that the only viable institutional home for constitutional conservatism was the Republican Party. The Progressive vote failed to materialize in the 1914 House elections and the Republicans made solid gains, which filled the party with optimism for the upcoming presidential contest. But the GOP was still split, and many feared Roosevelt would attempt another run in 1916. If there was to be any successful advocate of the Constitution as traditionally understood, he would have to "bridge the chasm" of 1912 and bring the proponents of the "New Nationalism" back under the same tent as the Taft conservatives. There was only one man who Republicans believed could do this; he was the same man that many had hoped

[145] David G. Dalin, "The Appointment of Louis D. Bradeis, First Jewish Justice on the Supreme Court," *Louis D. Brandeis 100: Then & Now*, 7, part of a series produced by Brandeis University for the centennial of Brandeis' appointment, 2016.
[146] *The Kingston Daily Freeman* (NY), Mar. 24, 1916, 4.

would be the compromise choice in 1912. That man was Associate Justice Charles Evans Hughes.

Hughes first emerged on the national scene when he defeated William Randolph Hearst in the 1906 New York gubernatorial election as a sane, honest reformer. In 1908, he thrilled Republicans across the nation with his Taft campaign speech at Youngstown, Ohio. There he had defined the Republican Party as "the most important political agency for conservation and for progress," identifying it with "the National cause." Hughes emphasized the importance of the Supreme Court, "that august body," and warned that the next president would likely select four new justices (in the event, Taft made five appointments, including Hughes himself). He noted that Taft had been a judge who "commanded the respect and esteem of the entire bar of the country." In contrast to the Democracy under Bryan, which he characterized as reckless and incompetent, Hughes championed a party of progressive conservatism; a party whose "progress" avoided "false steps" and was "clear-eyed, calm, patient, and steadfast." He was a progressive reformer, but, as a conservative, he understood that "we cannot change human nature or bring about a state of society ... which does not reflect its failings."[147] The address was so successful that it was still used as campaign literature in 1916. Since 1910 he had been safely ensconced on the supreme bench, from where he had avoided all the controversy of 1912.

Though he took great efforts to avoid politics while on the bench, he did make occasional forays in the interest of the legal profession. In 1914, Hughes appeared at a banquet of the New York State Bar Association seated at the same table as Parker and Root. Much of the talk that night had involved a defense of the judiciary. Though Hughes' speech was less pointed than the others, he praised Parker personally and expressed hope that the bench would weather the

[147] Charles E. Hughes, "Address Delivered at Youngstown, Ohio, September 5, 1908," *Addresses of Charles Evans Hughes, 1906-1916*, second ed. (New York: G.P. Putnam's Sons, 1916), 299-330.

present storm.[148] In January, 1916, he was specifically honored at another meeting of the New York bar.[149] There he gave a speech that stressed the need for procedural reform in judicial work and improving court efficiency.[150] Appraised in a vacuum, the speech would appear politically unremarkable. But Hughes urged reforms that echoed exactly the line taken by the ABA, and pursued by the "trio of noted public men who are working to end law's delays," Taft, Root, and Parker, that such efficient reforms were necessary to forestall criticisms against the courts.[151] Thus, Hughes was a noted progressive who was also an integral part of the traditional conservative legal establishment.

There was a thoroughgoing Hughes boom among Republicans by the spring of 1916.[152] He was Taft's pick for the nomination. In April, the former president sent Hughes two sprawling letters encouraging him to accept should the party nominate him. After asserting that the country's "great need" was for the "restoration of the Republican party to power" so that it could resume "constructive work," Taft discussed the other prospective Republican candidates. He found none of them capable of uniting the party. Hughes was the only man capable of "bridging the chasm of 1912" who appealed to both "Republicans and Progressives in their hearts." In this way, Taft imagined Hughes filling the same role as himself in 1908. Taft did not believe Roosevelt could win because conservatives detested him and his bellicose stance on the war in Europe isolated the German vote. Taft admired Hughes for dismissing efforts to draft him, but said that his nomination, barring a flat rejection, was inevitable. Because of his conduct, the

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[148] *The Brooklyn Daily Eagle* (NY), Jan. 4, 1914, 1, 5.
[149] Attendees included Parker and Henry "Harry" Taft, see *Buffalo Courier*, NY, Jan. 23, 1916, 4.
[150] Charles E. Hughes, "Address before the New York State Bar Association, January 14, 1916: Some Aspects of the Development of American Law," *Addresses of Charles Evans Hughes*, 331-63.
[151] *New Castle Herald* (PA), Mar. 3, 1914, 5.
[152] For the most recent book on the Election of 1916 (the first in about four decades), see Lewis L. Gould, *The First Modern Clash over Federal Power: Wilson versus Hughes in the Presidential Election of 1916* (University of Kansas Press, 2016).

Court would be spared any politicization. In concluding his first letter, Taft told the Justice that, should he accept, "you will certainly be elected" and that "you will reunite the only party from which constructive progress can be expected."[153] Though Taft worried on account of the Brandeis nomination that Hughes' replacement would not "strengthen the Bench," he felt leaving Wilson in office could free him to appoint other judges "of the Pennsylvania Law School, supporters of the recall of judicial decisions." Hughes was the man to restore sound, conservative leadership.[154] For his part, Parker felt that it would be Hughes' "duty to accept" should he be nominated.[155]

When Republicans convened again at Chicago in June 1916, most expected Hughes to be nominated. The Republican convention was in conservative hands, but all knew reunion was necessary for victory. Senator Warren G. Harding, the man who had nominated Taft in 1912, was selected as chairman. In his keynote address at the Chicago Coliseum on June 7, freshman Chairman Harding preached a political gospel that was both new and yet familiar. After calling on the party to forget the division of 1912, Harding asserted that "the essential principles of Republicanism are unchanged and unchanging;" the spirit of the GOP was as strong as it was in Lincoln's day. He emphasized the importance of eternal "abiding principles" in guiding a nation safely through change. "For example," he said, "we ought to be as genuinely American today as when the founding fathers flung their immortal defiance in the face of old-world oppressions and dedicated a new republic to liberty and justice."[156] In this impressive example of national myth-making, Harding introduced for the first time the phrase "founding fathers," as a name for the

[153] William H. Taft to Charles E. Hughes, April 11, 1916, Hughes Papers.
[154] William H. Taft to Charles E. Hughes, April 13, 1916, Hughes Papers.
[155] *The Buffalo Commercial* (NY), May 3, 1916, 7.
[156] Warren G. Harding, "Address to the Republican National Convention, June 7, 1916," *Republican Campaign Text-Book, 1916*, 19-29.

leaders of the Revolution, into national discourse. He projected a consummately conservative image, aligning contemporary American values with the same vision of the founders; the Republicans now stood for continuity where Wilson's Democracy signaled departure. In this spirit, the convention nominated Justice Hughes after only three ballots.

In his telegram of acceptance, Hughes promised "a dominant, thorough-going Americanism," while in his speech of acceptance the next month, he declared that "the party of Lincoln is restored." He meant for the Republican Party, "a great liberal party," to be "the organ of the effective expression of dominant Americanism." His precise policy goals were vague and wrapped in the language of flag and country, except for his emphatic and pointed endorsement of "the protective principle." He summed up his position in the phrase "America first and America efficient," which would later be expressed as "undiluted Americanism."[157] Hughes was attempting to weld together the values of Roosevelt nationalist-progressives with Taft conservatives. Roosevelt embodied the nationalistic doctrine of "America First," while legal-minded conservatives had been stressing "efficiency progressivism" as a means of preventing revolutionary agitation. By painting their common opponent as weak, ineffective, and out of touch with timeless American values, Republicans could build a nationalism that cherished the "abiding principles" of the "founding fathers." This was not a "New Nationalism," but a Constitutional Nationalism—a nationalism that identified itself with the tried rather than the experimental. The fact that Hughes was leaving the nation's highest court to challenge Wilson only further fused notions of patriotism with the Constitution. Adding to the contrast was the fact

[157] Charles E. Hughes, "Telegram of Acceptance," *Republican Campaign Text-Book, 1916*, 30; Hughes, "Speech of Acceptance at Carnegie Hall, New York, July 31, 1916," *Republican Campaign Text-Book, 1916*, 3-15; *The Morning Post*, NJ, Jun. 14, 1916.

that, for the first time in its history, the Democratic platform of 1916 did not include the word "Constitution."

Hughes was not a good campaigner. Perhaps his time on the bench had dulled his stumping abilities. He failed to develop much beyond the themes of his initial speeches. Flanking Wilson's popular neutrality stance was difficult, especially when Roosevelt's pro-Hughes speeches led many to think a Republican victory would mean war. But he did manage to reunite the party on a conservative-progressive basis that endorsed a traditional constitutionalism. This effort included a Roosevelt-Taft handshake dinner in October that helped to put 1912 in the past. When Wilson, threatened by a national railroad strike, gave railroad workers the eight-hour day without a fight, Hughes led his party in a conservative response. "Never surrender principle to force," he belted, "we have left autocracy. We have left tyranny. We have left force. They shall not come back if we can prevent it." In his eyes, Wilson had capitulated to class legislation, which represented a "shameful" line on a "fundamental issue."[158] On the other hand, Hughes endorsed an amendment to grant women the vote, while Wilson preferred to leave it up to the states. In the end, Hughes' Constitutional Nationalism seems to have isolated some progressive Republicans in the West and some Germans. Wilson won in a close election without securing a popular majority.

Despite this immediate conservative failure, the new pattern of constitutional politics had begun. The Republican Party was reconsolidating as an increasingly constitutional conservative force, while the Democratic Party was tilting in the progressive direction. Of course, conservatives and progressives remained in both parties, and both Senators Robert LaFollette

[158] Gould, *The First Modern Clash over Federal Power*, 90-95.

and William Borah offered faltering attempts at checking court authority in the mid-1920s.[159] Still, the dominant trends were clear. The new Constitutional Nationalism built under Hughes, combined with the post-war collapse of Wilson's popularity, would propel Republicans to a decade of victory in which the GOP stacked the Supreme Court with traditionalist judges. Fittingly, both Taft and Hughes, one after the other, would be appointed Chief Justice of the Supreme Court by the succeeding Republican administrations. They would oversee the planning and construction of the marble "Temple of Justice" where the Court resides today. But their victory was pyrrhic. The next serious constitutional clash would come in the late 1930s during President Franklin D. Roosevelt's fight with the Supreme Court, in which debate centered not around court accountability but court composition. In the ensuing decades, the entire legal culture and faith in a traditional common law inheritance that legal grandees like Parker and Taft cherished would be eviscerated. If 1912 was their Chancellorsville, then 1937 was their inevitable Appomattox. Future fights over the Constitution's meaning would no longer take place in the public square. Instead, they would be fought from atop the bench; the victories of the future did not belong to the heirs of Taft and Parker.

[159] Progressive and left-wing criticism of the court did not simply evaporate. As the court became more conservative with Harding's 1920 victory, many progressives challenged it. But direct challenges to court authority never regained their 1912 strength and both LaFollette and Borah's proposals were dead on arrival. Critics concentrated more energy on the membership of the court than its powers, see Ross, *A Muted Fury*, 193-232.

CONCLUSION

While constitutional conservatives and progressives since the Progressive Era have consistently disagreed over what government can do, they have also consistently agreed on one large question: who ought to decide what the Constitution says? The certain answer has been "the Supreme Court!" This consensus around judicial supremacy has received little serious opposition since the days of the Commoner and the Colonel. Instead, there has been endless debate and argument over who ought to be a member of the Supreme Court. The common Whiggish narrative of the twentieth century sometimes reads less like a story of democratic, legislative successes and more a string of good court rulings. The great constitutional questions of the nineteenth century were answered at the ballot box or, at the extreme, the point of a bayonet. Though Progressive Era conservatives defended a jurisprudence that was traditional, they did so alongside a sort of judicial power that was new in practice and that promised the power to destroy the republic they cherished as much as it did to save it. Constitutional conservatives could not foresee a day when men who thought differently than them would hold the powers they held. Judicial progressives over several generations interpreted the very power conservatives defended as a new tool to serve far different ends. Judicial supremacy takes any interpretive power over the Constitution, which is inherently arbitrary, away from the people and hands it to nine judges with life tenure—from popular opinion to the opinion of the legal establishment of the day. If Taft could inspect the legal opinions that predominate at his old alma mater today, one wonders if he would not consider lending his vote to the Bull Moose in 1912.

The long reign of judicial supremacy has produced legal critics on the left and right, though their criticisms have, predictably, been lobbed primarily against decision trends that preclude their own policy preferences. On the cultural right, for instance, Judge Robert H. Bork

has criticized the Court's usurpation of power in preventing democratic action to limit or check abortion. He favored a constitutional amendment empowering Congress to uphold legislation struck down by the Court that echoed the doomed proposal of Robert LaFollette in the 1920s. On the economic left, legal scholar Larry D. Kramer, though a fan of the Court's defense of civil rights and liberties, has argued that the Court was never given a right to overturn federal statutes—as opposed to state statutes—and that the power has been usurped.[160] But such arcane legal arguments have remained largely, well, arcane. There has been no serious political movement to limit or check the Supreme Court's power since 1912.

Today one can hear whispers of placing term limits on Justices, or packing the Court with new justices, but this is merely an effort to gain access to the bench's power, not a criticism of the power itself.[161] Presumably, too many on the right see judicial supremacy as necessary to preserving economic individualism, while those on the left require it to promote their own cultural laissez-faire. Whatever the causes, the result is that constitutional politics in this country continues to be a farce, with either side vying for control of the judiciary so that the Constitution will read as they please. Pundits wait with bated breath to hear what the oracles have decided the Constitution means on any given day, the Senate Judicial Committee comes to resemble a three-ring circus, and the American Constitution is yet further removed from any serious notion of popular sovereignty. The irony, of course, is that, while every party today is quick to point to how shameful the *Lochner* days were and how badly they perverted constitutional democracy,

[160] Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (Reagan Books, 1996), 117, 321; Larry D. Kramer, "The Supreme Court 2000 Term Forward: We the Court," *Harvard Law Review*, Vol. 114, No. 4 (2001); for a synopsis of these views see, Saikrishna B. Prakash and John C. Yoo, "The Origins of Judicial Review," *The University of Chicago Law Review*, Vol. 70, No. 3 (Summer 2003), 889.
[161] For examples of such talk, see Jay Willis, "Why a Radical Supreme Court Reform Is Catching On," *GQ*, Jun. 21, 2019, and Mario Loyola, "Packing the Court Is a Real Threat," *Wall Street Journal*, Sep. 18, 2019.

contemporary constitutional politics is presided over by a Lochnerian Janus; one face shouts "free labor" while the other clamors for "free love," commonweal be damned!

Did it have to be this way? Lincoln at Gettysburg thought not. Roosevelt at Osawatomie did not think so. In his inaugural address, President James Abram Garfield, who perhaps offers the missing link between Lincoln's Republicanism and Roosevelt's, offered his vision of constitutional government. "The voters of the Union," the Preacher President said, "who make and unmake constitutions, and upon whose will hang the destinies of our governments, can transmit their supreme authority to no successors save the coming generation of voters, who are the sole heirs of sovereign power."[162] But, if the Constitution is "what the judges say it is," as Hughes put it, and the law is what judges are willing to say it is, as Holmes illustrated in "The Path of the Law," then what does that make of the people's "sovereign power," of government "by the people, for the people?"[163] The populist-progressive criticism of the *Lochner* court and its associated political establishment championed by Roosevelt and Bryan was not an attempt to replace one form of individualism for another, it was a call to remember that the law and the Constitution were meant to serve the common good. In a nation committed to popular sovereignty the supreme and sovereign determiners of what suited the common good had to be "the people," for better or for worse. And yet the result of constitutional politics in the Progressive Era—a period typically regarded for its democratizing ethos—is the rejection of such a government and the inauguration of an era of judicial supremacy. To provide a young American with a civics education under such conditions is a bit like giving a camel swimming lessons; he is unlikely to need them. If we, as Americans, are as fond of popular government as

[162] James A. Garfield, *Inaugural Address*, March 4, 1881.
[163] *Addresses and Papers of Charles Evans Hughes*, 139; Holmes, "The Path of the Law," 10 *Harvard Law Review* 457 (1897).

we profess, then perhaps we ought to reconsider the position of the man who stood for "the absolute right of the people to rule themselves."[164]

[164] Roosevelt, "A Charter of Democracy."

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VITA

Logan Stagg Istre is a native of Louisiana and a teacher of American history and social studies. Mr. Istre completed his undergraduate studies at Louisiana State University, and this thesis has been completed toward the end of completing his graduate studies in American history. He expects to earn his Master's in August of 2020. His chief areas of historical interest are American civilization and politics during the Gilded Age and Progressive Era, but, on the whole, they extend to western civilization. One of his favorite songs is "Oh, Shenandoah," his favorite beverage is coffee, and his favorite tree is the American Sycamore. Two of his favorite authors are C.S. Lewis and G.K. Chesterton. Perhaps these details provide some portrait of his disposition beyond the clues offered in the paper above. Mr. Istre is thankful to LSU for some of the best years of his life and cannot express enough gratitude for his colleagues at the History Department in Himes Hall.