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Modern America and the Legacy of the Founding,
2006, pp. 35-74

**George Mason University Law and Economics
Research Paper Series**

08-44

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The National Regulatory State in Progressive Political Theory and Twentieth-Century

Constitutional Law

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NOTE: This is a draft version of an essay published in final form in “The National Regulatory State in Progressive Political Theory and Twentieth-Century Constitutional Theory,” in *Modern America and the Legacy of the Founding*, Ronald J. Pestritto & Thomas G. West eds. (Lanham, MD: Rowman & Littlefield, 2007): pp. 35-74.

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Over the past century, American elites have changed their opinions about the objects of good government. Before 1900, most American policy makers agreed that the federal government should have a few limited powers over core national objects, that all levels of government should enforce strong individual property rights, and that all levels of government should actively support the public morals relating to civic and family life. Now, a controlling bloc on the U.S. Supreme Court now holds that strong individual property rights “rest on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.” That bloc also supports a broad construction of Congress’s regulatory powers—largely because it is skeptical of “relatively unregulated markets.” In the realm of public morals, by contrast, the same bloc understands individual liberty to protect the autonomy to be free from being defined by common morals—the autonomy “to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹

Over the same time span, the same elites have also changed their attitudes toward constitutionalism. Before 1900, most leading lawyers would have agreed with Publius’s

sentiment, from *Federalist 78*,² that judges should “guard the Constitution and the rights of individuals from the effects of those ill humors . . . which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.” (No. 78, 437.) Publius presumed that most changes of political opinion would turn out to be fads, and he hoped that constitutionalism would winnow out fads. Now, however, at least with respect to property regulation and government structure, most leading lawyers would agree with a sentiment expressed by then-political scientist and future-President Woodrow Wilson: Because “[t]he idea of the state and the consequent ideal of its duty [have] undergo[ne] noteworthy change,” “[i]t is getting harder to *run* a constitution than to frame one.” In Wilson’s diagnosis, constitutionalism needed to be revised so that “public opinion” could be made to be “efficient without suffering it to be meddlesome.”³ Wilson was receptive to many of the changes in opinion that would have concerned Publius, and he worried that Publius’s constitutionalism would frustrate constructive government action.

While these broad contrasts are subject to many qualifications, American elites *have* changed their minds about how they understand good government and constitutionalism between 1900 and the present, and students cannot understand the character of law and politics in modern America if they do not appreciate the change. To give a sense of how this change came about, this Essay surveys two important slices of this transformation: in how modern lawyers understand the structural Constitution, and in how they understand what it means to “interpret” the Constitution. This survey is far from complete, not only because it passes over many topics relating to individual rights but also because it covers an extremely thin slice of structural constitutionalism. At the same time, the topics covered here present two of the best places to

start to understand the full shift from pre-1900 classical liberalism to contemporary modern liberalism. Both the Constitution's structure and its status as a source of law were hotly contested in the most influential and far-reaching theoretical transformation in American law and politics after the Civil War—the Progressive critique of the American Founders' regime, which prevailed from the Founding, through the Civil War, until the beginning of the twentieth century.

In both structural constitutionalism and constitutional interpretation, constitutional law has gradually shifted over a century to accommodate Progressives' critique of the Founders' constitutional order. This shift occurred in several waves, the first of which was theoretical. Between roughly 1880 and 1920, leading Progressive political scientists developed a broad critique of the pre-1900 constitutional order. As the American Founders had organized their understanding of politics around nature, specifically the “laws of Nature and Nature's God” to which they appealed in the Declaration of Independence, so leading Progressives appealed to an Americanized version of “History,” specifically in the form of “Progress,” or (to use the term this Essay will use) the “living Constitution.” As Progressive academics understood the living Constitution, around 1900 the American people were demanding, and a proper understanding of social efficiency required, that the United States nationalize regulatory power and centralize it in independent bureaucracies to a greater degree than the pre-1900 order allowed.

This critique then took hold in American practice largely, though not completely, between roughly 1920 and 1950. The Progressives' critique left some practical impact during the 1910s and 1920s. However, the Progressives succeeded on a larger scale during the New Deal, as their students took leading teaching positions in the legal and political-science academies, leading offices in President Franklin Roosevelt's administration, and seats on the U.S. Supreme Court. By the close of the New Deal, leading academics and judges assumed,

contrary to pre-1900 constitutional law, that Congress had general regulatory powers over the American economy, and that Congress could transfer those powers to centralized agencies largely free from direct legal supervision by the President or the courts.

At the same time, the Progressives' critique did not entirely wipe out the pre-1900 constitutional tradition, in large part because lawyers and judges were less enthusiastic about living-Constitution theory as a recipe for interpretation than they were about it as a blueprint for running a government. Neither Progressives nor President Roosevelt's Congress passed an amendment abolishing constitutional federalism or separation of powers. The New Deal Court did not cite "the living Constitution" as an independent source of legal meaning that by itself required the Court to break with its pre-1900 precedent. Instead, the Supreme Court poured new wine into old bottles. It continued to pay respect to the forms of pre-1900 structural constitutional law, but concluded that the Progressives' and New Dealers' innovations fit within the details of those forms. The Court did so in part for institutional reasons, because the judiciary's power comes in large part from the Constitution's status as a source of law and the judiciary's reputation for following precedent. Separately, however, and in marked contrast to later Courts, leading Progressive political theorists and the New Deal Court were ambivalent about the possibility that the living Constitution might serve as an explicit source of constitutional meaning.

Both sides of this tension influence contemporary constitutional law and scholarship now. On one hand, most modern Supreme Court Justices and many scholars assume the truth of many of the Progressives' specific substantive claims about nationalism and centralized, independent administration. At the same time, these claims are often qualified to stay within the precedent and the broad interpretive theories that New Deal Justices and jurists developed to reconcile

Progressives' and New Dealers' agenda to pre-1900 precedent and the Constitution's text. That tension creates strange quirks and opportunities for change in the Court's structural constitutional case law.

Before proceeding, let me explain briefly this Essay's method and focus. This Essay is intended only as an introductory survey, as any essay must be to cover developments across a century. To distinguish between key themes and diversions, I rely in large part on a broad portrait of twentieth-century constitutional development that has been sketched already by several legal historians and political scientists—legal historians G. Edward White and Morton Horwitz, and “institutionalist” political scientist and Supreme Court specialist Howard Gillman.⁴ Many portraits of the twentieth century suggest that structural constitutional law changed suddenly, during the New Deal, in an epic confrontation between President Roosevelt and Congress against the Supreme Court.⁵ In my opinion, White, Horwitz, and Gillman's accounts are superior to this more popular view. They describe the transformation as a more gradual process, in which Progressive academics and public intellectuals gradually ground down the pre-1900 consensus and trained two generations of legal elites to build a new consensus.

At the same time, readers should note that in this Essay I interpret the source materials differently from White, Horwitz, and Gillman in at least three important respects. First, my coverage is narrower. To help give this Essay's broad contrasts concrete context, I illustrate the impact of broad Progressive living-Constitution themes using specific examples drawn from Commerce Clause federalism and separation of powers. Second, in different ways White, Horwitz, and Gillman all assume that Progressive political science was either substantively more attractive than or at least inevitably bound to displace pre-1900 classical political science. By contrast, following David Ricci, John Marini, Dennis Mahoney, Thomas West, and others, I

assume here that this choice was not clear-cut, and portray the contrast between pre- and post-1900 political thought as a closer contest.⁶ Finally, this interpretation focuses to a greater degree than do previous ones on the problem that Progressive living-Constitution political theory creates for the legal practice of constitutional interpretation. Many observers portray all living-Constitution interpretation as more or less the same. In reality, in some doctrines, the “living Constitution” is an express source of constitutional meaning; in others, it operates much more remotely, by setting important background political-science assumptions that give content to specific policy values on which judges and scholars rely. This Essay gives a sample how different audiences at different times have understood and applied “the living Constitution.”

The Structural Constitution in Two Schools of Political Science

Constitutional interpretation can be largely autonomous from political science—indeed, many judges and scholars insist it *should* be autonomous. In practice, however, political science often influences interpretation indirectly. Before considering how constitutional interpretation has changed, then, let us start by understanding how political science has changed, and how that broad change contributed to more specific changes in how elites understand federalism and separation of powers.

The Founders, Federalism, and Separation of Powers

At least in contrast with modern constitutionalism, early American constitutionalism sought to limit the power of the federal government to a few focused and encompassing ends, and to limit and to mark off clearly the divisions between the legislative, executive, and judicial departments of the federal government. These limitations followed from a specific diagnosis of human nature, one which followed the Declaration of Independence and informed constitutional law until the early twentieth century. According to this diagnosis, federalism and separation of

powers contributed to the cause of human freedom by limiting and dividing government. At the same time, federalism and separation of powers also promoted effective government. Both took advantage of natural human tendencies like subsidiarity, the desire for general laws, and the differences between law enforcement and adjudication. While it can be dangerous to rely exclusively on “snatches of debate from the Federal Convention and salient passages of *The Federalist*” to appreciate the intentions behind the Constitution, *The Federalist* conveys the important themes clearly enough for consideration here.⁷

To appreciate the logic behind federalism, it helps to start with the Commerce Clause, which symbolizes federalism more than any other. In its original meaning, the Commerce Clause assigns the federal government only the power to superintend interstate trade, as the World Trade Organization now superintends international trade. The Commerce Clause vests in Congress power “to regulate commerce . . . among the several states.”⁸ This grant assigns to the federal government power to regulate trade, transportation, and communication (“commerce”) between states. At the same time, because the Constitution limits the federal government’s objects by enumerating them, the Commerce Clause tacitly withholds from the federal government the power to regulate similar commerce within states, and also the power to regulate the productive activities that generate goods and services that will go into commerce. That is why Publius spoke of the interstate-commerce power as the power to “regulate the trade between State and State” and as “the reciprocal trade of confederated States.” (No. 42, 232, 235.)

This allocation of power was designed at least in part to promote good government, in two separate respects. First, it secured individual liberty, by dividing governmental power into two separate and competing units. That is why Publius referred to federalism as one half of the “double security . . . as to the rights of the people.” (No. 51, 291.) Second, however, the

Commerce Clause created a division of labor between national and state government to promote energetic and effective government. Publius regarded as “a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union.” For these reasons, “[t]he administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature” are properly the subject of “local legislation” and “can never be desirable cares of a general jurisdiction.” (No. 17, 86-87.) Congress should therefore regulate interstate trade, because the central government takes a broader view of interstate trade than more parochial states. But states should regulate the conditions by which goods are made at the state level, because local producers and other interested parties can then participate more actively in the political processes that affect their livelihood.⁹

The Constitution’s separation of powers then channels the limited powers assigned to the federal government into three separate departments. By assigning “all legislative Powers herein granted” to Congress, the Constitution tacitly withholds from federal officials who do not belong to Congress any power to legislate. Article II similarly withholds “executive power” from anyone except the President, and Article III withholds “judicial power” from anyone except a Supreme Court Justice or a judge on a court inferior to the Supreme Court.¹⁰

Again, to hear Publius explain, tripartite separation of powers was designed at least in part to promote goals similar to Commerce Clause federalism. Separation of powers was the second half of *Federalist 51*’s “double security” for protecting individual liberty, for it gave

“those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” (No. 51, 290, 291.) As with federalism, however, separation of powers was also supposed to promote good government because it organized government to comport with human nature. Although *Federalist 37* admitted that it can be difficult to mark off the lines of distinction, it insisted no less that there exist intelligible and principled differences between legislation, execution, and adjudication. As Charles Kesler has recounted, the second half of *The Federalist* presumes that political talent is hard to find. Separation of powers conserves political virtue and elevates the quality of the federal government by channeling men into offices that allow them to show off their special political virtues. The legislature attracts men with discernment, deliberation, and prudence; the executive calls forth courage, energy, and magnanimity; and the judiciary demands learning, respect for the rule of law, and a sense of equity in cases not clearly settled by established law.¹¹

These arguments for federalism and separation of powers depended on an understanding of political science that was informed in substantial part by classical political philosophy. In particular, these arguments assume that philosophy can provide more reliable and long-lasting insights into human happiness and excellence than more concrete and immediate sources of knowledge. Consider a law like the Federal Trade Commission (FTC) Act, which establishes a federal agency with broad powers to define “unfair competition,” prosecute violations of its definitions, try those prosecutions, and fine and penalize companies found liable in its own trials. This scheme promises many short-term advantages: Many American companies may engage in unfair trading practices; such practices may undermine investors’ and businesses’ confidence in the American economy if not stopped quickly and decisively; but the companies that engage in such practices may exploit the divisions between the House, Senate, and President’s agencies to

create conditions of “gridlock” in which they can get away with their unfair practices unpunished. However, Publius would have insisted that such a scheme threatened longer-term disadvantages: The FTC could endanger the rights of many parties by using its concentrated powers in ways that flout the rule of law, and it might eventually be overwhelmed as its open-ended mandate forced it to make difficult policy choices in highly politicized cases. To make such generalizations about the long haul, Publius would have relied at least in part on political insights drawn from the study of history and a classical-philosophical analysis of the human soul. Publius presumed that the “experience of ages” could transmit general political knowledge accessible to a people in another time and country and applicable to their circumstances. (No. 37, 196.) He also presumed that human nature could provide general knowledge about politics—indeed, he asked, “what is government itself but the greatest of all reflections on human nature?” and assumed that political life is characterized by a little reason, more opinion, and a great deal of passion. (No. 51, 290; No. 49, 282-83.) Thus, a reasonable analysis of the human soul, taken together with a reasonable interpretation of human history, could identify broad distinctions between national and local and among legislative, executive, and adjudicative functions. Even though these distinctions were abstract for all the reasons that metaphysical concepts are abstract, such abstractions still remained a surer guide to the American people’s long-term happiness than more concrete sources of political knowledge.

To be sure, this interpretation of early American constitutionalism is not accepted by all. For instance, as will be explained below, conventional legal wisdom now holds that the Commerce Clause was originally intended to give Congress much greater flexibility to extend its powers and organize the federal government than this section has suggested. Nevertheless, the themes discussed in this section were influential in pre-1900 political theory and constitutional

law, and leading contemporary scholars appreciate the difference. In particular, Bruce Ackerman has suggested that the conventional wisdom exists “to satisfy the modern need to legitimate the New Deal.” He insists it does so at the cost of “anachronistically subordinat[ing] [our] understanding of the early periods.” and suppressing the deep differences between early American constitutionalism and what Ackerman describes as “the revolutionary spirit of modern times.”¹²

The Progressives and the National Administrative State

When Ackerman refers to a “revolutionary spirit,” he appeals to an understanding of modernity that was influenced in large part by the thought of seminal Progressive political theorists. This section concentrates on the thought of Progressive theorists who deserve among Progressive opinion leaders pride of place corresponding to the place of the authors of *The Federalist*: Woodrow Wilson, a seminal political scientist, President, and leader of the Progressive wing of the Democratic Party; Frank Goodnow, a law professor at Columbia University and first president of the American Political Scientists’ Association; Charles Merriam, a University of Chicago professor who wrote an influential history of American politics; and Herbert Croly, prominent public intellectual, adviser to President Theodore Roosevelt, and founder of *The New Republic*. These writers all reinforce two themes characteristic of Progressive political science. At the level of high theory, they elevated a Hegelian concept of “History,” and a Darwinian conception of “the living Constitution,” as the unifying standard in political life. At the level of constitutional structure, they criticized the Constitution’s original design and advocated a more encompassing national government with a more powerful and independent administrative bureaucracy.

The Progressives' specific prescriptions relied substantially on a philosophical analysis of man substantially different from the Founders' analysis. Leading Progressives tended to assume that human rationality manifested itself less through the individual, as *Federalist 37* and *49* had, than through the community. Woodrow Wilson thus made the "common political consciousness" the ultimate foundation for the prescriptive elements of his political science, and he regarded the Constitution as the "vehicle of the nation's life," which transmitted the prescriptions of the people's consciousness. Similarly, Charles Merriam summarized the general intentions and accomplishments of leading Progressives by stating that "[t]he present tendency . . . is to disregard the once dominant ideas of natural rights and the social contract The origin of the state is regarded, not as the result of a deliberate agreement among men, but as the result of historical development, instinctive rather than conscious."¹³

These broad appeals to community will and historical development subtly inclined the Progressives' understanding of political science toward a more rationalistic understanding of practical politics. If the people's will is taken as a historical development or a fundamental fact, it makes sense for political science to focus on how most efficiently to satisfy the people's will. Woodrow Wilson illustrated this connection in a seminal article on administration. He complained that, in the tradition of political philosophy from Aristotle to Hegel, the "question, how law should be administered with enlightenment, with equity, with speed, and without friction, was put aside as 'practical detail' which clerks could arrange after doctors had agreed on first principles." Since Wilson was confident that democracy was right as a matter of first principle, he was more interested than the philosophical tradition how to make democracy work effectively. In *Constitutional Government in the United States*, one of his last works, Wilson explained the understanding of political science that followed from this shift:

The object of constitutional government is to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need, and thus make it an impartial instrument of symmetrical national development; and to give to the operation of the government thus shaped under the influence of opinion and adjusted to the general interest both stability and an incorruptible efficacy. Whatever institutions, whatever practices serve these ends, are necessary to such a system; those which do not, or which serve it imperfectly, should be dispensed with or bettered.¹⁴

Progressives also made this shift clear by referring to the study of politics not a branch of philosophy but rather as branch of *science*. Charles Merriam described the Progressive movement by noting a “change from the rather haphazard style of discussing political theory in earlier days to a more scientific way of approaching the questions of politics.” Particular policy disputes were to be settled in reference to the particular policy values they raised. As Merriam explained, when the Progressives established “that there are no ‘natural rights’ which bar the way” to state action, each policy question became “one of expediency rather than of principle. . . . [E]ach specific question must be decided on its own merits, and each action of the state justified, if at all, by the relative advantages of the proposed line of conduct.”¹⁵

The Progressives applied these general principles to critique the Constitution’s scheme of federalism and separation of powers. In each case, their critique followed in part from their conception of a national will, and in part from efficiency-based policy arguments. While these two strands of argument are technically separate, they are still intertwined. The Progressives’ efficiency-based arguments make sense only if one first assumes the proper object of government is efficiently to satisfy the commands of the sovereign political will.

Both tendencies are easy to see in Herbert Croly's writings on federalism. Croly appealed to the national will to defend an expanding national government: "the Federal government belongs to the American people even more completely than do the state governments, because a general current of public opinion can act much more effectively on the single Federal authority than it can upon the many separate state authorities." At the same time, Croly acknowledged that "[w]hether a given function should or should not be exercised by the central government in a Federal system is from the point of view of political logic a matter of expediency – with the burden of proof resting on those who propose to alter any existing Constitutional arrangement." He hastened to add, "however, in the same breath, that under existing conditions and simply as a matter of expediency, the national advance of the American democracy does demand an increasing amount of centralized action and responsibility." The reason was simple: "a more scrupulous attention to existing Federal responsibilities, and the increase of their number and scope, is the natural consequence of the increasing concentration of American industrial, political, and social life."¹⁶

Frank Goodnow used similar arguments to argue in favor of reforming tripartite separation of powers. He appealed to a separation of government functions higher than tripartite separation of powers, namely the distinction between "administration" and "politics." While Goodnow described separation of powers as a "somewhat attractive political theory," he concluded that in practice it had proven to be "an unworkable and unapplicable rule of law." Goodnow appealed to a superior conception of government by observing that "[t]he state abstractly considered is usually likened to an organism." He deduced that "the action of the state as a political entity consists either in operations necessary to the expression of its will or in operations necessary to the execution of its will." Expression was the realm of politics;

execution was the realm of administration; the distinction between the two followed in large part from Goodnow's starting premise that the state is an "organism." At the same time, Goodnow believed what was true as a matter of high political philosophy generally produced useful consequences in everyday life. When politicians meddled with administration, "the spontaneous expression of the real state will tends to become difficult and the execution of that will becomes inefficient." Goodnow thus envisioned a class of administrators with training, to acquire "considerable technical knowledge," and tenure "reasonably permanent in character," to acquire the "wide and varied knowledge" they would need to regulate complicated affairs. These administrators would apply general legislative standards in a "quasi judicial manner," acting substantially like judges to apply standards to particular cases.¹⁷

In contrast to the presentation here, many government textbooks or constitutional-law treatises often portray the transition from the pre-1900 regime to the present-day regime as more or less inevitable. In a widely read government textbook, James W. Wilson and John DiIulio suggest that the federal government has expanded because "changes in attitudes and the impact of events tend to increase the number of things that government does." Similarly, in his treatise on constitutional law, professor Lawrence Tribe explains that the Supreme Court ratified the federal government's expansion during the New Deal "[a]fter the Great Depression had conclusively established for many Americans the interdependence of economic factors and the mutability of even quite traditional economic relationships."¹⁸ The standard narrative overstates the extent to which the federal government's expansion was a necessary or pragmatic adjustment, and understates the extent to which it was driven by intelligent and purposeful political choice. Political attitudes changed in large part because new generations of leading Americans were learning a different political science; that political science used

“interdependence” as a justification for political control to a far greater degree than had pre-1900 political science. The easiest way to confirm this fact is to consider how the practitioners of the new science of politics viewed pre-1900 politics. Woodrow Wilson thought the Constitution’s drafters “had made no clear analysis of the matter in their own thoughts” when they designed the structural provisions of the Constitution. Charles Merriam’s *History of American Political Theories*, which was written as a historical and by no means polemical survey of American thought, concluded that among Progressive theorists, “it is evident that the modern idea as to what is the purpose of the state has radically changed since the days of the ‘Fathers.’ They thought of the function of the state in a purely individualistic way; this idea modern thinkers have abandoned, and . . . have taken the broader social view.”¹⁹

Of course, this interpretation can be qualified in many details. For one thing, this portrait suppresses differences among Progressives. Not all Progressives focused on nationalized and centralized administration; especially in state and local politics, many Progressives advocated the initiative, the recall, and other direct-democracy reforms. Separately, there were certainly differences in emphasis among the leading Progressive theorists. For instance, Woodrow Wilson has been viewed as more protective of states’ rights than many of his contemporaries, although R.J. Pestritto has recently called this view into question.²⁰ Moreover, there was probably some lag between Progressive theory and political practice during the Progressive Era. On one hand, the FTC Act (enacted during Woodrow Wilson’s tenure as President), breached traditional principles of separation of powers principles. On the other hand, another major Progressive accomplishment, the Food and Drug Act of 1906, was organized more or less consistently with traditional principles of Commerce Clause federalism and separation of powers.²¹

Most important and interesting, however, a complete account would also need to explain many of the complications that follow when general political ideas are applied to specific problems. To get a sense of these complications, consider the fact that the Progressives are often regarded as being *for* federalism and states' rights in many respects. In modern legal discussion, one of the most popular arguments in favor of federalism is that the institution encourages "laboratories of experimentation" in the states. This phrase, however, traces back to Progressive Louis Brandeis, who argued in a U.S. Supreme Court dissent that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." While this statement is an exception from leading Progressives' views about nationalism, it still comports with some broader truths about Progressive theory. Consider the context of Brandeis' argument—a case in which a state sought to force an ice-delivery service to get a state certificate of convenience and necessity before selling ice. Following Progressive attitudes toward property regulation, Brandeis was defending a state scheme that restricted access to a competitive, non-monopolistic industry on the ground that the state was entitled to prevent too much competition in the ice business. The Court struck down the scheme because it violated the natural rights of liberty and property protected by Fourteenth Amendment substantive due process doctrine; Brandeis was appealing to federalism to protect "experimental" schemes that expanded state power and discredited natural rights. As Stephen Gardbaum and Michael Greve have suggested, Progressives and then New Dealers repeated this same pattern elsewhere, such as the law of preemption and the choice-of-law principles determining whether federal courts should apply general international law or state-specific local law to disputes between parties from different states.²² Although these connections have not been traced out

adequately in legal or political-theory scholarship, Greve and Gardbaum's findings still suggest a clear pattern: Brandeis and his judicial allies appealed to federalism when necessary to stop federal courts from using different sources of national law to undermine interventionist Progressive regulations at the state level; they turned around and appealed to nationalism when they believed that a national majority wanted Congress to intervene in problems that state legislatures could not solve effectively by themselves. These exceptions do not overturn the portrait presented in this section, but they do suggest that a complete portrait would need to account for the ways in which Progressives' attitudes toward the structural Constitution interacted with their attitudes toward state regulation and individual rights.

Constitutional Interpretation in Two Schools of Political Science

Constitutional Interpretation and Original Meaning

These two accounts of political science also produced different approaches to constitutional interpretation—although jurists and scholars in both periods did not explore this topic as systematically as the topics covered in the previous section. With some important exceptions, early American jurists usually interpreted and applied constitutional provisions by trying to ascertain the original meanings of those provisions. A constitution was understood as a fundamental act, or as an expression of the will of the fundamental authority, the people who ratified it. As such, the act of interpreting a constitution was understood primarily as an exercise in ascertaining the meaning of that fundamental act or will.

This commitment to originalism stemmed from many factors. Some were cultural: Morton Horwitz cites the influence of Protestant scriptural interpretation on how lawyers read legal text. Other factors, however, followed from the basic commitment to natural rights that informed the Declaration, the federal Constitution, and state constitutions. One such factor,

explored by Howard Gillman, is the idea of popular sovereignty. As Publius explained, “every act of a delegated authority, contrary to the tenor the commission under which it is exercised, is void,” and to affirm otherwise would be to say “that the representatives of the people are superior to the people themselves.” (No. 78, 435.) Another factor, explored by G.E. White and Philip Hamburger, consists of what White calls “essentialism.” Because early constitution drafters believed that human nature transcended time and culture, they assumed that constitutions could contribute to permanent political happiness by establishing good institutions, customs, and opinions. Since they wrote constitutions for the long haul, readers assumed their constitutions needed to be read as if written for the long haul. Finally, at least some jurists believed that original-meaning interpretation secured natural rights by promoting the rule of law. In an imperfect world in which people disagree bitterly about political opinions, citizens are safer if they abide by written rules than if they reargue every dispute in light of first principles. That is why, for instance, in the 1798 case *Calder v. Bull*, Justice Iredell refused to agree that the federal judiciary could declare invalid laws that comported with the letter of the Constitution even though they flouted the natural law. “[T]he Court cannot pronounce [a law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice,” he explained, because “all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.”²³

To be sure, not all jurists before 1900 followed original-meaning principles consistently. In *Calder*, for instance, one of Iredell’s colleagues argued that the Court had power to invalidate any “ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact.”²⁴ In addition, the phrase “original meaning” begs important questions about

how to go about identifying original constitutional meaning. Even if pre-1900 judges tended to be originalist, their methods and arguments differed in important respects from those of contemporary “original intent” jurists, like Judge Robert Bork, or “original public meaning” jurists, like Clarence Thomas.²⁵

Even with these qualifications, however, before 1900, original-meaning principles substantially influenced constitutional interpretation. They exerted considerable influence in the areas of Commerce Clause federalism and separation of powers. The phrase “commerce among the several states” provided ample textual support to distinguish between interstate trade on one hand and local trade, manufacture, and labor on the other. It was not seriously disputed that the vesting grants of “legislative power” barred officers outside Congress from making legislative rules, nor that the creation of specific departments prevented anyone except officers within that department from exercising the powers delegated to that department.²⁶ There were exceptions to this pattern, especially the “dormant Commerce Clause” doctrine, which the Court developed during the nineteenth century to declare preempted state laws that interfered with interstate trade. As Justice Scalia and Thomas have argued, this doctrine violates the original meaning of the Commerce Clause because the Clause vests power in Congress and not the courts.²⁷ All the same, in the broader picture, such doctrines were exceptional and did not reverse the general preference for original meaning.

Progressive Political Science and “Living Constitution” Interpretation

Leading Progressive political theorists pointed constitutional interpretation in a different direction, although they did not agree on precisely how. They generally agreed that constitutional interpretation ought to incorporate changing political and social conditions, but they did not agree on precisely how doctrine could and should change.

Although Gillman, Horwitz, and Dennis Mahoney have all described the Progressives as being committed to a “living” or “changing Constitution,”²⁸ from a lawyer’s point of view it is more helpful to distinguish between two versions of such a constitution. One version is a “hard” living constitutionalism, in which the Progressive theory of a national American political consciousness becomes an explicit source of legal constitutional meaning. Under this approach, the Commerce Clause, vesting clauses, and other key constitutional clauses might be understood as constitutional beacons that transmit into the Constitution the progressing will of the American people. This approach has become respectable in American constitutional law since the Warren Court. For example, the Supreme Court now routinely reads the Eighth Amendment’s ban against “cruel and unusual” punishments to ban punishments contrary to “the evolving standards of decency that mark the progress of a maturing society.”²⁹

The other version of living constitutionalism is a “soft” version. In this version, as in the hard version, the progressive will of the American people sets the fundamental substantive goals that constitutional doctrine should achieve. However, contrary to the hard version, in the soft version the doctrine achieves these goals more incrementally and, from a lawyer’s point of view, much more conventionally. Lawyers and judges interpret text, sift evidence of original meaning, consider new cases in light of relevant precedents, and so forth, with one difference. In original-meaning interpretation, these different interpretive tools are more or less relevant depending on how well they help the interpreter identify the original meaning of the constitutional provision in question or apply it to the case at hand. By contrast, in soft living constitutionalism, lawyers use these interpretive tools to conform constitutional doctrine to sound policy as identified by the changing will of the people.

To illustrate the difference, consider the 1920 U.S. Supreme Court decision *Missouri v. Holland*, written by Progressive Justice Oliver Wendell Holmes. The state of Missouri asked the Supreme Court to declare a Canadian-U.S. migratory-bird treaty unconstitutional on the ground that bird preservation was a subject reserved by the Constitution to the states. Justice Holmes rejected this argument and upheld the treaty, with a mix of different arguments. On first reading, Justice Holmes seemed to rely primarily on hard living-constitution interpretation:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.³⁰

Yet on a closer reading, the case really relies on soft living-constitution interpretation. If one reads Holmes's Court opinion not as a political theorist but as a lawyer, Holmes's main legal argument focused on the relevant text: Article II gives the President power to negotiate treaties, and it does not specifically stop the President from negotiating about subjects that Article I clearly keeps away from Congress and assigns to the states. Thus, Holmes concluded that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment," and Holmes quickly concluded there was no such radiation.³¹

To be sure, since Holmes's day, legal scholars have raised serious questions about whether Holmes's interpretation captures the original meaning of the relevant clauses.³² No

matter whether Holmes or those scholars are right, Holmes's opinion still illustrates an important tendency of Progressive constitutional interpretation. As G.E. White has explained, Progressives insisted as a matter of normative political theory that the federal government, and particularly the President, had broader powers in foreign affairs than early American jurists had assumed.

Holmes agreed, as he made clear when he spoke of the nation as an "organism" which developed through "experience." But to push his legal argument past the finish line, Holmes did not appeal to political arguments as much as he did a seemingly neutral rule of textual interpretation, that vesting clauses should be construed in the government's favor except when the text strongly suggested otherwise. This rule is often associated with Harvard law professor James Thayer.³³

Although leading Progressives did not explore this tension systematically, by and large they seem to have assumed that Holmes's compromise was the right one. They appealed to the living Constitution when making policy arguments, but they also tended to appeal to soft living constitutionalism when making legal arguments. In his lectures on *Constitutional Government*, for instance, Woodrow Wilson assumed that the Constitution was a "vehicle of a nation's life." At the same time, he insisted that only "by slow and searching labor [should] the courts . . . keep our singularly complex system at its right poles and adjustment," and that they should act not "as instruments of politics, but only as modest instruments of law," relying "always upon clearly defined legal grounds." In *Social Reform and the Constitution*, a practical roadmap for defending Progressive legislation in court, Frank Goodnow complained that prevailing conventions did not recognize that "legislative bodies possess wide discretion under the constitution," and argued that the doctrine of *stare decisis*, which requires courts to follow settled precedents, ought to apply to constitutional law "less strictly than to other branches of the law." When Goodnow turned to the merits of key Progressive legislation, however, he defended them

as a common-law lawyer would have, by showing how the laws were consistent with the constitutional text and especially with logical extensions of existing precedent.³⁴

The Structural Constitution during the New Deal

President Franklin Roosevelt and a Democratic Congress established a centralized national regulatory state in American political practice, and the New Deal Supreme Court eventually gave it a respectable pedigree in constitutional doctrine. Many New Deal agencies assumed what had previously been understood to be local functions and combined what had previously been held to be separate powers. These agencies assumed control of many activities more local than the local activities that interested Progressives: not only local commerce and transportation regulation, but also local manufacturing conditions and crop production. However, these changes did not come about by constitutional amendment, and by and large the Supreme Court did not repudiate its previous case law by appealing explicitly to a living Constitution. Instead, the Court developed several soft living-constitution tools to accommodate its case law and the New Deal program. Ironically, the most successful argument turned originalism around against the guardians of the pre-New Deal constitutional order. New Dealers claimed that the New Deal program was really in accord with the Founders' original intention, and that cases from 1880 to 1937 that stood in the way represented illegitimate judicial activism.

To appreciate the dominant trend, it helps to consider the few exceptions. When the early New Deal Court struck down important New Deal laws, at least a few New Deal proponents directly cited the living Constitution as an explicit authority and source of constitutional law. When the Court struck down laws under the Commerce Clause and other federalism doctrine, professor James Hart argued that “[t]o apply dual federalism to this unified economy is unnecessarily to render the Constitution obsolescent. To apply the nationalist interpretation is to

adopt Woodrow Wilson's conception of the Constitution as a vehicle of life."³⁵ Similarly, Dean Alfange wrote a book titled *The Supreme Court and the National Will* to criticize the Court's treatment of the first New Deal. He argued that the Court should reconsider its decisions in light of "their economic, social and political background," and "in light of the national will manifested at the time the decisions were made."³⁶

All the same, Hart and Alfange were exceptions. The notion of a living Constitution was powerful in politics; it served as the fundamental organizing principle for a political theory and a rallying cry in political practice. In law, however, the living Constitution probably seemed much more problematic. In law, and nowhere else in law more so than in constitutional law, the appearance of continuity matters. As of the 1930s, it may have seemed so radical to make the living Constitution an explicit source of constitutional meaning and authority that people like Alfange and Hart seemed *pro tanto* to be calling for a constitutional amendment. For some combination of such reasons, as Morton Horwitz observes, "Progressive elaboration of a theory of a changing constitution ground to a halt after 1937." Although it is hard to find a systematic exposition and defense of New Deal constitutional method, by and large New Dealers seem to have assumed that the soft form of living-constitution interpretation was legitimate to accommodate pre-New Deal doctrine to the New Deal national regulatory state.³⁷

Let us consider some of the different methodologies used. First, and most commonly, the New Deal Court relied on the case method. The Court's non-delegation cases illustrate. When a litigant makes a non-delegation claim, in substance the litigant claims that the statute in question punts basic legislative choices to the executive or the courts. That fact requires the court to conduct an open-ended inquiry, examining the statute's language and context to determine "whether Congress . . . has itself established the standards of legal obligation, thus

performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.”³⁸ Since every statute gives some standards and leaves some gaps, the non-delegation doctrine requires courts to exercise an unusual degree of discretion and judgment—even when they are applying it in exacting fashion. During the New Deal, the Supreme Court used that discretion and judgment to expand the doctrine with a three-step formula: It insisted that the non-delegation doctrine needed to recognize the realities of regulating a national industrial economy; it distinguished the most restrictive precedents as extreme cases; and then it cited other generous delegations as proof that the delegation under challenge was not so bad.

This formula is apparent in *Yakus v. United States*, in which a litigant brought a non-delegation challenge against a federal law instructing a presidentially-appointed Price Administrator to cap wartime prices at levels in effect between October 1 and 15, 1941, except as modified to price levels that “in his judgment [would] be generally fair and equitable and [would] effectuate the purposes of this Act.” Chief Justice Stone cited precedent for the proposition that “[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function.” He distinguished *Schechter Poultry v. United States*, a 1935 case which had invalidated a delegation in the National Industrial Recovery Act, on the ground that its delegation was more extreme than the delegation in the price-control statute. Finally, since in previous cases the Court had allowed agencies to regulate under the mandate to promote the “public interest” or the “public interest, convenience, or necessity,” Stone concluded that the standards “fair” and “equitable” were not excessive.³⁹

The Court used the case method to similar effect in the 1935 case *Humphrey's Executor v. United States*, which lent a great deal of respectability to the idea of an independent-agency commissioner. The Court entertained a constitutional challenge to the Federal Trade Commission Act, and specifically to provisions protecting Federal Trade Commissioners from being fired at will by the President. The most applicable precedent was a 1926 opinion from *Myers v. United States*, in which Chief Justice Taft declared unconstitutional the Tenure of Office Act, cited by a postmaster who was trying to avoid being fired at the beginning of a change of administration. Taft wrote a 70-page opinion surveying the available evidence of original meaning and subsequent precedents. He concluded that the Founders had intended to create a unitary executive, that the president's Article II "executive power" allowed him to fire at will any executive-branch official, and that the Tenure in Office Act was unconstitutional.⁴⁰ If the Court had chosen to follow *Myers* and its understanding of original meaning, however, any President could fire any agency commissioner who performed executive functions. That conclusion would have run against the Progressive injunction not to let politicians interfere with administration. To avoid that result, Justice George Sutherland read *Myers* only to stand for "the narrow point . . . that the President had power to remove a postmaster first class" at will and did not apply to any "administrative body," the functions of which "must be free from executive control" and are instead "quasi-legislative or quasi-judicial."⁴¹

Second, as the above cases suggest, in the course of applying the case method, New Deal jurists and scholars assumed the truth of Progressive political science and used it as an authority to discredit contrary precedent. For instance, *Crowell v. Benson* set an important precedent letting administrative tribunals adjudicate claims that might otherwise have gone to Article III judges and lay juries. With a few qualifications, the Court upheld a maritime workers'

compensation scheme against due process and Article III challenges. Progressive Chief Justice Charles Evans Hughes defended the law on its policy merits by appealing to policy goals similar to those proposed by Frank Goodnow: “To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency assigned to that task.”⁴² Similarly, in another non-delegation case, Justice William Douglas, a strong Roosevelt supporter and a former law professor and Securities Exchange Commission chairman, defended a permissive non-delegation doctrine in terms of social efficiency: “Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward. Whether a particular grant of authority to an officer or agency is wise or unwise, raises questions which are none of our concern.”⁴³

In cases such as these, the Supreme Court was encouraged by scholarship. A substantial strand of scholarship in politics and constitutional law assumed that it was appropriate to evaluate the Supreme Court’s constitutional decisions on policy grounds. For instance, the Court switched course between *Myers* and *Humphrey’s Executor* at least in part because academics understood that *Myers* significantly threatened administrative government and criticized the likely consequences. To discredit *Myers*, Princeton scholar Edward Corwin appealed to “that ‘scientific ideal’ of a government in which questions of ‘principle’ are resolvable into questions of fact, susceptible in turn of determination by the impartial processes of scientific research.” *Myers* had been wrongly decided, he believed, because the Court had underestimated the

possibility that independent administrators could determine factual truth apolitically separate from politics or contested court proceedings.⁴⁴

Perhaps the most comprehensive contribution to this genre of scholarship was *The Administrative Process*, a defense of national administrative government by James Landis, a professor of the burgeoning field of administrative law at Harvard Law School. *The Administrative Process* is now regarded as a representative restatement of the reasons why New Deal supported centralized administrative governance. Landis relied heavily on the practical, efficiency-based claims of Progressive political science. An increase in “social interests,” he argued, is “simply a rationalization of the growing interdependence of individuals in our civilization and the consequent necessity of insisting upon the observation of rules of conduct. It is the fact of interdependence that is the warp for such rationalization, and it is that fact rather than the weft of rationalization that accounts today for the administrative process.” *The Administrative Process* is also representative in that it illustrates how Landis (and, by extension, New Dealers generally) applied the Progressives’ prescriptions to a wider range of political disputes than had the Progressives. In Landis’s reading, the Progressives established “a view which conceives it to be a function of government to maintain a continuing concern with and control over the economic forces which affect the life of the community.” Landis drew from this principle that the federal government needed to regulate the entire American economy, for the principle required “the deliberate organization of a governmental unit whose single concern was the well-being, in a broad public sense, of a vital and national industry.” Landis also concluded that Congress needed to establish administrative agencies across the board, for one “consequence of an expanding interest of government in various phases of the industrial scene must be the creation of more administrative agencies if the demand for expertness is to be met.”

Even if some Progressives might have been surprised by some of Landis's prescriptions, Landis was drawing quite reasonable consequences from leading Progressives' overarching theoretical claim that "the growing interdependence of individuals" required "that government assume responsibility not merely to maintain ethical levels in the economic relations of the members of society, but to provide for the efficient functioning of the economic processes of the state."⁴⁵

Finally, and in tension with this emphasis on policy, the New Deal Court justified its transformation by appealing to the original meaning of the Constitution. The Court did not make such an appeal to any significant degree in separation of powers law. *Crowell, Humphrey's Executor*, and non-delegation cases had shifted the law close enough to Landis's position before the Court challenged the New Deal that no appeal was necessary. However, in Commerce Clause doctrine and also in substantive due process law (which protected natural rights to property and liberty from invasive state regulations), the Supreme Court's conservative wing continued to strike down acts of Congress and state legislation through the first four years of the New Deal. In 1937, the Supreme Court reversed course in these areas, in part in the face of President Franklin Roosevelt's proposal to pack the Court, and in part in response to doctrinal changes like those already discussed.⁴⁶ Later, however, when President Roosevelt began to appoint his own nominees to the Court in 1938, his nominees cemented this transformation by appealing to the authority of original meaning. They claimed that their reading of the Commerce Clause and substantive due process restored the original meanings of the relevant constitutional provisions from deviations created by activist conservative decisions between the Civil War and 1937.

Robert Jackson, Attorney General and Supreme Court Justice, probably contributed to this "restoration" theme more than anyone else. He wrote a book-length defense of the New

Deal transformation using this theme as his thesis.⁴⁷ He also made the theme a standard feature in case law through his opinion for the Court in the 1942 Commerce Clause case *Wickard v. Filburn*.⁴⁸ *Wickard* cemented in place the New Deal expansion of the Commerce Clause. In it the Court rejected a challenge to federal wheat quotas by a farmer who claimed that he grew his wheat solely for use on his farm, and that he did not intend to sell his wheat in *any* market, local or national. If the U.S. Department of Agriculture could regulate Roscoe Filburn, there was no principled legal reason why it could not reach anyone at all connected to any economic transaction anywhere in the United States.

Jackson used the Framers and Chief Justice Marshall as authority against the Supreme Court's conservatives between the Civil War and 1937. "At the beginning [in the 1824 decision *Gibbons v. Ogden*,]" Jackson observed, "Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes." In the period between 1880 and 1937, he noted, some lines of precedent kept Congress's powers narrow, but other, "broader interpretations . . . destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*." He cited Justice Holmes as authority for the claim that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." Then, when Filburn complained that the law forced him to buy at an inflated price wheat that he could have grown for nearly free, Jackson demurred on the ground that Progressive political science required courts to defer to Congress: "The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and

responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness of the plan of regulation we have nothing to do.”⁴⁹

As a matter of original meaning, Jackson was probably wrong about the meaning of the Commerce Clause, for reasons explained earlier. (In fairness, however, Jackson and his allies were probably right about the original meanings of the Constitution’s due process clauses, which entitle litigants not to challenge the substance of economic regulations but only to “process due”—to trial of their claims, before impartial officers, under whatever substantive laws and procedures were in effect when the government proceeded against them.) In addition, Jackson’s “restoration” theme stands in uneasy tension with the arguments of theorists who defended the New Deal on policy grounds. James Landis, in particular, acknowledged that New Deal agencies created tension with pre-1900 separation of powers law, but then decided that he was “not too greatly concerned with the extent to which [administrative] action does violence to the traditional tripartite theory of government organization.”⁵⁰ All the same, as Morton Horwitz observes, “the victorious New Deal majority sought to portray its triumph not as constitutional revolution, but as constitutional restoration,” and that portrait has carried forward.⁵¹ This recasting contributes to the conventional legal wisdom referred to at the beginning of this essay, which holds that the broad shift to a modern welfare state was wrought primarily in the confrontation between President Roosevelt and the conservative early New Deal Court.

Contemporary Law and Scholarship

The Living Constitution in Contemporary Law

In short, Progressive ideas about government structure prevailed and were applied broadly during the New Deal, but the Progressives’ unifying theme, the living Constitution, largely receded from view in Supreme Court case law and constitutional scholarship. In

structural constitutional law, little has changed since the New Deal. Consider Harvard Law professor Lawrence Tribe's casebook on *American Constitutional Law*, which restates constitutional black-letter doctrine consistently with the views of mainline liberal legal academics. Tribe follows the New Deal Court on the Commerce Clause, criticizing pre-1937 law for a mix of policy and textual reasons. He criticizes the Supreme Court's pre-1937 approach to the Commerce Clause as "tightly constricting," "woodenly segmented," and suffering from "characteristic blindness," and he praises the cases that "see the interconnectedness of formally interstate and intrastate activities." As for the non-delegation doctrine, Tribe quotes as the leading non-delegation case the Supreme Court's 1989 decision in *Mistretta v. United States*, in which the Court held that the doctrine "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Elsewhere in separation of powers doctrine, Tribe says the law turns on policy values including "diffusion of power, the primacy of Congress in domestic affairs, and the need to insulate quasi-judicial decision-makers from executive control."⁵² In each of these areas, the law conforms to Progressives' policy sensibilities, but without reference to the ways in which the notion of a living Constitution originally informed those sensibilities.

During the same period, however, the living Constitution has become quite prominent in individual-rights constitutional law. This development started during the Warren Court. During oral argument in *Brown v. Board of Education*, when the state's counsel insisted that the Court follow its pro-segregation precedents, Justice Burton objected: "But the Constitution is a living document that must be interpreted in relation to the facts of the time in which it was interpreted." Warren Court death-penalty cases started moving Eighth Amendment law in the same direction

in the same period. In a dissenting opinion in the 1961 decision *Poe v. Ullman*, Justice Harlan urged his colleagues to consider using due process principles to strike down a state anti-contraception law, on the ground that due process incorporates a moral tradition that is “a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.”⁵³

These appeals create an irony: In structural constitutional law, modern law follows Progressive substance without citing the authority of a living Constitution, while in individual-rights law, modern law appeals to a living Constitution with little regard to the substance of Progressive thought. There is not sufficient scholarship about how leading Progressive theorists considered individual rights. The Progressive Era was certainly not a period of racial equality, and some strands of Progressive political science, following nineteenth-century German political science, legitimized state race-based discrimination. As for sexual privacy, it is at least telling that Woodrow Wilson expected that “[p]aternal morals . . . do not and cannot create vital habits or methods of life unless sustained by local opinion and purpose, local prejudice and convenience . . . and only communities capable of taking care of themselves will, taken together, constitute a nation capable of vital action and control.” On the other hand, as Mark Graber has suggested, some Progressive theorists anticipated later trends in American liberalism by suggesting that free-speech principles protected a wider zone of personal autonomy and self-determination than the Founders had supposed. In any case, theorists of the rank of Wilson, Goodnow, Croly, and Merriam spent far more energy applying their theories to property regulation and government structure than they did to individual rights or questions of racial equality.⁵⁴ In short, the idea of a living Constitution became an explicit source of legal authority

significantly after the Progressive Era and the New Deal, and in connection with rights and causes that are hard to attribute to leading Progressive thinkers.

Contemporary Separation of Powers

Nevertheless, Progressive political science continues to influence contemporary structural constitutional law, within limits. Progressive ideas shape the agenda for discussion among modern lawyers, judges, and scholars in structural constitutional law and administrative law, but those ideas are not always easy to see. Legally, the New Deal's doctrinal settlements often obscure the Progressive values that influence how modern judges consider the merits of structural cases. Theoretically, many contemporary debates seem removed from the Progressives' agenda, in large part because the Progressives prevailed so thoroughly on the merits that the academy has moved on to new questions created by the Progressives' ideas.

Separation of powers illustrates one kind of influence, where the law and scholarship operate largely within the parameters of Progressive political science. The most telling piece of evidence is the rise of the interpretive theory known as "functionalism." "Functionalism" is now the leading theory of constitutional interpretation in separation of powers law and scholarship. Again, no single case recast separation of powers law during the New Deal as comprehensively as *Wickard v. Filburn* recast the Commerce Clause; Supreme Court Justices and academics developed the theory of functionalism to tie the loose ends left hanging by the New Deal cases. Gary Lawson, a scholarly critic of functionalism, has usefully described it as a "kinder, gentler Landis": It defends the constitutional status of administrative agencies without saying, as Landis did, that agencies "do violence" to separation of powers.

Peter Strauss, a leading separation of powers scholar, illustrates functionalism's overriding intentions when he posits that "any useful legal analysis of the limits on Congress's

ability to structure administrative government must, at least in large measure, accept the reality of the existing government.” In other words, the substance of separation of powers is and should be measured by contemporary administrative practices rather than the other way around. In Strauss’s description, functionalism requires interpreters to engage in nuanced and textured interest-balancing; they must use contemporary social and political science to determine whether a particular act of Congress “might unbalance the distribution of authority at the apex of government by crippling existing informal controls” by which the various branches interact with one another in practice. In one scale, that balancing considers the social goods associated with “pragmatic ways with government” and “civil servants protected from political reprisal in the performance of their jobs”; in the other, it considers the social goods associated with fostering a healthy tension among the three branches.

This interest balancing subtly tilts in favor of Progressive normative policy prescriptions. It has the same tendency as Charles Merriam’s understanding of Progressive political science; it favors immediate policy goals and prefers not to give weight to more abstract substantive goals that get higher priority in political philosophy or history. Of course, functionalism differs from Progressive/New Deal administrative theory in that it explicitly requires courts to consider the policy value of separation of powers. All the same, as scholar Thomas Merrill has observed, “the case for preserving” separation of powers usually “will seem abstract and remote.” On the other hand, Merrill correctly predicts, the social goods that flow from creating an agency to stop unfair competition, or to protect farmers, or so forth usually “will be concrete and immediate.” Functionalism respects the formalities that animated pre-1900 separation of powers law, but it still ratifies the Progressive conclusion that (in Strauss’s words) separation of powers law is

“inconsistent with any notion that the powers of government are or can be neatly parceled out into three piles radically separated the one from the other.”⁵⁵

To be sure, the Supreme Court has ignored functionalist methodology from time to time and appealed to the original meaning of the Constitution to invalidate congressional regulatory schemes. These exceptions, however, merely confirm how strongly the current Court still follows Progressive/New Deal ideas about administrative government. As I have shown elsewhere, since the mid-1970s, the Supreme Court has alternated between original-meaning and functionalist theories of interpretation depending on which better promotes administrative government. When an act of Congress increases the power or autonomy of federal agencies, the Court uses functionalism to uphold the Act. By contrast, when the act increases Congress’s power to second-guess the actions of the agencies, the Court is motivated by a Progressive fear that Congress is injecting politics into the administrative process, but it uses original-meaning interpretive principles to strike the provision down.

For instance, in *Buckley v. Valeo*, the first case in this trend, the Court considered provisions of federal-election law that allowed Congress to appoint several officers to the Federal Election Commission. (Normally, the President nominates officers and Congress’s only participation occurs when the Senate confirms the President’s nominees.) On one hand, the Court surprised many observers—first by striking the scheme down, and next by citing original-meaning principles to do so. The Court used original-meaning principles to ignore the policy arguments to which it normally listens and defers when it is in a functionalist mood: Such policy reasons, the Court insisted, “do not by themselves warrant a distortion of the Framers’ work.” In the details, however, the Court made clear it was in no way interested in applying original-meaning principles in ways that might limit the scope of administrative agencies. The Court’s

approach forced it to consider the fact that the FEC promulgates legislative rules, prosecutes violations of those rules, and adjudicates those prosecutions. If the Court meant to apply original-meaning principles across the board, the entire structure of the FEC was ripe for an originalist separation of powers challenge. The Court discouraged such a challenge, however, by praising these functions as being “of the kinds usually performed by independent regulatory agencies,” properly “exercised free from day-to-day supervision of either Congress or the Executive Branch,” and “essential to *effective and impartial administration* of the entire substantive framework of the Act.”⁵⁶

Similarly, many of the most important substantive issues in administrative law can be understood as important practical problems created by the fact that Progressive norms about administrative delegation have taken hold and the non-delegation doctrine and strict conceptions of separation of powers have vanished from the scene. In the 1950s and 1960s, administrative law changed drastically. Many leading New Dealers and their students were dissatisfied at how slowly federal agencies were making new law under the broad mandates they had won during the New Deal. Law-and-economists contributed to the general sense of malaise by launching the study of “public choice,” which tended to suggest that all parties to regulation used regulation as one of several means to maximize their selfish interests. New Dealers were not surprised to know that businesses or labor interests acted in such a selfish manner, but they were surprised, convinced, and ultimately disheartened to learn that regulators in the agencies they had fought so hard to create were often “captured” by the interests they were supposed to be regulating.

Scholars and officials involved in administrative-law reform could have responded in a few ways. One would have been to take the capture theory to heart, by limiting federal regulation only to those cases in which regulation seemed to lead to more economically efficient

results even after discounting for the slippage caused by agency capture. Economists started to make such arguments in the 1960s and 1970s; their arguments gradually culminated in the deregulation movement of the 1980s.⁵⁷ Another, more radical response would have been to reconsider whether the Progressive/New Deal transformation was fundamentally wrong. After all, Publius had argued that the federal government should be kept out of domestic regulation to protect it from complex, diverse, and passion-inducing local interests. He also believed that, for matters properly within federal jurisdiction, the federal government would operate better if Congress were forced to lay down the general rules to settle policy choices, and if the other two branches were then left with the less controversial functions of executing those rules. Publius would not have been surprised, then, if after the New Deal domestic federal agencies suffered from mission overload. However, in the 1950s and 1960s, no one took that critique seriously, and extremely few academics do even now.⁵⁸

Instead, during the 1950s and 1960s, the main response by leading lawyers was to say that the cure for bureaucratic gridlock was to give bureaucracies even more power. James Landis illustrates the trend better than anyone else. Most of the New Deal agencies were required to make new law primarily by administrative adjudication, in which the agency proceeds against one individual party at a time. In 1960, in response to a request by President-elect Kennedy, Landis complained that agencies were not as effective as he expected they would be when he wrote *The Administrative Process*: “A prime criticism of the regulatory agencies is their failure to develop broad policies in the areas subject to their jurisdiction.” As a solution, he proposed that agencies switch from slow, incremental case-by-case adjudication to “other methods of policy planning”--especially rulemaking, for “policy also emanates from rule-making where forward-planning is possible.” As Thomas Merrill and Kathryn Tongue Watts have

recounted, agencies already in existence responded by reading their enabling statutes aggressively to find grants of rulemaking power. As Congress created a new wave of agencies during the 1960s and 1970s, it vested them with clearer and broader rulemaking powers.⁵⁹

As agencies sped up the pace of legislative rulemaking, they created a second problem: Now that agencies have broad delegations and are encouraged to make rules aggressively in fulfillment of those delegations, what institutions are best-positioned to hold the agencies accountable when they misbehave? This question has preoccupied administrative-law scholarship since 1970. By and large, across a wide range of administrative-law topics, judicial liberals usually insist that federal courts should intervene to prevent agency misbehavior, while judicial conservatives insist that courts either must or should generally leave the President and federal politics to hold agencies accountable. This disagreement arises in the law regarding the procedural rights of parties interested in administrative proceedings. Judicial liberals prefer to encourage federal courts to develop “hybrid” doctrines giving those parties broad rights to object during agency hearings and demand a paper trail; judicial conservatives prefer to construe the statutes that trigger those hybrid rights more narrowly. The disagreement also arises in the “*Chevron*” doctrine, which governs the circumstances in which courts should defer to agency interpretations of their enabling statutes. Judicial conservatives prefer a rule requiring courts to defer to any agency interpretation not clearly precluded by statute. This rule leaves agencies, and indirectly the President, who appoints agency heads, largely free to read agency statutes as they think proper. By contrast, judicial liberals prefer to encourage courts not to defer, and to use broad, “purposivist” readings of enabling statutes to force agencies to work harder to promote the public interest. The same disagreement repeats itself in the law of standing. Judicial liberals prefer broad standing rules, which encourage taxpayers or citizens to bring

agency policies before courts solely on the question of principle whether the agency has flouted the law. By contrast, judicial conservatives prefer to keep standing narrower and reserve judicial review only for parties that have a financial interest or another comparably concrete interest in the dispute.⁶⁰

While these disputes are important, they are subconstitutional disputes, and they arise because in the politics of administrative law liberals and conservatives both agree that the Progressives were right to centralize federal government in independent agencies. Virtually all judges and an overwhelming majority of legal academics agree with Professor Abner Greene, who once explained, “as the world got more complicated, so did congressional legislation, and therefore so did execution; more laws enacted meant more laws to execute,” and “more laws requiring broad-scale policy making before execution.”⁶¹ Since that sentiment is a starting point of separation of powers and administrative-law scholarship, the terms of debate are correspondingly narrow.

Contemporary Federalism

While the Supreme Court has largely followed the Progressive critique of separation of powers over the last generation, it has challenged the Progressive critique of constitutional federalism, with revealing results. A preponderant bloc of judges and academics inclines toward Progressive views about federal-state relations. If the New Deal left mainstream liberal lawyers and academics with a soft presumption in favor of Congress, the civil-rights era made that presumption nearly irreversible. During the 1950s and 1960s, southern states cited federalism to protect segregation, and it took the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to break Jim Crow. In 1964, William Riker, a leading political scientist, reflected mainstream

views when he concluded a prominent study of federalism by saying, “if in the United States one disapproves of racism, one should disapprove of federalism.”⁶²

Yet even as important segments of the academy and the bench became more skeptical of federalism, the Burger and Rehnquist Courts started reviving it. This revival is significant in at least two respects. First, it highlights the tension left hanging by the way in which the New Deal Court ratified the expansion of the Commerce Clause. Because the New Deal Court never explicitly overruled pre-1937 Commerce Clause doctrine, and because it relied on original-meaning arguments to justify the New Deal transformation, it left openings that a later Court might exploit to reverse course. Second, the revival highlights the substantive attachments of many elite lawyers and academics. The federalism revival has generated some of the most creative scholarship and some of the most acrimonious exchanges in case law and scholarship in the last two decades. Many judges and scholars are so irate at the federalism revival that it is reasonable to conclude that they treat the Progressives’ defense of national power to be a political regime principle.

In the 1995 decision in *United States v. Lopez*, a bare majority of the Rehnquist Court held that Congress exceeded its powers under the Commerce Clause when it made it illegal for anyone to possess a firearm within 1000 feet of any school in the United States. In the 2000 decision in *United States v. Morrison*, the same majority held that Congress exceeded its commerce powers when it gave a federal cause of action to any victim of gender-motivated violence anywhere in the United States. Judged in light of the precedent, *Lopez* and *Morrison* were close cases. On one hand, it was plausible to read the civil-rights Commerce Clause cases, *Wickard*, and other late New Deal cases as suggesting that federal courts have virtually no role to play in enforcing the Commerce Clause. On the other hand, *Lopez* and *Morrison* involved laws

that extended federal regulation a noticeable step beyond those earlier precedents. In particular, *Morrison* illustrated a new trend, to use federal law to recognize and protect classes of individuals who suffer discrimination not covered by the Civil Rights Act of 1964. The *Lopez* and *Morrison* majority chose the latter perspective. It distinguished the New Deal and civil-rights precedents on the ground that the laws challenged in these cases regulated “economic” matters and regulated intrastate conduct within broader schemes for controlling interstate traffic. That majority held that neither gun-free school zones nor gender-motivated violence involved the same kind of economic activities or comprehensive schemes, and declared that both laws exceeded the scope of Congress’s enumerated powers.⁶³

If viewed in isolation from the history, the politics, and the symbolism associated with the Commerce Clause, the Court’s decisions in *Lopez* and *Morrison* were, if debatable, still within the bounds of recent doctrine. Nevertheless, *Lopez* and *Morrison* were regarded in important quarters as beyond the pale, precisely because of that history, politics, and symbolism. In *Lopez*, Justice Stevens described the majority’s decision as “radical” and “extraordinary.” Justice Souter suggested that the majority was taking a “backward glance at . . . the old pitfalls” of pre-New Deal conservative judicial activism. In an essay written shortly after *Bush v. Gore* and the 2000 elections, law professors Jack Balkin and Sanford Levinson cited *Lopez* and *Morrison* along with *Bush v. Gore* and other decisions as proof that the moderate-to-conservative wing of the Rehnquist Court was driving a “constitutional revolution” that threatened to “redraw the constitutional map as we have known it.”⁶⁴ Of course, these critics begged the crucial question: In the context of the Commerce Clause, does “activism” mean refusing to follow the most likely interpretation of the original meaning of “commerce among the several states,” or does it mean any theory of constitutional interpretation that calls into question the

constitutionality of New Deal regulatory agencies and federal civil-rights laws? The Court's critics assumed the latter. They believe that Commerce Clause is and should continue to be governed by soft living-constitution principles of interpretation, and they strongly believe that America's experience over the twentieth century demands a federal government with broad powers.

Other criticisms of *Lopez* and *Morrison* have exposed the tensions in the New Deal Court's settlement of the Commerce Clause. Recall again Justice Jackson's restorationist reading of the Commerce Clause in *Wickard v. Filburn*. Jackson's opinion contained a theoretical tension: Jackson obviously thought the permissive reading right as a matter of substance, but he also thought it preferable to ground that reading in the original meaning of the Constitution. If anyone decided later that his reading of the Commerce Clause was wrong, however, Jackson left Commerce Clause case law open to reconsideration on originalist grounds.

That gap explains in large part why the Court's moderates and conservatives had room to revive Commerce Clause federalism in *Lopez*. Chief Justice Rehnquist, Justice Antonin Scalia, Justice Clarence Thomas, and law professors outside the intellectual tradition surveyed in this Essay have taken new interest in original-meaning constitutional interpretation, and found Justice Jackson's arguments wanting. In *Lopez*, Chief Justice Rehnquist was able to insist in *Lopez* that, notwithstanding the New Deal transformation, the federal government was still bound by "first principles," particularly the principle that "[t]he Constitution creates a Federal Government of limited and enumerated powers." In *Lopez*, Justice Thomas reasoned that, since the Commerce Clause grants Congress jurisdiction to regulate commerce with foreign nations and Indian tribes as well as between states, "commerce" cannot mean "manufacturing" or other activities that involve assembly; after all, "assembly cannot take place 'with a foreign nation' or 'with the

Indian Tribes.’” Thomas also re-read *Gibbons v. Ogden* and concluded, in contradiction to Souter and before him Jackson, that Chief Justice Marshall “was *not* saying that whatever Congress believes is a national matter becomes an object of federal control.” Randy Barnett and Richard Epstein also conducted persuasive studies on the original meaning of and the seminal precedent on the Commerce Clause; Epstein anticipated Thomas’s conclusion and Barnett strongly supported it.⁶⁵ Of course, some liberals have responded on originalist grounds. Justice Souter insisted that the “Court has defined the commerce power as plenary, unsusceptible to categorical exclusions.” In scholarship, Professor Lawrence Lessig proposed a text-based defense of *Wickard* and other cases, according to which he kept the case law “faithful” to the text of the Commerce Clause while still “translating” that text to adapt for twentieth-century economic developments. Even so, among scholars and lawyers who are interested in originalism for originalism’s sake, Thomas, Barnett, and Epstein have had the better of the argument over original meaning.⁶⁶

To be sure, in 2005, the Rehnquist Court significantly weakened the force of *Lopez* and *Morrison* in the case *Gonzales v. Raich*. *Raich* upheld a federal prosecution, under the Controlled Substances Act, of two women who grew marijuana on their properties for personal medicinal use. The majority followed *Wickard* to hold that the home-grown marijuana threatened interstate regulation of illicit drugs for the same reasons that Roscoe Filburn’s home-grown wheat threatened interstate agricultural price controls. *Raich* shows that a majority of the Court still subscribes to Progressive principles of nationalism when it comes to broad interstate schemes, even if some members of that majority will strike down isolated federal statutes like the ones at issue in *Lopez* and *Morrison*. At the same time, *Raich* does not eliminate the tensions that the New Deal Court left for the debate over the Commerce Clause. At least in Supreme

Court doctrine, turnabout is fair play. Because the New Deal Court ratified the Commerce Clause transformation using arguments based on precedent and original meaning, it left open the possibility that a later and a more conservative Court might use the same interpretive tools to roll back the transformation. *Raich* may have slowed the federalism revival, but it did not and could not completely foreclose that revival because the key New Deal cases left the revival open.⁶⁷

In the process, *Raich* also highlights why Supreme Court confirmation politics have become so contentious. At least as a matter of doctrine, the New Deal Commerce Clause settlement could unravel easily. As a result, among modern liberals, it is crucially important that the Supreme Court continued to be staffed by Justices who vote as the majority did in *Raich*: to reaffirm Progressive principles of nationalism, and to use the New Deal's doctrinal formulas to keep federalism from coming back. Even when liberals do not hold the presidency, they must invest considerable energy to deflect Republican Presidents from nominating Robert Borks, conservative intellectuals who have considered and rejected the Progressive/New Deal transformation, into nominating Anthony Kennedys, practical conservatives who will vote for conservative results in new cases but will not reconsider the New Deal transformation root and branch. In *Raich*, Kennedy provided the Rehnquist Court's liberals with the fifth vote they needed to limit *Lopez* and *Morrison* from developing into a doctrine that might significantly threaten comprehensive federal regulatory programs. The same motivations explain why liberals looked last year for ways to oppose President George W. Bush's nomination to replace Sandra Day O'Connor, a pragmatic like Kennedy, with John Roberts, who may turn out to be a more ideological conservative.

Even so, *Lopez* and *Morrison* are still threatening, so much so that some liberal constitutional scholars have reconsidered how liberals should think about constitutional judicial

review. Since the late 1970s, most liberal judges and constitutional scholars have assumed that federal courts ought to be supreme interpreters of the Constitution. This assumption, however, was tied closely to liberals' assumptions about how the courts would use their interpretive supremacy. Liberals expected courts to continue to defer to legislatures in property cases and to Congress in federalism and separation of powers cases, and override legislatures only in individual-rights cases like *Brown v. Board of Education* (involving race desegregation), *Roe v. Wade* (abortion), and religion, speech, and other similar non-economic autonomy rights. *Lopez*, *Morrison*, and other federalism cases have caused some to wonder whether the Rehnquist Court is straying from this expected settlement so often that liberals ought to abandon judicial supremacy.⁶⁸ Barry Friedman calls the general problem one of “cycling”: Constitutional theorists may need to “re-cycle” their broadest assumptions about constitutional interpretation when political changes undermine the substantive results they expect such interpretation to deliver. More specifically, Mark Tushnet has suggested in a book that neo-progressive grassroots political movements ought to “take the Constitution away from the courts.” In a lengthy article and then in a book, Larry Kramer has advanced a thesis of “popular constitutionalism,” in which he proposes that the federal courts should leave Congress, state legislature, and federal and state political processes to settle important questions about the Constitution’s meaning.⁶⁹ Without commenting on the substantive merits of these proposals, taken together, they suggest that a substantial segment of the legal academy will at least reconsider a strong commitment to judicial supremacy if the Supreme Court revives constitutional federalism.

Finally, Justice Breyer illustrates one other important tendency in recent federalism scholarship—to question *Lopez* and *Morrison* by appealing to the authority of political science.

In *United States v. Lopez*, Breyer regarded the constitutional question primarily as a policy question: Could a gun-free school-zone law promote good social consequences, particularly by encouraging the health of the national economy? If there was any plausible basis for saying “Yes,” Breyer argued, the question was better answered by Congress than by the Supreme Court. He cited “[n]umerous reports and studies—generated both inside and outside government—mak[ing] clear that Congress could reasonably have found the empirical connection that [the Gun Free School Zone] law asserts.” To substantiate these citations, he included a 14-page appendix of reports by congressional committees, agencies, and think tanks. Separately, in a published lecture on constitutional interpretation, Breyer has challenged his colleagues on the federal bench to “ask why the Court should not at least consider the practical effects on local democratic self-government when it elaborates the Constitution’s principles of federalism.”⁷⁰ When Breyer speaks of “practical effects,” he challenges his colleagues to put less emphasis on formal interpretive principles like original meaning or structure, and to put more emphasis on policy.

Breyer’s policy analysis, however, exhibits the same tendencies as functionalism does in separation of powers. When a political science focuses, as Charles Merriam’s did and Breyer’s does, on a “more scientific way of approaching the questions of politics” or on “practical consequences,” it tends to focus on easily measurable phenomena and concrete policy goals. In federalism, such a political science tends to emphasize heavily the number of farms that might be saved by a federal farm policy, the number of school children who might be saved by a national gun-free school-zone law, and so forth. It tends to deemphasize the more abstract concerns of political philosophy and history that informed Publius’s judgment--whether and how national character and happiness might change as Congress expands its regulatory jurisdiction.

Of course, this observation neither confirms Publius's views on federalism nor refutes Breyer's. But it does suggest that Breyer assumes the truth of Progressive normative claims about what the science of politics is, what its study entails, which kinds of knowledge count in it, and on what sorts of objects its practical prescriptions should focus. For better or worse, that attitude toward political science inclines him to place heavy emphasis on the quantifiable policy reasons why Congress might want to tackle an urgent national problem, and light emphasis on the long-run and experiential reasons why it might not be such a good idea for Congress to tackle it.

Conclusion

When leading Progressives reconceived of American political science, they launched a process that eventually transformed American structural constitutional law. Progressive political science has convinced several generations of lawyers that federalism and separation of powers ought to turn more on policy than on textual interpretation. Progressive political science also discredited Commerce Clause federalism and strict separation of powers; it made respectable an encompassing national government with centralized administrative agencies largely independent from direct supervision by the political branches. All of these tendencies still inform contemporary law and scholarship. The law and scholarship vary from these tendencies in quirky ways, but many of the quirks exist because when the Supreme Court left tensions when it ratified Progressive/New Deal changes within the framework of the original Constitution and pre-1900 case law.

It is harder to say precisely how the Progressives' notion of a "living Constitution" has influenced the development of American constitutional law. The Progressives clearly succeeded in making the living Constitution a respectable symbol in American politics. Later generations

made it a respectable symbol in American constitutional law, but it is not clear that leading Progressives intended or even desired that result. The notion of a living Constitution has not played a direct, legal role in the development of structural constitutional law. At the same time, the living Constitution certainly played an important contributing role at the beginning of the transformation of the structural Constitution. When it set the standard for Progressive political science, the living Constitution created a soft presumption in favor of the claim that the proper object of government is efficiently to execute the will of an encompassing majority of Americans. Many important features of contemporary structural constitutional law still assume the truth of that claim.

ENDNOTES

¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 851, 861-62 (1992).

² Alexander Hamilton et al., *The Federalist Papers*, ed. Clinton Rossiter & Charles Kesler (USA: Mentor Books, 1999). Subsequent references to *The Federalist* are in text, in parenthesis, by the number of the *Federalist Paper* and the page of this edition. Throughout this article, the authors of *The Federalist* will be referred to as “Publius.” I believe the author of *The Federalist* deserves to be discussed as a single person because the work presents a complete and integrated argument of political theory, for reasons explained by Charles R. Kesler, “Introduction to *The Federalist Papers*,” in *The Federalist Papers*, at x-xxi.

³ Woodrow Wilson, “The Study of Administration,” *Political Science Quarterly* 2 (1887): 201, 200, 215.

⁴ G. Edward White, *The Constitution and the New Deal* (Cambridge, Mass.: Harvard University Press, 2002); Morton J. Horwitz, “Foreword: The Constitution of Change: Legal Fundamentalism Without Legal Fundamentalism,” *Harvard Law Review* 107 (1993): 32-33; Howard Gillman, “The Collapse of Constitutional Originalism and the Rise of the Notion of the ‘Living Constitution’ in the Course of American State Building,” *Studies in American Political Development* 11 (Fall 1997): 191. For other examples of “institutionalist” scholarship, consider Supreme Court Decision-making: New Institutional Approaches, Cornell W. Clayton & Howard W. Gillman, eds. (Chicago: University of Chicago Press, 1999); The Dynamics of American Politics: Approaches & Interpretations, Lawrence C. Dodd & Calvin Jillson eds., (Boulder: Westview Press, 1994); Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953-1993* (Lawrence, Kan.: University Press of Kansas, 1994).

⁵ Consider the sources cited by Stephen A. Siegel, “Lochner Era Jurisprudence and the American Constitutional Tradition,” *North Carolina Law Review* 70 (1991): 3-4.

⁶ David A. Ricci, *The Tragedy of Political Science: Politics, Scholarship, and Democracy* (New Haven, CT: Yale University Press, 1984), 32-45, 57-69; Dennis J. Mahoney, *Politics and Progress: The Emergence of American Political Science* (Lanham, MD: Lexington Books, 2004), 61-73; John Marini, “Theology, Metaphysics, and Positivism: The Origins of the Social Sciences and the Transformation of the American University,” in *The Progressive Revolution in Politics and Political Science: Regime Change in America*, Ken Masugi & John Marini eds. (Lexington, KY: Rowman & Littlefield, 2005), 224-42; Thomas G. West, “The Constitutionalism of the Founders versus Modern Liberalism,” *Nexus: A Journal of Opinion*, 6 (Spring 2001): 79-84, 89-96.

⁷ Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996), xiv-xv. The portrayal in text accords with accounts presented in Gillman, “Collapse of Constitutional Originalism,” 197-213; White, *Constitution and the New Deal*, 96-98.

⁸ U.S. Const. art. I, § 8, cl. 3.

⁹ For proof that these themes carried forward in case law through the early twentieth century, see Eric R. Claeys, “Justice Sutherland and Commerce Clause Federalism before the New Deal,” *Publius: The Journal of Federalism* (forthcoming 2005); Eric R. Claeys, “The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after *Lopez* and *Morrison*,” 11 *William & Mary Bill of Rights Journal* 11 (2002): 409-413.

¹⁰ U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1; Gary Lawson, “The Rise and Rise of the Administrative State,” *Harvard Law Review* 107 (1994): 1237-49.

¹¹ *Federalist 57*, 318; *Federalist 63*, 352; *Federalist 70*, 391; *Federalist 71*, 400; *Federalist 78*, 437-38; *Federalist 83*, 473; Kesler, “Introduction to *The Federalist Papers*,” at vii, xx-xxi; Charles R. Kesler, “Separation of Powers and the Administrative State.” In *The Imperial Congress: Crisis in the Separation of Powers*, ed. Gordon S. Jones & John A. Marini (New York: Pharos Books, 1988), 27-29.

¹² Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991), 61, 227 n.*.

¹³ Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 26-28, 157; Charles Edward Merriam, *A History of American Political Theories* (New York: The MacMillan Company, 1924), 311.

¹⁴ Wilson, “The Study of Administration,” 198-99; Wilson, *Constitutional Government*, 14.

¹⁵ Merriam, *History of American Political Theories*, 306, 322.

¹⁶ Herbert Croly, *The Promise of American Life* (New York: Macmillan Co., 1909; Boston: Northeastern University Press, 1989), 278, 273-74. Citations are to the Northeastern University Press edition.

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²² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 67 U. Chi. L. Rev. 483 (1997); Michael S. Greve, “Laboratories of Democracy: Anatomy of a Metaphor” (April 1, 2001) (available at http://www.aei.org/publications/pubID.12743/pub_detail.asp); Michael S. Greve, “Madisonianism with a Minus Sign: ‘Our Federalism’ and the Constitution,” at 16-21 (available at <http://federalismproject.org/masterpages/publications/Madison%20lecture.pdf>)

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²⁴ See *Calder*, 3 U.S. at 388 (opinion of Chase, J.).

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²⁶ Claeys, “Living Commerce Clause,” 409-12; Richard A. Epstein, “The Proper Scope of the Commerce Power,” *Virginia Law Review* 73 (1987): 1393-1442; White, *Constitution and the*

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²⁹ *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J.)).

³⁰ *Missouri v. Holland*, 252 U.S. 382, 433 (1920).

³¹ *Id.* at 433-34.

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- ³⁶ Dean Alfange, *The Supreme Court and the National Will* (Port Washington, N.Y.: Kennikat Press, 1937), viii.
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- ³⁸ *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935).
- ³⁹ *Yakus v. United States*, 321 U.S. 414, 420, 425, 424, 427 (1944) (internal quotations and citations omitted).
- ⁴⁰ *Myers v. United States*, 272 U.S. 52 (1926).
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- ⁴⁴ Edward Corwin, *Corwin on the Constitution*, ed. Richard Loss (Ithaca, NY: Cornell University Press, 1981), vol. 1: 320.
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⁵⁰ Landis, *Administrative Process*, 12.

⁵¹ Horwitz, "Constitution of Change," 56.

⁵² Tribe, *American Constitutional Law*, 810-11, 978, 715; *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989).

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⁵⁸ Richard Epstein is the most prominent critic on the Commerce Clause, in Epstein, “Proper Scope.” David Schoenbrod is the most prominent critic on the non-delegation doctrine and separation of powers. See David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven: Yale University Press, 1993).

⁵⁹ Staff of Senate Subcommittee on Administrative Practice and Procedure to the Senate Committee on the Judiciary, 86th Congress, Report on Regulatory Agencies to the President-Elect (Committee Print 1960) (written by James M. Landis), 22, 18; Thomas W. Merrill & Kathryn Tongue Watts, “Agency Rules with the Force of Law: The Original Convention,” *Harvard Law Review* 116 (2002): 467.

⁶⁰ *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525 (D.C. Cir. 1982) (liberal procedural rights); *Chevron, USA v. NRDC*, 467 U.S. 837 (1984) (agency legal interpretation); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (agency legal interpretation); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (standing).

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⁶³ *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

⁶⁴ *Lopez*, 514 U.S. at 602 (Stevens, J., dissenting); *ibid.*, 608 (Souter, J., dissenting); Jack M. Balkin & Sanford Levinson, “Understanding the Constitutional Revolution,” *Virginia Law Review* 87 (2001): 1052-53. The text in the next several paragraphs follows my interpretation and argument in Claeys, “Living Commerce Clause,” 434-39.

⁶⁵ *Lopez*, 514 U.S. at 552 (Rehnquist, C.J., for the Court), 587, 596 (Thomas, J., concurring); Randy E. Barnett, “The Original Meaning of the Commerce Clause,” *University of Chicago Law Review* 68 (2001): 101; Epstein, “Proper Scope,” 1393-99, 1401-08; Richard A. Epstein, “Fidelity Without Translation,” *Green Bag* 1 (1997): 21.

⁶⁶ *Morrison*, 529 U.S. at 640 (Souter, J., dissenting); Lawrence Lessig, “Translating Federalism: *United States v. Lopez*,” *Supreme Court Review* 1995: 125.

⁶⁷ *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

⁶⁸ The Supreme Court announced in *Cooper v. Aaron*, a desegregation case decided shortly after *Brown v. Board of Education*, 347 U.S. 483 (1954), “that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” 358 U.S. 1, 18 (1958). For other authorities relating to judicial supremacy or the substantive settlement that informs modern judicial review, see *Casey*, 505 U.S. at 866-69; *Roe v. Wade*, 410 U.S. 113 (1973); *United States v. Carolene Products Co.*, 304 U.S. 152 & n.4 (1944); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

⁶⁹ Barry Friedman, “The Cycles of Constitutional Theory,” *Law and Contemporary Problems* 67 (2004): 149; Mark Tushnet, *Taking the Constitution Away From the Courts* (Princeton, NJ: Princeton University Press, 1999); Larry D. Kramer, *The People Themselves* (New York: Oxford University Press, 2004); Larry D. Kramer, “Foreword: We the Court,” *Harvard Law Review* 115 (2001): 4.

⁷⁰ *Lopez*, 514 U.S. at 619, 631-44 (Breyer, J., dissenting); Stephen Breyer, “Our Democratic Constitution,” *New York University Law Review* 77 (2002): 260.
