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978-1-107-03295-8 - The American State from the Civil War to the New Deal: The Twilight of Constitutionalism and the Triumph of Progressivism

Paul D. Moreno

Excerpt

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Introduction

For several generations, historians have told the story of twentieth-century America as a triumphant tale of the ever-expanding power of the central government, which has liberated individuals and a proliferation of minority groups from the shackles of inequality, prejudice, and the repressive ideas of human nature itself. In a reversal of the classically liberal “Whig history” of the preceding century, progressives depicted history as the rise of state power and as the source of *genuine* liberty.

The election of 2008 and the Obama administration have called this narrative into question and provoked an unprecedented debate over the nature and purpose of American government. No previous expansion of the national welfare state brought the fundamental principles of constitutionalism into such high relief. The persistence of constitutionalism in the thinking of the populace left contemporary liberals nonplussed. Congressional leaders were flummoxed when questioned as to the constitutional source of Congress’s power to enact the Patient Protection and Affordable Care Act of 2009. The controversy over the Act suggested that the basic features of the Constitution still had life. The Supreme Court and the American public heard lively arguments as to whether Congress could delegate legislative power to bureaucrats; whether it could exceed its constitutionally enumerated powers; whether it could usurp the reserved powers of the states; and whether it could use the taxing power to compel individuals to purchase health insurance. At the same time, the nation’s financial plight provided an alarming indication that the sort of unlimited government represented by the Act makes government not only “destructive of the ends for which governments are instituted among men,” but positively self-destructive as well.

This history shows how we came to occupy this twilight zone between constitutional and unlimited government. “Constitutional” government means the rule of law or government limited by a constitution. American constitutionalism of the Founding era rested upon several broadly shared assumptions. While they disputed constitutional *interpretation*, the Founders all agreed that the Constitution had a fixed meaning that bound political actors, derived from a

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political philosophy superior and anterior to the Constitution. Historians have given different degrees of emphasis to elements that composed this common understanding. The philosophy was obviously Lockean, but also had elements of Scottish commonsense philosophy. Montesquieu did a lot to temper the radicalism of Enlightenment philosophy and fit it into English history and tradition. While it allowed more room for individualism, and particularly commercial endeavor, than ancient constitutionalism, it did not jettison the idea of a common good – it was thus both liberal and republican. The variegated, broadly tolerant religious denominations of colonial America – both evangelical and enlightened – were able to support the principles of the Revolution.

Similarly, legal expressions that historians have often used to contrast liberal and republican principles were in fact complementary. *Sic utere tuo ut non alienum laedas* (use your own property in a way that does not harm others' equal right) did not undermine that of *salus populi suprema lex* (the welfare of the people is the supreme law). Rather, they reinforced the ancient constitutional principle that public power must be used only for genuinely public purposes. The most common term for unconstitutional legislation in the nineteenth century was "class legislation" – public power exercised for a part of the polity, rather than the whole, just as Aristotle defined it. Neither laissez-faire anarchists nor communitarian statists, the Founders were constitutionalists. They recognized the need for government, but also the need to keep government limited. This followed from their understanding of human nature: Men were not comrade-angels who needed no government, nor ruler-angels who could be entrusted with unlimited power; neither were they citizen-devils who needed despotic rule, nor ruler-devils who could not be entrusted with any power to rule whatsoever.

This history, then, is an analytical narrative, combining the insights of political theorists of constitutionalism with the empirical work of legal, economic, and social historians. Above all, it shows how the battle between traditional constitutionalism and progressive statism manifested itself in concrete policy choices, in the contentions of interest groups and parties as well as in the realm of ideas. Part I discusses the challenges of Republican policy in the late nineteenth century. Lincoln and the Civil War Republicans maintained a commitment to the Founders' principles of constitutionalism; their eradication of slavery brought America closer to those principles. But their adoption of Hamiltonian policies of national mercantilism raised serious constitutional questions, and produced the social and economic problems of the urban and industrial revolution. Part I concludes with a discussion of the federal judiciary's role in constitutional interpretation in these years. Historians of the last generation have gone a long way toward dispelling the progressives' caricature of a "laissez-faire jurisprudence" that served the interests of big business; this account builds on that work. Far from being mere agents of the capitalist class, late nineteenth-century judges earnestly engaged in the difficult task of reconciling government power and constitutional limits.

Part II treats the development of early progressive thought and policy under the Republican administrations of Theodore Roosevelt and William Howard

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Excerpt

[More information](#)*Introduction*

3

Taft. Just as various strands composed a common Founding-era constitutionalism, progressivism displayed many varieties or emphases but shared certain core ideas. The central tenet of progressivism was the development of state power to deal with the problems of the urban and industrial revolutions, and consequently a hostility to the idea of fixed constitutional limitations. A variety of modern political and legal theories – historicism, utilitarianism, Darwinism, sociological jurisprudence, legal realism – repudiated the natural rights constitutionalism of the Founding. Congress began to slip the leash of constitutional limitations as it developed a “federal police power” out of the Constitution’s commerce and taxing powers. Theodore Roosevelt expressed a new, plebiscitary kind of executive power, beginning in insular imperialism and spilling over into domestic policy. It culminated in his radical “New Nationalism” campaign of 1912. The federal judiciary, for the most part, went along with the expansion of federal and state power in these years, though its occasional insistence on constitutional limits made it a progressive ogre, its animus focusing almost obsessively on such cases as *Lochner v. New York*.

Part III discusses the advanced Progressivism of Woodrow Wilson. Wilson expressed profound hostility to the principles of the Founders in his early, academic life, but adopted a more cautious and ambivalent position in his early political career. The electoral campaign of 1916, and especially the First World War, brought about a new phase of Progressivism. The post-war decade saw a reaction to this unprecedented statism, principally in Presidents Harding, Coolidge, and the Supreme Court. But it also saw considerable maintenance, and even extension, of two decades of progressive policy. Herbert Hoover, in many ways the last influential progressive, became a tragic figure precisely because he believed *some* constitutional limits must control government, even in the severe economic straits of the Great Depression.

Part IV describes the culmination of the constitutional revolution in the New Deal. Though Franklin D. Roosevelt had none of Wilson’s academic progressive background, he expressed Wilsonian ideas more forcefully in his presidential campaign and administration. His Commonwealth Club Address, outlining the idea of a “second Bill of Rights” and an “economic constitutional order,” became the basis of all subsequent twentieth-century “liberalism.” Roosevelt rhetorically transvalued the values of the Founding, substituting an entitlement-based ethos for the rights-based one of the Founding. The Supreme Court, as ambivalent as it had been since the beginning of the century, posed the last obstacle to the establishment of a centralized bureaucratic state. Roosevelt’s profound overestimation of the public’s support for the New Deal, and his equally profound underestimation of its support for constitutionalism and the Supreme Court, led him into the dramatic 1937 “court-packing” fight that temporarily set back the liberal program. Liberalism has ever since been principally concerned with the completion of the New Deal revolution.

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PART I

THE OLD REGIME

1870–1900

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I

The Post-War Constitution

REPUBLICAN LEVIATHAN

Abraham Lincoln told Congress at the outset of the Civil War, “Our popular government had often been called an experiment. Two points in it our people have already settled – the successful *establishing* and the successful *administering* of it. One still remains – its successful *maintenance* against a formidable internal attempt to overthrow it.”¹ The Union government put down the rebellion within the limits established by the original Constitution.² And the abolition of slavery made the original Constitution more perfect. But scholars still claim that the Republican party used the war to establish a “leviathan state,” or at least its prototype. Charles and Mary Beard advanced this argument in their 1927 classic, *The Rise of American Civilization*, calling the Civil War the “second American Revolution.” They depicted the Civil War as a clash of economic classes, resembling late republican Rome, the seventeenth-century “bourgeois” English Civil War, or the French Revolution.³ The Republicans furthered this revolution through the non-military legislation of the Civil War Congresses – the protective tariff, banking legislation, railroad promotion, and contract labor law, as well as the Fourteenth Amendment and the federal judicial power. The “Second American Revolution,” the Beards claimed, brought about the triumph of “the party of industrial progress and sound money.”⁴

¹ Message to Congress, 4 Jul. 1861, in *Abraham Lincoln: His Speeches and Writings*, ed. Roy P. Basler (New York: Da Capo, 2001 [1946]), 608.

² Herman Belz, “Lincoln and the Constitution: The Dictatorship Question Reconsidered,” in *Abraham Lincoln, Constitutionalism, and Equal Rights* (New York: Fordham University Press, 1998); Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Knopf, 1973).

³ Charles A. and Mary R. Beard, *The Rise of American Civilization*, 2 vols. (New York: Macmillan, 1927), II: 53. The Beards appear to misread the meaning of “social war” in the Roman context. The great Social War of 91–88 B.C. was a war between Rome and its allies (*socii*), not a war between classes within Rome. The American Civil War was indeed a social war in this sense, establishing the nature of the American Union as a federal government, not a confederation of allied states.

⁴ *Ibid.*, 108, 111.

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[More information](#)

Subsequent works reiterated the argument that the Civil War had ushered in an “American Leviathan.” According to Roy F. Nichols, the Civil War Congress undertook “a *more or less unconscious* experimentation in long-range planning, whereby through grants and subsidies and legal enactments it was shaping what would turn out to be a new Leviathan.”⁵ Leonard P. Curry concurred, stating that “The 37th Congress ushered in four decades of neo-Hamiltonianism; government for the benefit of the privileged few.”⁶ More recently, Wilfred McClay wrote “It is certainly tempting, in this connection, to recur to the Beardian argument that the war represented a second American Revolution.”⁷ In today’s standard history of the Civil War era, James McPherson adds, “this legislation did indeed help fashion a future different enough from the past to merit the label of revolution.”⁸

Authors of a libertarian stripe, who depict Lincoln as a Constitution-trampling wartime dictator, also see a legacy of statism arising out of the political economy of the Republican party. Jeffrey Rogers Hummel argues that “in contrast to the whittling away of government that had preceded Fort Sumter, the United States had commenced its halting but inexorable march toward the welfare-state of today.”⁹ A similar theme marks the “new institutionalist” political scientists, particularly in the work of Richard F. Bense. The Republican party kept the South in the Union, and in doing so redistributed income from the South and West to underwrite the industrialization of the Northeast and “Great Lakes littoral.” Republicans enacted “an extremely harsh program of interregional redistribution that favored the industrial and financial core,” Bense argues. “Union victory in the Civil War,” he continues, “consolidated national sovereignty around a reinvigorated central government, retained the impoverished market and robust cotton exports of the South in the national political economy, and placed the interests most closely associated with northern industry and finance in control of the central state.”¹⁰ But Republicans empowered this central state only to benefit a new plutocracy. They made sure that state power did not go so far as to threaten to bring about further redistribution. A “massive redistribution of wealth from southern agriculture to northern industry” accompanied “the brutal repression of lower classes

⁵ Roy F. Nichols, *American Leviathan* (New York: Harper & Row, 1966), 202, emphasis added.

⁶ Leonard P. Curry, *Blueprint for Modern America: Nonmilitary Legislation of the First Civil War Congress* (Nashville: Vanderbilt University Press, 1968), 147.

⁷ Wilfred M. McClay, *The Masterless: Self and Society in Modern America* (Chapel Hill: University of North Carolina Press, 1994), 24.

⁸ James McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 1988), 452.

⁹ Jeffrey Rogers Hummel, *Emancipating Slaves, Enslaving Free Men: A History of the American Civil War* (LaSalle, IL: Open Court, 1996), 358. Hummel notes that, as to the original Constitution, “My hunch is that a thorough investigation would resurrect certain features of Beard’s economic interpretation, with a new public-choice emphasis on northern rent-seeking.” *Ibid.*, 31.

¹⁰ Richard F. Bense, *The Political Economy of American Industrialization, 1877–1900* (New York: Cambridge University Press, 2000), 201, 349.

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[More information](#)*The Post-War Constitution*

9

throughout the nation.”¹¹ Sectional animosity divided the common class interests of Northern labor and Southern agrarians, until the new intersectional class coalition of the New Deal, united by “a common assault on the privileges of northern capital,” arose to redistribute the Republicans’ ill-gotten gains.¹²

These versions of populist and progressive history fed the New Deal. That view pervades Franklin D. Roosevelt’s 1932 campaign speech to the Commonwealth Club in San Francisco. Roosevelt laid out the argument that Alexander Hamilton had envisioned a system under which “individual men and women will have to serve some system of Government or economics,” rather than having the government and economy serve individual men and women. The Jeffersonian and Jacksonian Democrats forestalled this until the Civil War, when government’s role shifted to economic promotion, to realize the great potential of the Industrial Revolution. Hamiltonian–Republican policy had produced a group of “financial Titans, whose methods were not scrutinized with too much care, and who were honored in proportion as they produced the results, irrespective of the means they used. The financiers who pushed the railroads to the Pacific were always ruthless, often wasteful, and frequently corrupt; but they did build railroads, and we have them today.” But now, Roosevelt claimed, “equality of opportunity as we have known it no longer exists.” The nation was now dominated by “some six hundred odd corporations . . . we are steering a steady course toward economic oligarchy, if we are not there already.”¹³ These forces had become too powerful, and now that “the day of enlightened administration has come,” Roosevelt called for “a re-appraisal of old values.” He went on to call for “an economic declaration of rights, an economic constitutional order,” which he would elaborate throughout the New Deal, and later particularly in his 1944 “second bill of rights” message to Congress.¹⁴

Roosevelt’s address hinges on a Beardian historical claim about the role that the federal government had played in the construction of the old political economy.¹⁵ The Republicans had created privileged “robber barons.” Just as the national monarchs in European history had put an end to the local tyranny of the medieval barons, Roosevelt promised that a new national government would

¹¹ Ibid., 527; David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862–72* (New York: Vintage, 1967).

¹² Richard F. Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859–77* (Cambridge: Cambridge University Press, 1990), 433.

¹³ Campaign Address, San Francisco, Calif., 23 Sep. 1932, *PP&A* I: 743, 747, 750–51.

¹⁴ On the significance of which see Cass R. Sunstein, *The Second Bill of Rights: F.D.R.’s Unfinished Revolution and Why We Need It More than Ever* (New York: Basic, 2004).

¹⁵ On the background and significance of this speech, see Robert Eden, “On the Origins of the Regime of Pragmatic Liberalism: John Dewey, Adolf A. Berle, and FDR’s Commonwealth Club Address of 1932,” *Studies in American Political Development* 7 (1993), 74–150. I am here principally concerned with the historical accuracy of Roosevelt’s claims. For a simpleminded restatement of the populist–progressive–New Deal interpretation, see Jack Beatty, *The Age of Betrayal: The Triumph of Money in America, 1865–1900* (New York: Knopf, 2007).

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free Americans from the “robber barons” of the industrial age. But how accurate is that history? To what extent did the post-war Republicans establish a political economy that fundamentally departed from the limited Constitution of the founders? Or, if they enacted policies that remained within the limits of that Constitution, did they nevertheless spawn a plutocracy?

ARMY AND NATIONALITY

The strongest evidence against the revolutionary impact of the Civil War Republican system lies in the institution most responsible for the Union victory – the Army. The Radical Republicans failed to use it as a long-term occupation force in the former Confederacy, and nobody proposed to use a permanent, peacetime, conscript army as a nationalizing force, as had many modernizing nation-states.¹⁶ Rather, the Army quickly demobilized and resumed its antebellum character as a small, minimally funded volunteer frontier constabulary.

The text of the Constitution provided great potential for innovative uses of the Army. To be sure, Copperheads made ingenious arguments against the raising of the Civil War Army, particularly by highlighting the Constitution’s textual distinction between “the militia” and “the army.” Some claimed, for example, that the Constitution only permitted Congress “to provide for calling forth the Militia to execute the Laws of the Union, *suppress Insurrections* and repel Invasions” (italics added), or that Congress could only “raise and support armies” by voluntary means.¹⁷ Governor Horatio Seymour of New York opposed conscription as beyond the constitutional power of the Union government. Under the guise of suppressing a rebellion, he argued, the Union government was itself engaged in “revolution,” trampling on the Constitution. The Conscription Act “threatens the integrity of the States, and trenches upon personal rights, opposed as it is to the genius of a free government.”¹⁸ Chief Justice Roger B. Taney drafted an opinion declaring the Act to be unconstitutional, though a case providing the occasion to publish it never arose.¹⁹

¹⁶ Ward M. McAfee, “Reconstruction Revisited: The Republican Public Education Crusade of the 1870s,” *Civil War History* 42 (1996), 136.

¹⁷ Leon Friedman, “Conscription and the Constitution: The Original Understanding,” *Michigan Law Review* 67 (1969), 1493–1552. Part of a challenge to the Vietnam-era draft, this article reviews historical arguments against the constitutionality of conscription. See also Michael J. Malbin, “Conscription, the Constitution, and the Framers: An Historical Analysis,” *Fordham Law Review* 40 (1972), 805–26; Charles A. Lofgren, “Compulsory Military Service under the Constitution: The Original Understanding,” in *Government from Reflection and Choice: Constitutional Essays on War, Foreign Relations, and Federalism* (New York: Oxford University Press, 1986).

¹⁸ Speeches at Buffalo, NY, 26 Oct. 1863, and Albany, NY, 9 Sep. 1863, in *Public Record . . . of Horatio Seymour*, ed. Thomas M. Cook and Thomas W. Knox (New York: I. W. England, 1868), 163–65, 366–67.

¹⁹ “Thoughts on the Conscription Law of the United States,” in *The Military Draft: Selected Readings on Conscription*, ed. Martin Anderson (Stanford, CA: Hoover Institution Press, 1982), 207–18.