Progressive Reformer or Ardent Constitutionalist? A Brief Revisiting of William Howard Taft

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Review: *William Howard Taft's Constitutional Progressivism,* by Kevin J. Burns. Lawrence: University of Kansas Press, 2021. Pp. 248. Hardcover, $40.00.

Scholars are divided over what William Howard Taft meant when he described himself as a "believer in progressive conservatism."[1] Echoing recent work by Jonathan Lurie, Kevin J. Burns's *William Howard Taft's Constitutional Progressivism* looks to revise the view that Taft was much more than a "jovial conservative."[2] Burns sees in Taft a "constitutional progressive" who "believed the Constitution could play a positive and constructive role, since it empowered the government to initiate and perpetuate dynamic progressive reforms."[3] In this view Taft was at heart a progressive, albeit one whose understanding of broad federal power was limited by adherence to the Constitution as the law of the land. Thus Taft advanced progressive policies while rejecting the kind of constitutional transformation proposed by radical progressives like Theodore Roosevelt and Woodrow Wilson. Burns attempts to show that Taft's thought is consistent, both as a progressive and constitutionalist, and therefore provides scholars today with a compelling argument for how to reconcile an energetic federal government with the protection of individual rights and federalism within the American constitutional order.

According to Burns, Taft was a progressive who broke from his fellow progressives on constitutional rather than policy grounds. He supported progressive policies such as

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[1] Jonathan Lurie, *William Howard Taft: the Travails of a Progressive Conservative* (New York: Cambridge Universality Press, 2012), ix.

[2] Kevin J. Burns, *William Howard Taft's Constitutional Progressivism* (Lawrence, KS: University of Kansas Press, 2021), 1. Lurie, *William Howard Taft*, xii, rejects the idea that Taft's was a "hide-bound traditionalist" and questions the use of contemporary words like *progressive* and *conservative* to make the assessment. "By every standard of progressive regulation, Taft appears to have exceeded the record set by his predecessors" (xiii). On Taft as progressive see Kevin Slack, *War on the American Republic* (New York: Encounter Books, 2023), 96-105. On Taft as conservative, see Sidney Milkis, "William Howard Taft and the Struggle for the Soul of the Constitution," in *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era*, ed. Joseph W. Postell and Jonathan O'Neill (New York: Palgrave Macmillan, 2013), 63-93, Ryan P. Williams, "A Neglected Statesman," *Claremont Review of Books* 13, no. 1 (Winter 2012/13), and the exchange between Williams and David Upham in "Correspondence," *Claremont Review of Books* 13, no. 2 (Spring 2013).

[3] Burns, *William Howard Taft's Constitutional Progressivism*, 21.

trustbusting, conservation, tariff reform, railroad regulation, and workplace safety laws), but disagreed with progressives over how such policies should be implemented under the Constitution. Contrasting Taft with Herbert Croly, Burns holds that "Taft's refusal to support constitutional transformation—the creation of Croly's 'new order' and Roosevelt's 'pure democracy'—marked his central point of disagreement with the extreme left of the Progressive movement."[4] In Burns's reading, Taft was a progressive reformer who saw the need for a radical change in federal policy to match the needs of a growing nation. Taft "recognized that industrialization had radically altered social and economic conditions in the country and believed these developments, and the challenges that came with them, should be addressed by government action at the national level."[5] In carrying on Roosevelt's policies of conservation, trust-busting, and tariff reform, Burns argues that Taft advanced the progressive cause of energetic and enlarged federal government, but attempted to do so through constitutional means. Indeed, Taft's progressivism was strengthened by his attachment to the Constitution: progressive measures could only be enshrined through the proper legislative process, rather than stepping outside the bounds of executive power as his predecessor Roosevelt was wont to do.

Burns couples this examination of Taft's policy with an assessment of his later works while at Yale and as chief justice of the United States. According to Burns, Taft's jurisprudence further underscores his support of expanded federal regulation; as an example of a progressive policy, he gives Taft's streamlining of the courts in order to aid poor litigants. Taft "presented a reform agenda for the judiciary and simultaneously strengthened the Court, defended individual rights, and affirmed the integrity of constitutional government."[6] Burns seems to think that progressivism and the Constitution are not mutually exclusive, and this assumption drives his reading of Taft. Taft adhered to the Constitution and its protection of individual rights, yet in service of progressive rather than conservative ends. In this way Burns qualifies his description of Taft's progressivism, "Without losing sight of Taft's strong nationalism, it is important to remember that he did believe the Constitution imposed real

[4] Burns, *Taft's Constitutional Progressivism*, 27.
[5] Burns, *Taft's Constitutional Progressivism*, 1.
[6] Burns, *Taft's Constitutional Progressivism*, 188.

limits on government action and at times restrained the momentary wishes of a democratic majority."[7] The reader is forced to wonder how conservative Taft really was.

Burns's approach to Taft is a refreshing and thorough examination of an under-appreciated president. Contrary to other depictions, he presents a Taft who was a capable executive, competent albeit flawed party leader, and effective jurist who worked within the constitutional order. If there is one flaw in this valuable contribution, it is an analysis of Taft colored by a false equivalence between progressivism and a strong national government.

TAFT AS CONSTITUTIONAL PROGRESSIVE

According to Burns, "Taft is the prime example of constitutional progressivism; he and his allies supported significant policy changes, but balked at the idea of constitutional transformation."[8] By *progressive* Burns means that Taft supported an expansive role for the federal government in ordinary life in response to urbanization and industrialization. By *constitutional*, he means that Taft's advanced these goals by constitutional means: Taft's constitutional interpretation was not limited to a strict construction of the Constitution. Rather, "In Taft's understanding of constitutional history, John Marshall and Alexander Hamilton were the heroes for their articulation of expansive national powers, and Thomas Jefferson and John C. Calhoun … were cast as the villains for their stringent interpretation of the Constitution."[9] In Burns's telling, Taft believed the people had granted broad powers to the federal government to achieve the objects entrusted to it. Thus, Taft's policies were progressive for his time, rather than part of a broader movement. Yet the federal regulation proposed by Taft pales in comparison to the size of the administrative state argued for by the progressives of his time, let alone the progressives of today.

Moreover, the term "progressivism" connotes a particular philosophical movement in American political thought at the turn of the twentieth century that firmly rejected both the Declaration of Independence and Constitution as outdated documents. Progressives such as Roosevelt, Wilson, Croly, and Walter Rauschenbusch argued for new positive rights, a departure from the natural rights doctrine of the Founding.[10] While progressive thinkers

[7] Burns, *Taft's Constitutional Progressivism*, 31.
[8] Burns, *Taft's Constitutional Progressivism*, 178.
[9] Burns, *Taft's Constitutional Progressivism*, 179.
[10] Progressives disagreed over the role of political parties, the judiciary, and other reforms; however, all agreed that the Constitution was totally insufficient for a new modern age. See Ronald J. Pestritto, *America Transformed: The Rise*

aligned themselves in different political parties, Ronald J. Pestritto and William J. Atto note that they differed "over particular means, not over fundamental ideas of what government is or ought to be"; indeed, their end goal was the same, "to progress, or move beyond, the political principles of the American founding."[11] For progressives, centralized scientific administration was the key to greatly expand the size and scope of the federal government, and this required overturning both American Founding principles and the old institutional checks and balances of the Constitution.[12] Understood as such, progressivism was logically incompatible with Taft's understanding of constitutionalism.

Burns is right about Taft's constitutionalism, but he mistakenly labels Taft's support of strong national government, broad federal power, and energetic government as defining features of progressivism, thus placing Taft among the progressive crowd. Taft indeed saw that the federal government could (and should) use broad powers for the national good, but arguably Taft's understanding of a strong federal power expresses a Hamiltonian understanding of the executive. But this means that Taft was no progressive, and his understanding of broad federal power was limited by his federalism and devotion to the constitutional separation of powers. His due regard for the Constitution was in no way embraced by progressives like Wilson, Croly, or Roosevelt, who attempted to subvert it.

In contrast, Taft was dedicated to maintaining the constitutional order of 1787, even as he recognized the need for reforms in political life. While the underlying principles of the American Constitution are fixed and unchanging, according to Taft, the policies enacted by the national government can, and should, change as political and economic circumstances change. To advocate new policies in reaction to new circumstances is not necessarily a progressive impulse. One finds evidence that Taft's commitment to the Constitution caused him to depart from progressive theory by examining two issues in Taft's presidency. The first is his approach to conservation, where he displayed a concern for both the separation of powers and the proper role of federalism. The second is the establishment of the Commerce

and Legacy of American Progressivism (New York: Encounter Books, 2021); *Progressive Challenges to the American Constitution: A New Republic*, ed. Bradley C.S. Watson (Cambridge: Cambridge University Press, 2017). On the natural rights theory of the Founding, see Thomas G. West, *The Political Theory of the American Founding* (New York: Cambridge University Press, 2017).

[11] Ronald J. Pestritto and William J. Atto, "Introduction to American Progressivism" in *American Progressivism: A Reader* (Lanham, MD: Lexington Books, 2008), 2.

[12] For a brief overview of philosophical progressivism, see *American Progressivism: A Reader,* 1-29.

Court by the Mann-Elkins Act of 1910, which created an Article III court to adjudicate disputes coming from the Interstate Commerce Commission.

CONSERVATION

One of Taft's many breaks from Roosevelt was his dismissal of Roosevelt's chief of the US Forest Service, Gifford Pinchot. Known later as "the Ballinger Affair," Burns discusses it as part of the larger conservation efforts wherein Taft "made a conscious and determined effort to maintain and expand Roosevelt's program by legalizing his environmental efforts and bringing them within the bounds of the constitutional order."[13] Burns's account underplays the vastly different approach the two presidents took. Taft was not only far more restrained than Roosevelt, but his approach to conservation also rested on maintaining the limits on executive power as well as the proper balance of power between state and federal governments.

Congress had passed multiple homestead acts as incentives to draw settlers to the western territories and states, and it passed the Forest Reserve Act in 1891 in response to perceived corruption by corporations and wealthy individuals who were using the homestead laws to gobble up large quantities of land.[14] However, a provision in Section 24 of the act allowed for the executive to unilaterally withdraw timber reserves without much guidance on how this power ought to be exercised. After presidents Benjamin Harrison and Grover Cleveland used the law to unilaterally set aside lands, Congress added statutory guidance in 1897 that directed the president could only remove reserves only if doing so "would protect forests or watersheds" and "furnish a continuous supply of timber for the use and necessities of citizens of the United States."[15] Roosevelt ignored these provisions in his conservation orders.

Over the course of his presidency, Roosevelt unilaterally set aside roughly 230 million acres of land for conservation purposes.[16] Of the 230 million, 17 million were famously withdrawn through "midnight proclamations" that Roosevelt handily ordered just before signing a bill from Congress that would have limited his ability to withdraw those same lands.[17]

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[13] Burns, *Taft's Constitutional Progressivism*, 20.
[14] Richard J. Ellis, *The Development of the American Presidency* (New York: Routledge, 2015), 294.
[15] Ellis, *The Development of the American Presidency*, 295.
[16] Ellis, *The Development of the American Presidency*, 296. Presidents Cleveland, Harrison, and McKinley had together reserved under 50 million acres.
[17] Burns, *Taft's Constitutional Progressivism*, 23.

His first land removal in 1902, Proclamation 467, pointed to the Forest Reserve Act of 1891 as basis for this precedent. This and subsequent proclamations for land removal used two reasons drawn from the Forest Reserve Act: first, the lands "are in part covered in timber"; second, "It appears that the public good would be promoted by setting apart and reserving said lands as a public reservation."[18] However, the 1891 Act's wording, that the president "may from time to time," suggests a scale of removal quite the opposite from Roosevelt's aggressive policy. To this point, Congress passed an appropriations bill in 1907 that strictly limited the president's power for land removal; Roosevelt had gone above and beyond his congressional authorization in the Forest Reserve Act of 1891.[19]

Roosevelt later justified his actions in his biography, reasoning, "My view was that every executive officer ... was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin."[20] In his famous "stewardship theory," the executive was more than mere executor of the law. Given the mandate to govern by popular vote, the president could use his office for good to protect ordinary Americans against the "special interests" of big business, even if that meant overstepping constitutional boundaries.

Taft seemingly agreed with Roosevelt's policy on conservation and indeed ran his 1908 platform as a continuation of the Roosevelt presidency.[21] However, his 1911 speech to the National Conservation Congress almost three years later revealed a break from Roosevelt. Taft told his audience, "The management of forests not on public land is beyond the jurisdiction of the Federal Government. If anything can be done by law it must be done by the state legislatures. I believe that it is within their constitutional power and duty to require the enforcement of regulations in the general public interest."[22] Taft's understanding of executive power, unlike Roosevelt's, was limited to what had been explicitly granted by the

[18] Theodore Roosevelt, "Proclamation 467—Establishing the San Isabel Forest Reserve," *The American Presidency Project Online*, ed. Gerhard Peters and John T. Woolley, University of California at Santa Barbara. Roosevelt repeats the argument from his first proclamation in subsequent ones, with exceptions for expanding already existing forest reserves and territories like Puerto Rico.
[19] Ellis, *The Development of the American Presidency*, 296.
[20] Roosevelt, "The Presidency; Making an Old Party Progressive," in *American* Progressivism, 181.
[21] Paolo E. Colletta, *The Presidency of William Howard Taft* (Lawrence, KS: University Press of Kansas, 1973), 9.
[22] Taft, "First Appendix to Second Annual Message," in *The Collected Works of William Howard Taft*, ed. David H. Burton, et al., 8 vols. (Ohio University Press, 2001-2004), 4:84.

Constitution and entrusted by Congress for execution. The president required Congress to pass a law before he could do anything; in short, he was still at heart an executor of the law.

Taft urged Congress to pass just such a law, explaining in 1909, "What, however, I wish to make as plain as possible is that these purposes [conservation of public lands] can not be accomplished unless Congress shall act, and that the burden of carrying out the policy of the conservation of our resources, in respect to the matters I have discussed is upon Congress."[23] Taft reaffirmed this sentiment in a 1910 interview: "There is only one bill I feel to be essential at the present time; that is the one assuring the President's right of withdrawal."[24] While Roosevelt was more than happy to step outside his constitutional bounds, good policy for Taft required commitment to the law. The executive could only act once given the requisite authority by Congress. In this regard, the executive acted as the executor of Congress's will as the legislative branch. Rather than enacting his own policy as Roosevelt did, Taft remained the humble servant of Congress.

Taft also disagreed with Roosevelt on the constitutional issue of federalism. Paolo Colletta writes, "Roosevelt strongly urged federal control, Taft, state control, saying in this connection that 'in these days there is a disposition to look too much to the Federal Government for everything.'"[25] While Taft had supported Roosevelt's conservation policy, it was with a significant caveat that constituted more of a break—Roosevelt at least thought it was significant enough to run against Taft in 1912. On the issue of federalism, Taft seems to stand at odds with Burns's interpretation in his later *The President and His Powers*, which discusses his understanding of the presidency and the federal government. In response to the suggestion that the federal government should take on a greater role when states do not exercise their regulatory powers, Taft writes:

> This would break up our whole Federal System. The importance of that system is frequently misunderstood. Its essence is in the giving through the states local control to the people over local affairs and confining national and general subjects to the direction of the central government. Our experience with the administration of the public lands … show that it is exceedingly difficult for the central government to administer what in their nature are local matters and put in force a uniform national policy as to these subjects that may often be at variance with the local view.[26]

[23] Taft, "Conservation of National Resources," in *The Collected Works of William Howard Taft*, 3:220.
[24] George Kibbe Turner, "How Taft Views His Own Administration," *McClure's* 35 (June 1910): 218.
[25] Colletta, *The Presidency of William Howard Taft*, 81.
[26] Taft, *The President and his Powers*, in *The Collected Works of William Howard Taft,* 6:46-47.

Taft's federalism does not stand at odds with his support of a strong federal government; rather the state and federal governments are two sides to the same coin. The federal government needs energy to fulfill the necessary duties entrusted to it, even as it respects the boundary between state and federal jurisdiction. Given the idea of local control and self-government at the heart of the American regime, "A centralized system of government, in which the President and Congress regulated the doorsteps of the people of this country, would break up the Union in a short time."[27] This limiting principle provides the framework within which executive action can occur. State and local matters are best left to those parties most interested, while national matters entrusted to the federal government require Congress to pass laws before the president can execute them. As Taft demonstrates, a robust sense of federalism does not preclude a strong executive; the two are not mutually exclusive.

Congress responded to Taft's appeals by passing the Pickett Act in 1910, granting the president the power to "at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States ... and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes ... and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."[28] Taft used this new power to withdraw another 80 million acres, exercising executive power once Congress had granted him the proper authority to do so. Roosevelt, by contrast, went above and beyond the bounds of executive power to achieve his conservation goals, directly eroding the balance of powers. Burns notes, "Taft made temporary withdrawals in order to give Congress time to legislate and determine which lands it wished to protect; in doing so, he respected the constitutional separation of powers and avoided an inflexible and formalist approach to conservation."[29] But Taft's adherence to the law's limits on executive power makes it hard for him to truly be *progressive* in the philosophical sense as described above. He respected the separation of powers and federalism, both elements of the horizontal and vertical checks and balances enshrined by the Constitution, in marked contrast to every major progressive political theorist.

[27] Taft, *The President and his Powers*, 47.
[28] Burns, *Taft's Constitutional Progressivism*, 25.
[29] Burns, *Taft's Constitutional Progressivism*, 23.

THE COMMERCE COURT

Taft's role in establishing the Commerce Court also shows his devotion to the constitutional order. Towards the end of the nineteenth century, railroads had become a cause of contention, and reformers opposed their monopoly power over rate-setting. In response, Congress passed the Interstate Commerce Act of 1887, which created the Interstate Commerce Commission (ICC). Originally charged with hearing complaints against interstate railroads regarding rates, the ICC was entrusted with issuing cease and desist orders to railroads found engaging in unfair practices.

Worries that the ICC was not doing enough to curb the railroad monopolies led to further reforms. In 1903, Congress passed the Elkins Act, which enacted criminal penalties for companies whose rates differed from those filed with the commission, with adjudication occurring in a federal circuit court.[30] A few years later, it passed the Hepburn Act in 1906, transforming the ICC from "an administrative body performing adjudication that eventuated in judicial proceedings to a modern regulatory commission with consolidated powers."[31] The main thrust of the Hepburn Act was to expand the ICC's jurisdiction and give it the power to set maximum railroad rates. After the Supreme Court's 1910 decision in *ICC v. Illinois Central Railroad Co.,* the ICC was given deference to its finding of facts.[32]

In question was whether administrative agencies should be given total deference regarding their regulation of industries. Taft understood that even as the ICC worked to prevent monopolies, carriers still had a constitutional right to due process of law. Going before Congress in January 1910, Taft asked Congress for improvements to the Hepburn Act, which would eventually become the Mann-Elkins Act of 1910. On the creation of proper legal procedure, Taft recognized that "every carrier affected by an order of the commission has a constitutional right to appeal to a federal court to protect it from the enforcement of an order which it may show to be *prima facie* confiscatory or unjustly discriminatory in its effect."[33] Moreover, it was critical that this was done in a swift and speedy manner. Average litigation before the Mann-Elkins Act took almost two years while an

[30] Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (Columbia, MO: University of Missouri Press, 2017), 186.
[31] Postell, *Bureaucracy in America*, 187.
[32] Postell, *Bureaucracy in America*, 188.
[33] Taft, "Special Message to Congress, January 7, 1910," in *A Compilation of the Messages and Papers of the Presidents*, James D. Richardson (compiler), 20 vols. (New York, Bureau of National Literature, 1897-1917), 17:442.

injunction was in place to keep the status quo, but rule of law requires speed and uniformity: "What is ... of supreme importance ... is that the decision of such questions shall be as speedy as the nature of the circumstances will admit, and that a uniformity of decision be secured so as to bring about an effective, systematic ... enforcement of the commerce law, rather than conflicting decisions."[34] By helping streamline how quickly cases were handled, Roosevelt's "little guy" was protected from the "special interests" who formerly could use the injunction to effectively continue price gouging rates while the case was being decided. But both parties were given due process of law, thereby making the judicial system work for all involved.

In 1910, Congress passed the Mann-Elkins Act, which created the Commerce Court. The Act offered a solution for how the federal government could rein in administrative discretion while simultaneously curbing Gilded Age corruption. Corporations could appeal ICC decisions to an Article III court, even up to the Supreme Court, as opposed to a mere administrative tribunal arguably invested with judicial power. Five circuit judges appointed by the chief justice of the United States would serve five-year terms on the Commerce Court, after which they would return to the circuit courts. The Mann-Elkins Act, according to Burns, "remedied a critical failure of the Hepburn Act and maintained important procedural safeguards."[35] To Taft's request, under the Commerce Court average litigation time dropped from two years to six months.[36]

However, Taft's above comments do not give credit to the delicate situation he found himself in. Leading up to Mann-Elkins, he confronted a fracturing Republican party. Stephen Skowronek notes, "Politically, Taft faced a growing Republican insurgency demanding more sweeping regulatory action. At the same time, he was tied to the Old Guard of the party, which had sought protection for the railroads in broad court review. Personally, Taft looked at the railroad regulation issue as a problem of separating powers and compartmentalizing different governmental functions under the appropriate constitutional authorities."[37] Taft's approach to solving the problem of railroad regulation balanced proper judicial procedure with the regulation of interstate monopolies that threatened smaller individual enterprise.

[34] Taft, "Special Message to Congress, January 7, 1910," 7442.
[35] Burns, *Taft's Constitutional Progressivism*, 50.
[36] Taft, "Veto Message," in *A Compilation of the Messages and Papers of the Presidents,* 18:7756.
[37] Stephen Skowronek, *Building a New American State* (New York: Cambridge University Press, 1982), 261.

Taft's Commerce Court was an attempt to both rein in administration and address the problem of "big business." Skowronek offers telling commentary:

> The administrative courts would not only provide close supervision of administrative action, they would aid in the exercise of administrative power by speeding up the appeals process and giving more timely effect to administrative decisions.... Rather than becoming overwhelmed by experts and ultimately accepting its retreat as a fait accompli, the judiciary could use its specialized courts to keep pace with administrators in replacing the formalistic posture of late-century regulation.[38]

Instead of deferring to the administrative state, railroads could have their cases heard in an Article III court. While still dealing with the ever-present problem of big business corruption, Taft's specialized court created room for judicial prudence to apply the law. With five-year terms, rotating judges on the court had time to gain the necessary expertise for deciding cases without having to defer to an administrative authority outside the judiciary.

Unfortunately for Taft, the Commerce Court was short-lived, as Chief Justice Martin Knapp's aggressive approach to reviewing ICC decisions made him generally unpopular with progressives who saw Knapp as intruding on the authority delegated to the commission by Congress.[39] Skowronek writes, "Knapp's exercise of judicial authority dashed visions of cooperation among experts and numbered the days of Taft's experiment with revitalizing the judiciary in the age of administrative expansion."[40] Yet, while Taft's beloved Commerce Court was abolished in 1913 under President Wilson, it shows how Taft was not an advocate of rule by administrative experts, to whom the courts should defer. Rather he supported the creation of a series of specialized Article III courts that could provide the necessary expertise and remain firmly within the separation of powers.

While Burns correctly notes Taft's constitutionalism, he misses the mark by labeling him a progressive. Taft's arguments for a strong federal government did not place him in the broader progressive movement, and his constitutionalism stands at odds with the philosophical progressivism that rejected both the American Founding and the institutional structures of 1787. On the issue of conservation, he kept the executive within the separation of powers, both state and federal, and in the creation of a Commerce Court, he offered a

[38] Skowronek, *Building a New American State*, 262.
[39] Skowronek, *Building a New American State*, 265.
[40] Skowronek, *Building a New American State*, 265.

constitutional solution to the problem of administrative governance. His statesmanship is best understood not as a strange combination of progressivism and constitutionalism, but as adherence to unchanging principle and adaptation of policy in the face of changing circumstances.