

TOWARD AN AMERICAN CONSERVATISM

Constitutional Conservatism during the Progressive Era

Edited by
Joseph W. Postell &
Johnathan O'Neill



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TOWARD AN AMERICAN CONSERVATISM: CONSTITUTIONAL CONSERVATISM
DURING THE PROGRESSIVE ERA

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Introduction

The Conservative Response to Progressivism

Myth and Reality

Johnathan O'Neill and Joseph Postell

Today more scholars than ever appreciate how fundamentally the Progressives of the early twentieth century rejected the American founding and how their academic heirs controlled interpretation of the period for decades thereafter.¹ The typical academic story about Progressivism had only contempt for those who criticized or opposed it. Resistance was nothing more than small-minded selfishness dressed up as principle or science: the rule of laissez-faire and social Darwinism. The constitutional jurisprudence of the Supreme Court prior to the New Deal was alleged to be an expression of these evils. This claim was clear enough in the dissenting opinion of Justice Oliver Wendell Holmes Jr. in the famous case of *Lochner v. New York* (1905), which overturned a state maximum hours law. Holmes chided the majority that “the 14th Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”²

Before *Lochner*, and even more so afterward, it was common for the American left to attack the court, judicial review, and the Constitution itself as mere tools of the rich.³ During the Progressive era these attacks were unrelenting, from the historian Charles Beard’s caricature of the Founders as self-interested hacks, to recurrent proposals for the abolition of judicial review or the rejection of particular judicial decisions by popular vote.⁴ Once much of the Progressive vision was realized in the New Deal, generations of Americans were taught that opponents of the modern liberal program were shills for vicious corporations, heartless laissez-faire

fundamentalists, and social Darwinists who cruelly ground the face of the poor. In almost any major work of constitutional history from the 1930s through the 1980s one could find an expression of this basic view: *Lochner* exemplified the pre–New Deal Court’s adoption of “laissez faire-social Darwinism.”⁵

To the extent that scholars accepted this characterization, they were coopted or cabined by the Progressive scholarly defense of the Progressive project. Moreover, those who sympathized with conservatism were not immune from the Progressive historiographical orthodoxy. Clinton Rossiter’s *Conservatism in America* (1955), long the standard work on the subject, insisted on the “depth of laissez-faire conservative devotion on the Supreme Court.” The “intellectual climate of the age was profoundly materialistic,” he said, and those who “advertised the beauties of laissez-faire conservatism were all disciples of Herbert Spencer.”⁶ It is a political art to discredit and villainize one’s opponents, with the authority of scholarship too, and the Progressives were quite successful at it.

But for some time now revisionists have been arguing that the Supreme Court of the so-called *Lochner* era actually was not beholden to social Darwinism or laissez-faire fundamentalism. Rather, it was committed to the Constitution as a set of organizing forms and principles that established limited government under the rule of law. As officials who were created under the authority of the Constitution, the justices treated it as the basis and boundary of what they could do. Accordingly, it was a key tenet of their jurisprudence that legislation must have a truly public purpose. It must not be what they termed “class” or “special” legislation, in which the power of government was exercised for the benefit of one group at the expense of another. Additionally, the court rejected legislation that violated the personal or contractual rights of individuals.⁷ Each of these jurisprudential themes was informed by the traditional American doctrine of natural rights, which held that by nature all people had rights that no government could legitimately violate. In sum, then, revisionists argue that judges of this period did not “read into the Constitution their own probusiness, anti-labor biases, [rather] they were faithful, heroically so, to the reigning constitutional ideology of limited government and state neutrality.”⁸

Understood in this way, this jurisprudence rested on principled bases that long preceded social Darwinism.⁹ It was defending the established meaning of the Constitution, not engaging in a jurisprudential ruse to enforce a new social theory. Moreover, because the court often upheld government regulations based on its view of the Constitution, it never came near laissez-faire orthodoxy, as was long ago noted by the historian Charles Warren (who was a constitutional conservative and a Democrat).¹⁰

As a result of the now quite large body of revisionist scholarship, it is fair to say that there has been a major shift in the interpretation of the constitutional history of the early twentieth century. Many scholars now conclude that the Supreme Court jurisprudence of the period was wrongly and tendentiously characterized by Progressives and those they influenced to better advance and solidify the Progressive political program. In fact, the court's jurisprudence was derived from a deeply rooted and long-established understanding of the Constitution. This convincing and now widely accepted reevaluation has prompted this volume's inquiry into the role of constitutional ideas in the broader conservative response to Progressivism.

At a basic but crucial level, constitutional conservatives opposed the Progressive claim that the nation's challenges were so severe that they required fundamental alteration or abandonment of the constitutional system. At a more abstract level, the conservative defense of constitutional forms, principles, and processes rejected the antinomian impulse in Progressivism, which stemmed from its belief in unlimited "improvement" or "development." Progressives often said that the laws and institutions of the past had been transcended and now could be abandoned. The constraints and limitations the Constitution imposed were outmoded or caused unwanted delay in the realization of Progressive goals. Hence, as we shall see in this volume, the era's conservatives often recurred to the American founding to defend restraint, limitation, the rule of law, and legal-constitutional formalism. This core attribute of the era's constitutional conservatism is well illustrated by a statement William Howard Taft made during one of the major episodes of his presidency, his removal of Gifford Pinchot as chief forester. Pinchot had been running roughshod through the Interior Department, and quite likely breaking the law, in pursuit of Theodore Roosevelt's program of conservation of natural resources. Exasperated with the Progressive tendency to treat the rule of law as an exhausted concept, Taft wrote to a correspondent that "we have a government of limited power under the Constitution, and we have to work out our problems on the basis of law. Now if that is reactionary, then I am a reactionary." He concluded in this letter that it was "a very dangerous method of upholding reform to violate the law in so doing; even on the ground of high moral principle, or of saving the public."¹¹ Of course, in extremis, violating the law might be necessary to save the republic. But Taft was rejecting the Progressive impulse, in *everyday politics*, to trample laws and institutions because the Progressives were so sure of what was good for other people. He thus expressed the conservatives' belief that the American Constitution merited preservation precisely because its institutions aimed to limit and constrain the actions of government (even in pursuit of policies that he supported, as he did the general program of conservation).

Another key tenet of the conservative position was that “progress” did not lay in abandonment of America’s natural rights tradition. One illustration of this view was Elihu Root’s opening speech at the New York State constitutional convention of 1915. He knew that the convention would contemplate a variety of reforms, some of which he favored, but he insisted that “we have in America [an] unchanging guide in the political philosophy” of natural rights announced in the Declaration of Independence. It was “a distinct denial and reversal” of any philosophy that “begins with the state as the basis of civil society, and derives the rights of the individual only as a member of the state.” On the contrary, “the rights of the individual citizen to life, to liberty, to the pursuit of happiness, are held by indefeasible title. He cannot rightfully be deprived of those rights by legislatures or executives or majorities or armies.”¹² Here we see that constitutional conservatism lay in articulating the principles of the American founding in response to the statist and collectivist orientation of Progressivism. As this volume will show, this approach characterized the conservative response to Progressivism across a variety of areas. Conservatives were convinced that American constitutionalism had accounted for and built around certain political truths, human liberty chief among them, and that therefore it was worth preserving.

This devotion to the theory of natural rights protected through a constitutional system was a critical component of the conservatism of the Progressive era. It is this devotion, we allege, that is central to constitutional conservatism. The topics and figures addressed in the chapters of this volume illustrate the centrality of constitutional conservatism—and not social Darwinism or crass individualism—to the conservative response to early-twentieth-century Progressives.

Johnathan O’Neill’s opening chapter introduces us to several different types of responses to Progressivism that can be called (in some sense) conservative. O’Neill examines the responses offered by Burkean traditionalism, Southern Agrarianism, and libertarianism and demonstrates that each response is based on principles outside of American constitutionalism. This fact, he argues, has limited their appeal as well as their effectiveness. O’Neill then turns to an often-neglected group of conservatives that rejected Progressivism based on principles of American constitutionalism. In their writings on the American Constitution, these conservatives met the challenge of Progressivism head on by arguing from first principles found in the American constitutional order. Their call to restore America’s first principles, O’Neill concludes, illustrates a strand of constitutional conservatism that offers the most powerful critique of American Progressivism.

David Bernstein outlines in careful detail the origins of the myth—advanced by Progressive historiography for generations—that the Supreme

Court during the Progressive era engaged in unrestrained judicial activism, based on a reactionary philosophy that favored the rich over the poor, corporations over workers, and rigid legal concepts over pragmatic decision making. He debunks this myth by tracing the true origins of the idea of “liberty of contract” as it emerged in the court’s substantive due process jurisprudence. The court merely insisted on the proposition that there were inherent limits on government and that these limits were necessary to preserve fundamental rights that preexist government. Importantly, Bernstein notes that the idea of fundamental natural rights connected to due process can be found in cases and arguments prior to the Civil War and that the arguments were often employed to advance antislavery ends. Thus Bernstein illustrates the long-standing precedent for a jurisprudence that protects fundamental natural rights, and cautions contemporary conservatives that the impulse to denounce “judicial activism” *itself* stems from the Progressive historiography surrounding the *Lochner* era.

Sidney Milkis examines the political thought and action of William Howard Taft and considers whether Taft offered coherent conservative principles in the face of his Progressive challengers. Taft faced a radical set of proposals advanced by Theodore Roosevelt in the 1912 election and assumed the burden of defending constitutional sobriety in the face of Roosevelt’s radicalism. Milkis shows that while Taft thought of himself as a certain kind of Progressive—namely, someone who agreed with the need for government to take a more active approach in economic regulation due to new circumstances—he was more fundamentally a constitutional conservative who believed that economic regulation could coexist with constitutional forms and limited government. Thus Taft’s political thought and action can be revisited and studied profitably by those who want to defend constitutional conservatism and the rule of law in contemporary politics.

Focusing on lesser-known but important figures in the 1912 election—Elihu Root and Henry Cabot Lodge—William Schambra offers a forceful thesis: the Republicans who conspired to deny Theodore Roosevelt the party’s presidential nomination in 1912 preserved the Constitution so that it can still stand as a bulwark against radical and pernicious political experiments. Had Root and Lodge not sacrificed the party’s prospects in 1912 for the sake of opposing Roosevelt, Schambra argues, today’s Constitution would no longer be a foundation for republican self-government. Schambra offers Lodge and Root as thoughtful conservatives worthy of serious study and emulation. They accepted—even embraced—national regulation of the economy, but they refused to countenance Theodore Roosevelt’s radical scheme for a “pure democracy” that would circumvent the framers’ wise constitutional restraints.

John Grant and Taylor Reveley focus on issues of foreign policy confronted by the constitutional conservatives of the period. John Grant examines closely the conduct and arguments of William Howard Taft with regard to the United States' policy in the Philippines. He ultimately concludes that Taft did not follow the Founders' approach to foreign policy consistently. Yet of the conservatives of the Progressive Era, in his analysis, Taft came closest to adopting the framers' social compact theory in considering the United States' role in the world. Since the idea of the social compact presupposes that individuals have natural rights based on their equality, it also requires that each independent nation is entitled to a separate and equal right to govern itself. The principle of equality requires that each nation must respect the sovereignty and independence of other nations. Taft did not wholly accept the arguments of many Progressive internationalists that America had the right and the duty to "civilize" the less-developed nations of the world by assuming the responsibility of ruling them. His belief in the idea of natural rights, possessed by Americans and non-Americans alike, guided his efforts to bring the Philippines to self-governance. While Grant acknowledges that Taft did not perfectly follow the framers' approach to foreign policy, he argues that Taft's partial dedication to that approach restrained him from advocating tyrannical rule over other nations.

Taylor Reveley offers a careful exploration of the controversy surrounding the League of Nations as well as its unfortunate demise. Reveley contrasts the foundational principles of the League of Nations and the United Nations that eventually replaced it. The league represented the classical roots of Western Civilization and the attempt on behalf of the West to preserve its classical roots. The leaders of the era (including such diverse figures as Taft, Theodore Roosevelt, and Woodrow Wilson) were concerned about the future of Western Civilization and America's role in preserving it. They feared the chaos that would ensue if the civilized nations of the world refused to band together in the wake of World War I. Sadly, he argues, the failure of the League of Nations practically ensured the demise of this classical civilization. In the 1930s the coherence of the West dissolved, and the United Nations represented a very different basis for international organization. Instead of cooperation by nations bound together by a shared civilization, the United Nations operated as (in Reveley's words) "a refuge from the state of nature," a deal among diffident nations whose systems were fundamentally at odds. Reveley's treatment of the League of Nations counters the pervasive view that it was simply a failed precursor to the United Nations and also illustrates why many conservatives—including Taft and Lodge—were essentially in favor of it without abandoning their conservative principles.

The book concludes with three chapters on the political thought of prominent political figures during this period. Joseph Postell argues that Calvin Coolidge offers the most thoughtful and comprehensive elucidation of the first principles of the founding as a response to Progressivism. While Coolidge is revered by many conservatives because of the economic policies he pursued as president—including massive reductions in marginal tax rates, significant federal spending cuts, and limits on federal regulation—Postell argues that the depth of Coolidge’s political ideas is what distinguishes him as the most thoughtful and successful conservative president of the twentieth century. Coolidge’s speeches reveal his keen understanding of the principles of the founding and his uncanny ability to explain those principles in commonsense but inspiring rhetoric. Postell attempts to provide a thorough treatment of Coolidge’s political thought through a careful examination of these speeches and in doing so to recommend Coolidge as a model for contemporary conservatives.

James Stoner considers the political and legal thought of Charles Evans Hughes, a prominent figure during the Progressive era who served as governor of New York, secretary of state, and ultimately chief justice of the Supreme Court. Stoner’s objective is to explain how Hughes managed to balance the need for law to adapt to new circumstances with the imperative to preserve traditional American constitutionalism. Hughes described himself both as a progressive and as a conservative, a fact that baffles contemporary analysts. But Hughes attempted to reconcile these two impulses by insisting that while changed circumstances call for changes in laws, American legal *principles* ought to be unchanging and stable. Hughes helps illustrate this distinction between changing one’s policies due to changed circumstances and changing one’s principles—a distinction that is infrequently understood in the midst of today’s political contests.

Finally, David Davenport and Gordon Lloyd explain the “two faces” of Herbert Hoover’s constitutional conservatism—which exhibit, they argue, two distinct faces of conservatism itself. Davenport and Lloyd argue that during the first phase of his career, spanning the 1920s and ending with the election of Franklin Roosevelt in 1932, Hoover favored progress but was not a Progressive. He believed in “constructive government,” which was based on finding the proper mode of relation between the federal government and the private sector. This proper mode of relation, Hoover believed, was not based on command-and-control regulation but on conferences of industry and government officials seeking collaboration. These conferences would advance standardization and efficiency in new industries, rather than government control. Certainly Hoover’s approach was not based on *laissez-faire*, but in Hoover’s mind government could assume this role without crossing the line into oppression of business by government. Yet during the

second phase of Hoover's career, Davenport and Lloyd note, he became a full-throated constitutional conservative, horrified by the threat to liberty presented by FDR's "New Deal." In fact, they argue, Hoover became the most prolific and vocal critic of FDR's attempt to establish what Hoover saw as European collectivism in America. This phase of Hoover's career, in which he recurred to the Declaration of Independence and the Bill of Rights in order to save the constitutional system itself, is often overlooked by contemporary conservatives. Davenport and Lloyd attempt to clear up prevalent misconceptions about Hoover's record and to illustrate how Hoover's philosophy of "constructive government" can be reconciled with the idea of constitutional conservatism.

Thus a common thread runs through the various chapters in this book: in seeking to confront the most pressing practical issues of the period, constitutional conservatives did not retreat to social Darwinism, radical individualism, or any of the other dogmas with which they are so frequently identified. Nor was their loyalty to the constitutional principles of the founding an unthinking exercise or an ungrounded impulse. The leading figures of this period understood those principles and why they were defensible. In mounting their defense they established the foundations of a particularly American conservatism, which adhered to the principles of the founding not simply because they were traditional but also because they were rationally defensible.

Certainly one objective of this volume is to shed new light on the Progressive era in American politics. Yet, in attempting to illustrate the contours of this constitutional conservatism, of course, our goal is not merely to reexamine political controversies that are generations old. Our aim is also to illustrate the ongoing relevance of constitutional conservatism in thinking about contemporary political issues. There is, we believe, much that today's conservatives can learn from a careful study of these constitutional conservatives. A few of these lessons are worth briefly noting.

First, the conservatives of this period willingly accepted the legitimacy of regulation and offered alternatives to progressivism that did not seek the entire elimination of the state. After all, most of them were Republicans, which meant that their roots lay in the Whig and Federalist parties. They were part of the tradition stretching back to Alexander Hamilton, Henry Clay, and John Quincy Adams. In other words, these conservatives were faithful to the "Whiggish" tradition in American politics that allowed for positive exercise of government power, so long as it remained within the bounds of the constitutional system and did not infringe on natural rights of citizens. They believed that an industrial society could be governed by regulations and remain faithful to constitutional principles.

A second lesson that can be gleaned from these constitutional conservatives is the importance of preserving the *structural* features of American

constitutionalism. In the minds of these conservatives, the right *policies* would flow naturally from the right *institutional principles*. The preservation of American constitutionalism, rather than specific policy outcomes, was their first priority. Furthermore, they were unwilling to sacrifice their constitutional principles for the sake of specific policies. The necessity to preserve limited government under the rule of law was more important than any immediate policy goal.

Finally, today's conservatives can learn from the fundamental foreign policy challenges faced by the constitutional conservatives discussed in this volume. Many observers have noted that today's conservatives are deeply fractured when it comes to the purposes of American foreign policy and the means that can be employed in pursuit of those purposes. While it is difficult to discern a coherent set of principles that constitutional conservatives employed in foreign policy during the Progressive era, certain features of their approach emerge in the chapters of this volume. They were neither isolationists nor Wilsonian internationalists. Many of them explicitly opposed the League of Nations on the grounds that it would sacrifice American sovereignty. However, they believed in international law, international order, and the creation of institutions that would enforce the norms of international law for the sake of promoting peace to the extent possible. The struggles of these constitutional conservatives to formulate foreign policy principles in the new circumstances of modern warfare are worth examining for those who seek coherent principles to address today's foreign policy dilemmas.

This volume was conceived with the hope that a serious treatment of these prominent figures in the early years of American conservatism would assist in the rediscovery of the principles for which they stood, as well as the renewal of their ideals in public discourse. In the Epilogue, Charles R. Kesler engages the conservatism analyzed in this volume and considers its relationship to American politics and American conservatism as they have developed since the Progressive era. Perhaps it is not overly optimistic to hope that reintroducing these ideas would elevate the political discussion and induce us to reconsider how these principles might be applied in present-day affairs. To assist in these ends would serve as a worthy dedication to those constitutional conservatives who tried to preserve the blessings of constitutional government in a modern age.

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for permission to reprint material in Chapter 2. Portions of Chapter 4 appeared originally in *National Affairs* and at <http://www.heritage.org>.

Notes

1. See, for example, Sidney M. Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy* (Lawrence: University Press of Kansas, 2010); Will Morrissey, *The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government* (Lanham, MD: Rowman & Littlefield, 2009); Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, MD: Rowman & Littlefield, 2005); Bradley C. S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (Wilmington, DE: ISI Books, 2009).
2. *Lochner v. New York*, 198 U.S. 45, 76 (1905).
3. The most detailed treatment is William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton: Princeton University Press, 1994).
4. *Ibid.*, 49–69.
5. Paul Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York* (Lawrence: University Press of Kansas, 1990), 5. Numerous similar examples are collected in Howard Gilman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993), 207–8, note 8.
6. Clinton Rossiter, *Conservatism in America* (London: William Heinemann, 1955), 156, 161, 159.
7. A helpful overview of the literature is David N. Mayer, “The Myth of ‘Laissez-Faire Constitutionalism’: Liberty of Contract in the *Lochner* Era,” *Hastings Constitutional Law Quarterly* 36 (2009): 217. See also, David E. Bernstein, “*Lochner* Era Revisionism, Revised,” *Georgetown Law Journal* 93 (2003): 1; Gary D. Rowe, “*Lochner* Revisionism Revisited,” *Law and Social Inquiry* 24 (1999): 221; Gillman, *The Constitution Besieged*. The most comprehensive attention to *Lochner* itself is David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011). An influential study that engaged the nascent revisionist trends was Michael Les Benedict, “Laissez-Faire and Liberty: A Reevaluation of the Meaning and Origins of Laissez-Faire Constitutionalism,” *Law and History Review* 3 (1985): 293.
8. Rowe, “Revisionism Revisited,” 239.
9. A good overview of the literature exploding this myth is included in Thomas C. Leonard, “Origins of the Myth of Social Darwinism: The Ambiguous Legacy of Richard Hofstadter’s *Social Darwinism in American Thought*,” *Journal of Economic Behavior & Organization* 71 (2009): 37.
10. Charles Warren, “The Progressiveness of the United States Supreme Court,” *Columbia Law Review* 13 (1913): 294; Charles Warren, “A Bulwark to the

State Police Power: The United States Supreme Court,” *Columbia Law Review* 13 (1913): 667.

11. Taft to William Kent, June 29, 1909, quoted in Henry F. Pringle, *The Life and Times of William Howard Taft*, 2 vols. (New York: Farrar and Rinehart, 1939), 1: 480, 481.
12. Root, “Opening Address as President of the Constitutional Convention, State of New York, April 6, 1915,” in Elihu Root, *Addresses on Government and Citizenship* (Freeport, NY: Books for Libraries Press, 1969 [1916]), 167, 168.

Constitutional Conservatism during Progressive Era

The National Association for Constitutional Government and *The Constitutional Review*

Johnathan O'Neill

Electoral defeats and long-standing differences of principle have separated the strands of conservatism held together for so long by the leadership of William F. Buckley and Ronald Reagan. Libertarians, who place their conception of liberty and individual choice above all else, have gained adherents due to dissatisfaction with the steadily increasing power of modern government. Traditionalist conservatism's emphasis on virtue and moral restraint, sometimes rooted in religion, distances it from the moral relativist orientation typical of libertarianism. The neoconservative understanding of human nature and dedication to an activist foreign policy, both built on a version of American exceptionalism, are often rejected by both libertarians and traditionalists.

Today these schools of contemporary conservatism usually think that there is more to be gained by supporting the Constitution than by attacking it, although they were more critical of it in earlier times. Consequently, another era of practical accord might be encouraged by a politics of constitutional preservation and defense.¹ Regardless of the ultimate principles and immediate aims of the various strands of conservatism, defense of the Constitution benefits all conservatives more than contemporary liberals or progressives, who would more likely prefer to abandon it.

How might politics look if conservatism oriented itself around preservation of the Constitution? We can gain historical perspective on this

question by considering how various kinds of conservatives responded when Progressivism challenged the established constitutional order in the early twentieth century.

Progressivism was an intellectual and political reform movement that aimed to alter the American constitutional system.² At the deepest level, as expressed especially in the thought of Woodrow Wilson and Herbert Croly, Progressives aimed to refound America based on the managerial-administrative political philosophy of the European state. Consequently, Progressives typically rejected the foundational American principles of natural rights and limited government for their own understanding of “progress,” defined as governmental experts’ management of social and economic change toward an evermore just and statist future.³

Progressives called for more activist regulatory power in the federal government via administrative bureaucracies and more direct democratic control of political decision making to wrest it from the supposedly corrupt hands of big business and the party system. They were confident that they knew the direction of history and could tutor and direct Americans in what was required to be in harmony with it, so they zealously attacked or redefined aspects of constitutionalism that they regarded as outmoded or simply false. Accordingly, local self-government, protected by federalism, was an obstacle to be overcome, as was the Supreme Court’s resistance to many of Progressives’ desired regulations. The president would become the representative of a properly instructed public opinion and then would oversee the bureaucracy that would affect the will of the masses.

As this description suggests, in many respects, Progressives created the world we now inhabit, and the modern liberal incarnation of Progressivism remains very much with us. Those who would resist the further implementation of the Progressive vision would do well to study the arguments and limitations of those who first opposed it. It is in this spirit that we will examine the critical responses to Progressivism by three prominent kinds of conservatism, including Burkean traditionalism, Southern Agrarianism, and libertarianism. In the early twentieth century, these types of conservatism had more of a strained, ambiguous, or hostile relationship to the American constitutional order than do some of their current exponents. Their principles, though considered and sometimes profound, limited their commitment to American constitutionalism, thereby preventing a stronger and more coherent conservative response to Progressivism. These conservatives’ insufficient attachment to the Constitution, at the time when it most needed thoughtful defenders, should serve as a warning to today’s conservatives.

After considering these three types of responses, we will examine a now-neglected group of conservatives who also rejected Progressivism but

did so precisely by rededicating themselves to American constitutionalism. Many people in this group were loosely affiliated with a now nearly forgotten organization called the National Association for Constitutional Government, as well as its journal, *The Constitutional Review*, which was published from 1917 to 1929. As I have described elsewhere, they understood Progressivism's challenge to the constitutional order and met it with arguments derived from the principles of the American regime. They defended individual liberty based on natural rights, federalism as the division of authority and responsibility between levels of government, an independent judiciary dedicated to the rule of law but not somehow above the Constitution, and a presidency constrained by other governmental institutions rather than by mere public opinion.⁴ In this chapter I will emphasize something at once more cultural and philosophical, though less precise—constitutional conservatives met Progressivism with precisely the respectful attachment to the Constitution that was lacking in the other types of conservatism. They saw Progressivism as a dangerously shortsighted falling away from the tried and true, and they thought that renewed education in America's first principles was essential to combat it.

Conservatives Alienated from American Constitutionalism

Humanism and the Limits of Burkean Conservatism

In the 1920s, Irving Babbitt (1865–1933), a professor at Harvard University, led a movement of conservative cultural criticism known as humanism. Sustained by Babbitt's influential writing and his popularity as a university instructor, humanism rejected the woolly headed utopianism and crude self-indulgence that it saw as degrading modern culture, especially literature.

Humanism steadily gained adherents among conservatives, and Babbitt remains an abiding referent for traditionalists who cast a wary eye on American culture. His deepest intellectual loyalty was to Edmund Burke, whose thought informed Babbitt's brief but pointed attack on Progressivism. Though Babbitt was not primarily a political thinker, his *Democracy and Leadership* (1924) is a fine example of a Burkean approach to the political and constitutional questions of the day.

In this book, Babbitt condemned Progressives' confiscatory reform schemes and defended the absolute necessity of property rights for any decent society (though always remaining critical of crude materialism). He praised the Supreme Court as the institutional embodiment of the principled restraint central to his thought. He also cautioned against increased

presidential power, ridiculed Prohibition as a characteristic modern intrusion on liberty, and warned that the Progressives' zeal for direct democracy was profoundly dangerous to republican government. Moreover, Babbitt valorized Washington and Lincoln as paragons of principled leadership who knew that ethical restraint was needed if democracy was to endure.

In the teeth of Progressivism, then, Babbitt's deep learning generated a kind of constitutional conservatism, yet his Burkean orientation ultimately distanced him from America's foundational principles. Babbitt held that on one side of man's dual nature stood insatiable appetite and passion, and on the other side stood moral self-restraint and willed moderation that constituted the "inner check" or "veto power" on the former.⁵ He deployed this dualism, which he knew had a long history in Western thought, as a powerful critique of democratic culture, materialism, and politics. Drawing somewhat on Aristotle and more on Burke, Babbitt argued that only an aristocracy could orient society toward ethical standards and self-restraint, thereby moderating the selfishness, vulgarity, and redistributionist meddling loosed by modern mass democracy.

But his Burkean distaste for democracy distanced him from the natural rights and popular sovereignty principles announced in the Declaration of Independence and sustained by the constitutional order. Focused on ethical standards and self-restraint, Babbitt saw in Locke and in Jefferson's Declaration only the assertion of "abstract rights" shorn of duties and thus the inevitable modern slide into vulgarity and petty self-interest. "The liberty of the Jeffersonian," he wrote, "makes against ethical union like every liberty that rests on the assertion of abstract rights." With more than an echo of Burke, Babbitt too quickly conflated the French and American Revolutions, dismissing the "supposed rights of man" as serving only the destructive leveling of democracy.⁶

Babbitt hoped that aristocratic leadership and ethical standards could be revived, but this was a hope against what he viewed as the low and irredeemably appetitive character of American principles. Consequently, his conservatism backed into a defense of important aspects of the constitutional order yet rejected its foundation in the early modern liberal theory of natural rights, popular sovereignty, and social contract.

Babbitt denied himself recourse to America's foundational ideas just at the time the Progressives were severely undermining them. This limitation was encapsulated in his juxtaposition of antebellum abolitionists' appeal to natural rights (and that of Lincoln, one might add) with the states' rights claims of Calhounite fire-eaters. He said both sides took equally "extremist" positions. So "the whole question of union, instead of being settled on ethical lines, had to be submitted to the arbitrament of force."⁷ But Babbitt's form of conservatism, as has been noted, "could not determine whether

some rights supercede some duties; his argument gives the impression that a stable social order is all-important, even though it mean some men and women live enslaved.”⁸

After the New Deal victory, some Burkean traditionalists reconsidered whether their position might form a closer attachment to the American founding than Babbitt had managed in the Progressive era. Russell Kirk, the Burkean giant of post–New Deal conservatism so influenced by Babbitt, initiated this shift by lauding the Constitution as a conservative bulwark for the American Revolution’s vindication of traditional English liberties—but not of natural rights.⁹

Kirk keenly appreciated that American conservatism depended on the achievements of Western civilization, and that the Americans would be aided and sustained by recovering this broader historical context. Yet Kirk and Burkean conservatism more generally were never fully reconciled to the idea of natural rights and persisted in viewing America as a somewhat disappointing offshoot of English civilization. Engagement with this set of problems, inherited from Babbitt, gradually helped form major fault lines among traditionalism and other strands of post–New Deal conservatism as they related themselves to America’s principles and Constitution.

The Limits of Southern Agrarian Conservatism

Another significant strand of conservatism in the early twentieth century was Southern Agrarianism, whose founding manifesto was an essay collection published in 1930 entitled *I’ll Take My Stand*. Southern Agrarians’ basic claim was that the South was a culturally distinct section, based on agriculture, which must be liberated from the alleged domination of the mercantile, industrial, and crudely materialist North.

As a group, Agrarians were devoted to individual liberty, local self-government, and Southern culture. They typically argued that the real reason for the Civil War was the North’s oppression of the South, not slavery’s offense to natural rights. Over time, this separation from the American idea of natural rights, and from the Constitution, increased as advocates of “states’ rights,” influenced by the Agrarians, defended secession and the Confederacy.

Frank L. Owsley (1890–1956) was an original Agrarian and influential historian who taught at Vanderbilt University and the University of Alabama. He influenced M. E. Bradford, a major figure in post–New Deal Southern Agrarianism, who wrote that Owsley articulated the movement’s combination of libertarian localism and communitarian traditionalism “better than the rest” of its early figures.¹⁰

While Agrarianism did not arise in direct response to Progressivism, several of its principles opposed the collectivist and regulatory tendencies of Progressivism and the New Deal. Ultimately, though, Owsley's conception of sectionalism, skillfully elaborated from the famed historian Frederick Jackson Turner, outweighed all else in his thought. It fostered his acceptance of the quasi-Marxist analysis of the Progressive historian Charles Beard, which led Owsley to view the Constitution as just one more tool of the Northern mercantile elite.¹¹ Accordingly, the New Deal ultimately revealed how tenuous Owsley's connection to the Constitution was and hence the limitations of Agrarianism as a rejoinder to the Progressive program.

Simply put, Owsley's sectional, Agrarian loyalties trumped constitutional principles. Indeed, he regarded even states' rights as something of a shibboleth: Antebellum Southerners, he argued, used it tactically as a defense of their section against the North more than they regarded it as a foundational constitutional principle. Likewise, fixation on states' rights undermined the shared Southern identity and unity necessary for the South to have won the Civil War.

So, in the Progressive and New Deal periods, when Northerners appealed to states' rights or federalism against centralizing statism, Owsley could not take them seriously. Tutored by Beard's view of the Constitution, he saw in such appeals only the obfuscation of corporate greed so that the North could continue to dominate the South. Moreover, when the early New Deal undertook some agrarian land reform and threatened Northern industrial elites, Owsley welcomed the increased federal power and called for more of it in order to revive the Agrarians' yeoman farmer ideal.

Just how fundamentally Owsley set Southern sectionalism over the Constitution was evident in "The Pillars of Agrarianism," an essay published in 1935. Since the "United States is less a nation than an empire made up of a congeries of regions marked off by geographic, climatic, and racial characteristics," the South would never be treated fairly under current governing arrangements. What was needed was "a new constitutional deal" that accounted for the conflicting regional interests and mores. Owsley then sketched a "new set-up [for] the federal government" that would have utterly redefined the constitutional order in keeping with his regionalism and Agrarianism.¹² For Owsley, the New Deal was to be used on behalf of the South, not resisted on behalf of the Constitution.

Even so, the Jeffersonian in Owsley could never quite abandon the American idea of natural rights as the basis for individual liberty and limited, responsible government. He defended natural rights before the New Deal and continued to do so afterward. But he also vehemently denied that natural rights had any bearing on the issues of slavery and the Civil War, and his racism obviated any suggestion that natural rights might

underlie a just approach to American race relations. Nor did he recognize any tension between his defense of natural rights and his emphasis on regional economic competition and class struggle as the driving forces in American history.

Given such large inconsistencies, most post–New Deal Southern Agrarians opted for a more Burkean traditionalist conservatism that openly rejected natural rights.¹³ Thus, despite Owsley’s proffered loyalty to America’s founding doctrine, his primary devotion to Southern regionalism prevented a strong defense of American constitutionalism amid the challenges of Progressivism and the New Deal. When post–New Deal Southern Agrarianism altogether abandoned natural rights, its connection to American constitutionalism became even more doubtful than it had been for Owsley.

The Limits of Libertarianism

Modern libertarianism, with its defense of individual liberty above all else, formed in direct response to the increase in centralized regulatory government under Progressivism and the New Deal. One of its leading lights was Albert Jay Nock (1870–1945), a journalist and author. Various a minister, professor, and full-time writer, from the late 1910s until his death, Nock published in the most important magazines of his era. With erudition and wit, he railed against the growth and centralization of state power, bureaucratization, and corrupt legislation that was beholden to private interests (including those of big business). Murray Rothbard, a major figure in the post–New Deal libertarian movement, wrote that “more than any other person [Nock] supplied twentieth-century libertarianism with a positive, systematic theory.”¹⁴ Nock’s antistatist critique remains influential, despite his unsavory Darwinian and anti-Semitic leanings in his final embittered years.

In his journal *The Freeman* (1920–24) and the elaboration of its perspective in *Our Enemy, the State* (1935), Nock described himself as a “philosophical anarchist.” He tolerated only a severely constricted role for state authority—a radical version of the classical liberal or libertarian position. While “government” had always existed in some form to manage the concerns natural to any community, brigands founded the “state” in conquest and confiscation to seize the land and exploit the production of others. In essence, the state was a criminal enterprise—the “political means” for expropriation from honest folk who made their living by productive “economic” means.

Nock applied these ideas to American constitutionalism. Although he eschewed Charles Beard’s socialism, Nock built explicitly on Beard’s

quasi-Marxist claim that the motor of history was conflict between economic classes. Beard's supposed revelation of the Constitution as a *coup d'état* on behalf of property interests proved that Nock's own view applied to America—that it was no different from any other inherently exploitative state.¹⁵

Unsurprisingly, then, and despite his zeal for human liberty, Nock did not think much of the Constitution and had little patience with any claim of a principled politics in defense of it. Early in his career, he observed that *The Freeman* was “never very strong for the Constitution . . . We sometimes think that it is the appointed function of the United States to clear the way for a regime of philosophical anarchism elsewhere in the world.”¹⁶ The doctrines of natural rights and popular sovereignty that were announced in the Declaration of Independence quickly came to justify merely “an unlimited economic pseudo-individualism on the part of the State's beneficiaries,” who served themselves while only appearing to act in the name of the public.¹⁷

Equally fundamental, Nock denied the possibility of politics as classically understood. What masqueraded as principled deliberation about common things only obscured the battle for control of the state. America's republican, representative politics derived from natural rights and popular sovereignty was “futile.” “Our nominally republican system is actually built on an imperial model, with our professional politicians standing in the place of the praetorian guards; they meet from time to time, decide what can be ‘got away with,’ and how, and who is to do it; and the electorate votes according to their prescriptions.”¹⁸ Indeed, Lincoln's “‘of the people, by the people, for the people’ was probably the most effective single stroke of propaganda ever made in behalf of republican State prestige.”¹⁹ Especially fraudulent was any politics “put on show as ‘constitutional principles.’” Such Constitution talk was only “an elaborate system of fetiches,” so much “sophistry” and “agonized fustian” that hid the “only actual principle of party action—the principle of keeping open the channels of access to the political means.”²⁰

Thus as Progressivism lurched toward the New Deal, Nock condemned American government along with all other government. The stinging critique of statism drawn from his libertarian and sometimes anarchist views alienated him as much from American constitutionalism as it did from everything else. In short, for Nock, the American Constitution was itself a reflection of the exploitation common to all political societies; thus it could not provide a suitable alternative to Progressivism and the New Deal. Whether libertarianism could be reconciled to American constitutionalism would eventually become an important question for post–New Deal conservatives.

Constitutional Conservatives in the Progressive Era

Another group of conservatives did offer informed and forthright resistance to Progressivism based on explication and affirmation of American constitutionalism. Many of these intellectuals, scholars, and politicians were involved with the National Association for Constitutional Government (NACG) or published in its journal *The Constitutional Review*. There was a thorough constitutional conservatism, which abjured the reservations or fixed aversions evident in Babbitt, Owsley, and Nock, and in them we have a historical example of how such a program might proceed.

In 1913, David Jayne Hill, a former ambassador to Germany and former university president, proposed the NACG in a galvanizing article that attacked socialism, Progressivism, and proposals for constitutional change that had circulated in the election of 1912.²¹ The organization was founded that year with Hill as its president and included, among its honorary members, Elihu Root, an influential former secretary of state, secretary of war, and senator. In 1917, the NACG began publishing *The Constitutional Review*, which ran through 1929 and included work by Chief Justice William Howard Taft; former senator and soon-to-be justice George Sutherland; Galliard Hunt, the biographer and editor of the papers of James Madison; Max Farrand, the compiler of *The Records of the Federal Convention of 1787*; and Nicholas Murray Butler, the president of Columbia University. The *Review* was edited by Henry Campbell Black, an established legal writer most widely known for *Black's Law Dictionary*, who contributed detailed editorials to most issues. After Black's death in March 1927, the *Review's* editorial board included Charles Warren, the leading constitutional historian of the era, and James M. Beck, a former solicitor general, a former congressman from Pennsylvania, and a noted author. The publication never boasted a large circulation, but NACG, the *Review*, and a few other like-minded public figures articulated an informed constitutional conservatism throughout the 1920s. They expressed themselves not only in the statesmanlike idiom of constitutional principle but also in more popularly accessible and persuasive writing and speech.

For most of the twentieth century, it was nearly impossible to understand these thinkers as they understood themselves because Progressivism so dominated the scholarly literature. In the academic accounts of this period, conservatives were successfully portrayed as opposed to all change—little more than “laissez-faire” apologists for corporate power who were transfixed by social Darwinism. To be sure, one need not search far in the *Review* for defenses of private property, capitalism, and limited government.²² After all, these were under severe attack, and it is unsurprising to see defense of the “commercial republic” that America had always

been. There is now a substantial body of revisionist scholarship on Supreme Court jurisprudence that undermines the Progressive view and makes possible a better understanding of the era's constitutional conservatism.²³

Revisionists have argued that the justices of the late nineteenth and early twentieth centuries actually took the law seriously as a conceptual system and did not simply read their preferences into it. The core tenets of the court's jurisprudence were rooted firmly in American constitutionalism and were manifested in its insistence that legislation must have a truly public purpose—there could be no “class” or “partial” legislation for the benefit of one group at the expense of another, nor could legislation violate the personal or contractual rights of individuals.²⁴ The revisionist interpretation has gained influence because it shows how the era's jurisprudence was principled, and therefore that its practitioners were not “shills for Carnegie.”²⁵

A recent study by Mark Warren Bailey provides an important additional perspective on the conservative intellectual response to Progressivism. Bailey argues that the court's jurisprudence built on and reinforced a religiously informed conception of a morally ordered world. His work examines the substance of the moral philosophy taught to most Supreme Court justices and to most educated Americans before the onset of the Progressive educational theories derived from John Dewey and pragmatism. The older education aimed primarily to transmit a “Classical and Christian heritage deemed to be true and useful,”²⁶ conveying both ancient conceptions of virtue and a generalized Protestantism. It commenced from a teleological proof of God and culminated in an ethics that emphasized prudence and responsibility, primarily by synthesizing the Christian doctrine of sin with the faculty psychology of the moderate Enlightenment. Students were taught that humans were created as free and rational beings capable of understanding the order of nature and governing their passions and appetites. Bailey quite properly refers to the result as a “moral individualist” or “ethical libertarian” disposition of mind and character.²⁷ Those so educated regarded individuals as responsible for their actions in a world where moral duties could be rationally discerned. Reward or punishment came in this life and the next, and proper conduct could be expected to yield prosperity and happiness. And proper conduct, above all else, required that the passions and appetites be restrained by reason and morality.²⁸ This education saw American constitutionalism as worthy of maintenance because it was in accord with man's dual nature (passion combined with reason and the capacity for moral restraint), as evidenced by its establishment of limited government and the additional safeguards of the separation of powers and judicial review.²⁹

Within this jurisprudential and intellectual setting, Progressivism appeared to constitutional conservatives as an unrealistic and somewhat