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Since the 1980s, conservative legalists have successfully advanced originalism—the conviction that the Constitution should be understood as it was at the time of its adoption—as their consensus theory of constitutional interpretation. Less noticed is a related project taking place on the intellectual and popular right, which tells the story of how the Founders’ “original” Constitution was abandoned. The Progressives are at the heart of this story.

This is a shift. For conservatives, legalist and nonlegalist alike, the conventional focus has long been on the constitutional betrayals of FDR and the New Deal. Although attacked for abandoning constitutional rules and restraints for ever-shifting policy imperatives, the New Deal was famously pragmatic and untheorized. Progressivism, by contrast, was affirmatively and elaborately theorized. Its deeper and more extensive conceptualization has enabled contemporary conservatives to trace later liberal policies back to their (purported) origins in a political theory that was at once substantive and systematic. Doing so moves the contemporary conservative critique well beyond the relatively one-dimensional (legalist) charge that “law” was abandoned for “politics.” Rather, it characterizes Progressivism, and the long line of reforms it spawned, as a wholesale abandonment of the Constitution and founding principles.¹ This holistic focus on Progressivism’s fertile corpus offers new possibilities on the right for forging common ground within a movement characterized by long-standing philosophical tensions and for emboldening a conservative federal judiciary to wield its (“new”) originalism aggressively in the service of substantive conservative ends.²

Later in this volume, Steve Teles examines the contemporary political and intellectual networks that streamlined and broadly disseminated this

conservative critique. This essay, by contrast, maps the contemporary right’s nascent obsession with the Progressive era as a developmental phenomenon—as a stage in the trajectory of a political-intellectual movement advancing through time. To that end, I venture three main claims. First, the recent conservative focus on Progressivism represents a shift on the right of understandings of the historical location or source of contemporary constitutional problems, an understanding informed by the sequence of constitutional conservatism’s development through time: whereas (old) “originalist” legal conservatives adopted Progressive thinking in focusing their attention on countermajoritarian “activist judges” and criticized the New Deal for its weightless, substance-free pragmatism, recent conservatives have forged a more global critique of contemporary constitutional practice that moves beyond judges to the entire modern structure and theory of American government, finding its weighty and substantive blueprint in the Progressive era, and its extension and institutionalization in the New Deal. Second, this more foundational and comprehensive constitutional critique was forged outside legal academia in political science, particularly by Straussian political theorists. And third, the overarching character of this critique centered on the Progressive era serves a movement-building function by offering a set of understandings that can win the assent of the movement’s diverse factions, including (it is said, the theoretically opposed and irreconcilable) social conservatives and religious traditionalists, on the one hand, and economic conservatives and libertarians on the other. This chapter considers the potential of this new, Progressive era-centered narrative to motivate, integrate, and expand the size of the modern conservative movement, and offers a brief (critical) assessment.

Straussians Against the Progressives

The disposition of conservatives toward Progressivism has changed over time. Late-nineteenth- and early-twentieth-century conservatives confronted and resisted Progressives directly, defending long-standing common law categories and rules, the authority of a traditionalist bench and bar, and the aggressive judicial policing of constitutional limitations.³ After that, the most important critical assessments of Progressive constitutionalism migrated from the realm of law to political theory, where they were undertaken by students of the émigré University of Chicago political philosopher Leo Strauss. Drawing upon close readings of ancient political thought (mostly Greek) and of the moderns who had (problematically, in his view) set out in new directions,

Strauss challenged the historicism, nihilism, relativism, and faith in progress rampant in the West, and called for a return to the study of the timeless truths of nature and natural right.⁴

Strauss said nothing about the Constitution (and reportedly voted for Adlai Stevenson). But his writings became a foundation for new departures in conservative constitutional theory. Before Strauss, Charles Kesler recently opined, liberals and conservatives alike “had lost touch, like Antaeus, with the ground of the Constitution in natural right. . . . They could never take the ideas of the . . . Constitution seriously.” But “thanks to this intellectual rebirth, the case against Progressivism and in favor of the Constitution is stronger and deeper than . . . ever.”⁵

Many conservatives credit Martin Diamond, the first of Strauss’s students to focus on American political thought, with the revival of the Founders’ Constitution. The theorist Diamond joined a small cohort of early Cold War historians in striving to unseat the then dominant Progressive critique of the Founders’ (allegedly) disfiguring elitism and mistrust of democracy.⁶ Diamond insisted that the Founders had conveyed a “useable past . . . available to us for the study of modern problems”—that they remained “necessary,” carrying “both the authority of the founding and a wisdom . . . [un]surpassed within the American tradition.” Catherine and Michael Zuckert—who called Diamond’s achievement the “rough equivalent to Strauss’s rediscovery of the ancients”—praised Diamond’s insistence that the founding was “a beginning that must be re-won in the face of progressivist prejudices that steadfastly reject the beginning as superseded.”⁷

Diamond devoted his career to explaining both why Americans needed the Founders now and how to get them right. He sympathized with Henry Cabot Lodge Sr.’s 1911 lament of the decline in the once “universally held . . . conviction . . . by Americans of the original and continuing excellence of their Constitution.” Like Lodge, Diamond held the Progressives responsible. “The conventional wisdom of those who give academic and intellectual opinion to the nation” had been formed by Charles Beard’s contention that the Constitution was “the handiwork of a reactionary oligarchy,” and by Populist and Progressive demands that the Constitution be democratized.⁸ This fostered a fundamental misunderstanding of the relationship the Founders had struck between democracy and liberty, and fomented a succession of misguided attempts at reform in democracy’s name. Since the Progressive view of the founding was “false in both history and political philosophy,” Diamond called for a “renewed appreciation of our fundamental institutions and rededication to their perpetuation.”⁹

The Progressives held that the Revolution’s democratic spirit—as affirmed in the Declaration of Independence—had been snuffed out by the Founders in the Constitution and in the rationalizations of *The Federalist*. Diamond, in contrast, treated the Declaration as a statement of Lockean contractualism, “neutral with regard to the democratic form,” holding only that the people had the right to choose their own form of government. The Constitution was designed to form a popular government that would sagely correct for democracy’s well-known deficiencies (like the tyranny of the majority) by protecting the legitimate (low, modern) ends of government—security, “the pursuit of happiness,” and the protection of rights. It was in this specific sense that the Founders were friends of democracy, an argument Diamond dilated on in a career-long exegesis of *The Federalist*.¹⁰

Diamond venerated the Founders but, notably, did not insist that we were strictly obliged to abide by their understandings. “With us the Founding Fathers have great authority,” he explained in 1963.

The Constitution they framed is our fundamental legal document. The worthiness of their work has rightly earned from us a profound respect for their political wisdom. [They thus] have for us the combined authority of law and wisdom. . . . But to pay our respect to that authority—to know how to obey intelligently or, sometimes, when and how to differ intelligently—we must know precisely what their Constitution meant and the political thought of which it is the legal expression. “What you have inherited from your fathers / You must first learn to make your own.” Ours is such a patrimony that its possession requires constant recovery by careful study.¹¹

Also, unlike later Straussian constitutionalists (to say nothing of contemporary law school originalists), Diamond (who published in neoconservative outlets and was generally supportive of the New Deal and the modern welfare state) threw a spotlight on founding-era disagreements. He cheerfully noted that “the framers were not themselves unanimous regarding the actual character of the document they framed,” and that “the Constitution was ratified on the basis of many understandings.” While steadfastly declaring the 1787 Constitution “still the fundamental document of the American polity . . . still the source of its basic institutions and principles” (and *The Federalist* “the brilliant and authoritative exposition of [its] meaning and intention”), Diamond frankly conceded the need for an evolving constitutional analysis: “There have been two centuries of amendment, interpretation, and the sheer working of

great events and massive changes in our way of life. All these things must be taken into account in an understanding of what the Constitution was and is."¹²

Diamond lectured liberals and conservatives alike for, while professing Madisonianism, "fundamentally misconstrue[ing]" the Constitution's nature by misreading a crucial portion of *Federalist* 51: "A dependence on the people is . . . the primary control on the government; but experience has taught mankind the necessity of *auxiliary precautions*." Liberals favored the people over the precautions, and conservatives "ambiguously accept[ed] the 'dependence' but . . . vastly esteem[ed] the 'auxiliary precautions.'"¹³ Diamond argued that Madison had conceived of these two elements as constituting a coherent whole entailing "the fundamental compatibility of the Constitution's restraining devices with a system of majority rule." While Progressives were "understandably outraged by late-nineteenth-century scholarship and statesmanship that tended to convert the Constitution into a fixed and immutable code enshrining liberty of contract," they were mistaken in holding the Constitution fundamentally undemocratic—an error repeated by later liberals and conservatives alike. This was political gamesmanship. What liberals really objected to, Diamond said, was "the character of the majorities that result from the constitutionally generated process of majority coalition." "The real complaint is that majorities simply do not act as Liberals want them to act"—in a way that would transform the human condition.¹⁴ Liberals thus saw programmatic parties as their great hope. Conservatives answered by anathematizing parties as constitutional corruptions. This led to an ironic result: "The Liberal dislikes the Constitution for what . . . are correct reasons. The Conservative likes the Constitution for what . . . are wrong reasons. . . . [This makes] the Liberal . . . the intelligent foe of the Constitution and the Conservative its foolish partisan." The views were equally dangerous: "Given the dominance of either the Constitution would perish."¹⁵

For the Founders, Diamond argued, it was liberty that was "the comprehensive good, the end against which political things had to be measured." The particular guarantor of liberty was less important: "Democracy was only a form of government which, like any other form of government, had to prove itself adequately instrumental to the securing of liberty."¹⁶ Progressives and liberals were right to say that the Framers were sharp critics of democracy, but these criticisms had to be contextualized: "The American Founders, like all sensible men before them, regarded every form of government as problematic, in the sense of having a peculiar liability to corruption, and they accepted the necessity to cope with the problematics peculiar to their own form of government."

"Of course, the Founders criticized the defects and dangers of democracy," Diamond riposted, "and did not waste much breath on the defects and dangers of the other forms of government. For . . . they were not founding any other kind of government; they were establishing a democratic form, and it was the dangers peculiar to it against which all their efforts had to be bent."¹⁷

The Progressives (and their liberal successors) had demanded "imprudent democratizing reforms" occasioning potentially serious threats to liberty. Making matters worse, in the 1960s and 1970s liberals launched yet another assault on the Founders' Constitution—"a vast inflation of the idea of equality, a conversion of the [Declaration's] idea of equal political liberty into an ideology." This "demand for equality in every aspect of human life . . . [amounting to] a kind of absolutization of a single principle," when conjoined with the "absolutization of the democratic form of government understood as the vehicle for that complete equality," amounted to a systematic critique of the Founders' entire regime.¹⁸

This "originalism" was different from the legalist originalism being forged at about the same time by Raoul Berger and Robert Bork. Preoccupied with matters of design, structure, and principle, Straussians said relatively little about judicial review and how it should be exercised. The law professors, by contrast, were focused primarily on remedying the "problem" of (Warren Court) judicial activism. Far from repudiating Progressivism, their strategy was to appropriate its majoritarianism—its conceptualization of judicial review as "counter-majoritarian," its suspicion of a politicized judiciary, its call for judicial restraint, and its attack on "Lochnerism"—to indict Warren-era liberals for hypocrisy.¹⁹ On today's right, remnants of this "old" legalist originalism—genealogically Progressive—are conjoined in complex ways with the more comprehensive and structuralist Straussian constitutional theory. Add to that a classically liberal, rights-celebrating, judge-focused, *Lochner*-celebrating libertarianism, along with a fledgling revival of the Gilded Age conservative legalism of the likes of Lodge's, and the vibrant, contested life-world of the contemporary constitutional right begins to come into view.²⁰

From Theory to History

In the 1950s, Straussians discussed history but didn't write it. Diamond, Harry Jaffa, Herbert Storing, and others looked to American history to recover a few great texts: *The Federalist* (Diamond), the Declaration of Independence and the speeches and writings of Abraham Lincoln (Jaffa), and the Anti-Federalist

writings and Frederick Douglass (Storing). Their point was that these texts (like those of Plato or Aristotle) had distilled timeless truths, which were at hand now as then as unsurpassed founts of political wisdom.

Today's Straussians have reversed their teachers' emphasis, writing history assessed by the yardstick of political-philosophical truth. Rewriting the history of Progressivism is their overriding preoccupation. Contemporary conservatives tell many stories about the Progressive era and its constitutionalism. They write in a variety of arenas, including serious scholarship from R. J. Pestritto (on Woodrow Wilson) and Jean Yarbrough (on Theodore Roosevelt), quasi-scholarly polemics (such as by Fox News's Andrew Napolitano and *National Review's* Jonah Goldberg), and innumerable magazine articles, policy papers, and blog posts. I use a wide lens here to capture and present a culture, a frame of mind that seems informed and coherent to initiates, and incomprehensible, even absurd, to outsiders—most especially to liberals.²¹

At the core of the new conservative histories of the Progressive era is a story of faithlessness, betrayal, and treachery: Progressives impiously, proudly, and purposefully spurned the Constitution and the Founders, and substituted a heretical, antinomian political theory destructive of foundational political principles (like liberty).²² While Diamond had criticized the Progressives' abandonment of the Framers as a prelude to adjudicating the very real constitutional dilemmas they confronted, the newer accounts prosecute the Progressives as quislings. Pestritto repeatedly refers to Woodrow Wilson's "self-conscious rejection of the theory that had animated the founding era." Hillsdale College offers an online course titled "Constitution 201: The Progressive Rejection of the Founding and the Rise of Bureaucratic Despotism."²³ Many note that Wilson was the first president to mock the nation's "Fourth of July sentiments," "to speak disparagingly of the Constitution," and to call it "obsolete."²⁴ Yarbrough's study is structured around the contrast between Theodore Roosevelt's professed admiration for the Constitution, the Founders, and *The Federalist*, and the lion's share of his statements and actions stabbing them in the back. For TR, "the blind, unconscious movement of a whole people supplanted the founders' emphasis on deliberation and choice, and history, rather than natural right" supplied "the moral ground on which political actions were to be judged." Whereas the Founders looked to (timeless) human nature (including self-interest) in fashioning the Constitution's architecture, TR believed in pure, disinterested public-spiritedness and the imperatives of growth and expansion.²⁵

Kesler prefers the Populists to the Progressives, not only because of the former's suspicion of elites and (especially centralized, executive) governmental

power, but also because Populists rooted their politics in the Declaration and the Constitution and "insist[ed] that the Constitution had been betrayed," while the Progressives retorted that it had "become outmoded."²⁶ Today's conservatives now trace the theory of "living constitutionalism" to this Progressive abandonment, holding "living" to be a contemporary euphemism for (this once frank) rejection. "From the beginning," conservatives say, that history shows that modern liberalism has repudiated "traditional American political principles," including the timeless truths of human nature and natural right. It has "sought to sap and undermine constitutional morality, the habits of mind and heart appropriate to republican government under the Constitution, and to supplant it with a new morality appropriate to a living constitution."²⁷ A call has gone out to the conservative movement to learn this history and to rally—despite their differences—in defense of the Founders' Constitution.²⁸

Themes

Beyond denouncing the Progressives for betraying the founding, contemporary conservative histories level five substantive charges against them: statism; democratism; elitism; hostility to free markets, business, and accumulated wealth; and racism.

While the Progressive rejection of an inherent human nature and of natural right might be characterized as skepticism, if not nihilism, most of these histories describe the Progressives as seized by an outsized faith—alas in the state itself, which they looked to with a "messianic" zeal redolent of the French Revolution, charged with realizing heaven on earth. Progressives, they say, believed "the day of the organic redeemer state was dawning . . . [and] the Constitution must evolve or be thrown into the dustbin of history." This fanatical faith—alien to the Founders—is seen as the real threat, far more dangerous than today's "obscene moral panic over the role of Christians in public life."²⁹

The Progressive faith, they charge, was that all was possible through the application of man's (scientific) mind wielding the instrumentalities of the state, unrestrained by any natural or God-given laws. This faith, they claim, adumbrated a fundamental error that reached its apotheosis in the twentieth century's totalitarian and fascist dictatorships.³⁰ Liberals may "remember the progressives as do-gooders who cleaned up the food supply and agitated for a more generous social welfare state and better working conditions." But the Nazis and the Italian Fascists did the same thing "for the same reasons and in

loyalty to roughly the same principles." Unregenerate statism has the theoretical potential to do good, but unrestrained by a Constitution, it has the potential to do *anything*, including the most radical evil.³¹

When the state is all, natural rights and civil liberties are nothing. Anticonstitutionalism and suppression went hand-in-hand for Woodrow Wilson, who "was prepared to bend any rule, avoid any constitutional principle, and crush any individual liberty for what he believed was the common good." As Goldberg teaches, "nothing that happened under the mad reign of Joe McCarthy remotely compares with what Wilson and his fellow progressives foisted on America." Besides "silencing dissent" through criminal prosecutions, Wilson (through George Creel's Committee on Public Information) created "the West's first modern ministry for propaganda."³²

Progressives supplemented Creel's work with compulsory education, "brainwashing" impressionable children in Progressive nostrums and credos. (Napolitano's education chapter is titled "Reeducation Camps.") While the Constitution made education a reserved power of the states, Wilson expressed high hopes that through national leadership, the public schools would make America's children (especially Catholics) "as unlike their fathers as we can."³³

Progressives invented our separation-of-powers and federalism-flouting national administrative and regulatory bureaucracies. Wilson argued that the Founders' design of checked and diffused powers no longer made sense when the American people were coming to understand themselves as an organic whole possessed of a single will. Rather than perpetuate those outdated structures through "blind worship" of the Constitution, we should forge new understandings better suited to the realization of the nation's emerging general will.³⁴

Drawing on Hegel's *Philosophy of Right*, Wilson argued that salaried, lifetime civil service appointments would insulate bureaucrats from politics and the pursuit of self-interest, freeing them to dispassionately implement society's objective will. Large swaths of Wilson's essay on this were "dedicated to the argument that the age of constitutionalism was over and an age of administration was upon us."³⁵ Where the Founders were foundationalists rooted in the laws of nature and nature's God, Hegel was an antifoundationalist taking history as his guide. The Founders' teacher, Locke, held that rights belonged to the individual; Hegelian historicists held them to be gifts of a purposive state stocked with elite bureaucrats doling out rights they discerned as unfolding history required. This created an endless need for more government, stocked with ever more bureaucrats and administrators, fed by ever-larger federal budgets.³⁶ To

launch this dynamic, Progressives allegedly adopted Bismarck's "Machiavelian masterstroke" of making the middle class dependent on the state, and undermining its members' status as self-determining authors of enlightened government.³⁷

Some polemical accounts describe these developments as no less than the arrival, during World War I, of an American fascism. Progressives hoped that the wartime statist breakthrough would become the peacetime status quo (which happened in the New Deal).³⁸ Goldberg therefore situates Progressivism within an early-twentieth-century transnational "fascist moment" in the West in which "a coalition of intellectuals going by various labels—Progressive, communist, socialist, and so forth—believed the liberal moment was drawing to a close. It was time for man to lay aside the anachronisms of natural law, traditional religion, constitutional liberty, capitalism . . . and rise to the responsibility of remaking the world in his own image." In this way, Mussolini's motto—"Everything in the State, nothing outside the State, nothing against the State"—became an American credo.³⁹

It is alleged that Progressives eased the path to statism with their leveling brand of democratism. Conservative accounts of Progressive constitutionalism emphasize its rejection of the Founders' commitment to fragmented and opposing powers—rooted in man's self-interested (or, for Christians, "fallen") nature—in favor of a direct, plebiscitary democracy premised on individuals' and society's perfectability, and on government's purpose to serve their will.⁴⁰ Since Progressives didn't distinguish between government and will, formal and permanent limits on the state were unnecessary, if not harmful—hence, their invention of "living" constitutionalism.

The Madisonian framework for limiting government, Wilson and others believed, had met the needs of a time when Americans were most concerned with limiting power and protecting rights. But the time had come to concentrate power, and for Wilson that meant that democracy was imperative.⁴¹ Wilson's position gave short shrift to the Framers' view that democracy had problems, that it was susceptible to popular passions and elite manipulations. Napolitano described this Progressive embrace of democracy as a coup installing a revolutionary new "constitutional" rule of pure majoritarianism, setting us on the road to fascism, where will is law and might makes right. (Kesler concluded, less alarmingly, that leading Progressives and the American people were too genuinely democratic to travel these more dangerous [European] paths.)⁴²

Progressive democratism informed, in turn, the movement's views on executive power. When Wilson and TR touched on the vices of democracy, they

insisted that they could be transcended through visionary leadership ("the perfect confusion of the triumph of justice with the triumph of the will"). While Wilson had begun his career calling for a parliamentary system to replace the Founders' system of dispersed powers, he changed his mind after watching TR effectively wield executive power, determining instead that presidential leadership was the way to go.⁴³

The modern president's authority would be derived not from the Constitution but directly from the people, whose will—as their leader (a term Wilson celebrated, but the Founders deprecated)—he would intuit and interpret. This meant that the president would regularly appeal to and guide the will of a mass public. Today's conservative critics point out that while the Founders would have feared this as a recipe for demagoguery, Wilson seemed to believe the public-spiritedness of modern men rendered that fear obsolete.⁴⁴ Indeed, Wilson's "unintentionally chilling" essay "Leaders of Men" (1890) for the first time put "vision" and "compassion" at the core of the presidency. In *Constitutional Government in the United States* (1908), Wilson allegedly flirted with fascist dictatorship by exhorting the president to be "as big a man as he can be."⁴⁵

Yarbrough explains that for the Founders, the military was leadership's native soil. She traces TR's novel "stewardship" and "inherent powers" theory of the executive, along with his passion to lead, to his wartime exploits and adventures. Yarbrough says that TR took Oliver Cromwell (and not, as some say, the constitutionalists Andrew Jackson and Abraham Lincoln) as his model for executive leadership in a republic.⁴⁶ For TR, "the whole point of the stewardship [and inherent powers] theory was precisely that the president did not have to cite a specific constitutional provision or statute for his actions so long as the needs of the people required it, and it was not explicitly forbidden."⁴⁷

Democratism fueled Progressive understandings of judicial power as well. TR's hostility to the judiciary famously grew over time as the judges insisted on enforcing constitutional limits (he eventually called for direct democratic checks on judicial review). While, unlike TR, Wilson recognized the important role that courts played in preserving constitutional liberty, his understanding of how they should interpret the Constitution to protect that liberty was historicist: judges should read it in light of the needs of the time—a different route to the same (anticonstitutional) end.⁴⁸

The new conservatives tell us that Progressives were not only misguided democrats but also unregenerate elitists. They sought to turn the nation's new (Germanic) post-Civil War research universities into "the fourth branch of

government." Under the "Wisconsin Model, the university could be trusted to define the state's social problems, prescribe cures, and then evaluate the success of the very programs it had recommended." "Nothing separated Progressivism from Populism, or for that matter from all previous American democracy more sharply," Kesler avers, "than this faith in the presumptive expertise, integrity, and political authority of the academic mandarins," entailing "rule by sociologists," with modern problems "forever managed by science."⁴⁹ These "priestly experts" saw themselves as empirical and apolitical, but they were armed with "a new religion of the divinized state and the nation as an organic community." The Constitution was an obstacle for them to overcome: whatever the purported limits on government, they would "plan, exhort, badger, and scold" the populace into submission.⁵⁰

Conservative accounts of Progressive elitism are often scathingly populist. Napolitano calls Wilson "an old, stiff, cold academic who really believed he was smarter than anyone else" and "a power-hungry authoritarian academic who wanted to bend the country and the Constitution to his will." TR was "the bellicose Nanny Stater from Oyster Bay" who mocked the constitutionalist William Howard Taft as a "puzzlewit." Napolitano finds TR's dismissal of Taft as stupid "similar to the tactic used by the modern Left to describe Republican candidates such as George W. Bush, Sarah Palin, and Michele Bachmann."⁵¹

Students force-fed "popular legend[s]" about noble muckrakers, as opposed to the Founders' more sober understandings of human nature, might believe these bureaucrats were working to advance society's collective interests. But, many of these histories argue, recent scholarship has shown that modern administration was instituted by large, established national corporations to stave off competition from smaller local (and more entrepreneurial) businesses. This suggests the folly of governmental agencies "picking [market] winners and losers."⁵²

Progressives hated free markets, businessmen, and accumulated wealth. Conservatives have been rewriting the history of the Gilded Age and the Progressive era to transform those whom liberals dub "robber barons" into fully realized, public-spirited, Christian American heroes whose beneficent projects were nearly thwarted by reformers who subjected them to constant opprobrium and harassment. These histories give businessmen equal billing with politicians and reformers as significant public actors and present them, in contrast with reformers (whose weaknesses and foibles are underlined), as the nation's true leaders, innovators, and builders.⁵³

Burton Folsom's *The Myth of the Robber Barons* (1987)—providing a series of engaging didactic profiles in entrepreneurship (of Cornelius Vanderbilt, James J. Hill, the Scrantons, Charles Schwab, John D. Rockefeller, and Andrew W. Mellon)—is a touchstone. It distinguishes between “market entrepreneurs,” who innovate to create and market a superior product at low cost, benefiting consumers and society alike, and “political entrepreneurs,” who feed on federal subsidies and favors, collusion, and speculation, without incentives to reduce cost or price. Folsom describes a historical trajectory, beginning in the Gilded Age, in which, first, government (futilely) sought to promote economic development by servicing political entrepreneurs. This only rewarded incompetence and indifference to public wants and needs. The result was economic dysfunction—shoddy products at high prices—and angry consumers, who called for aggressive regulation. Reformist politicians responded to these complaints by passing laws, again with (bad) unintended consequences. This made things worse, generating cries for even more regulation, and the cycle continued, leading—tragically—to our own heavily regulated, dysfunctional economy. By these lights, Progressive-era regulation was the by-product of government efforts to resolve problems that government had created in the first place—and the first step in an insalubrious cycle leading to the counterproductive, ever more intrusive, ever-expanding government of the present.⁵⁴

Although critical of political entrepreneurs, Folsom defends the accumulation of vast wealth by market entrepreneurs, who “created something out of nothing,” generating wealth and income for numberless others.⁵⁵ Far from exemplifying a rapacious social Darwinist ethic, many of these heroes preached Christian stewardship. New conservative histories emphasize the philanthropic munificence of Carnegie, Rockefeller, and Mellon, which liberal historians (allegedly) either downplayed or ignored in perversely celebrating the era's bitter, carping muckrakers.⁵⁶ Polemics accuse the Progressives of wielding “class-warfare politics—where successful businessmen and women are treated as the enemies of working folks . . . [as] greedy and corrupt.” TR's celebrated trust-busting was more about a voracious power-seeking executive “hell-bent on tak[ing] down the wealthy” than about economics.⁵⁷

The taxes needed to fund the ever expanding state menaced this entrepreneurial and philanthropic good work. Many of these histories recount Andrew Mellon's valiant antitax philosophy and activism.⁵⁸ Since most people aren't rich, there is a natural (selfish) inclination (in a democracy especially) to soak those who are. Mellon, however, taught that high taxes “were the chief parasites

draining the lifeblood of the American economy.” The redistribution of tax revenue from market to political entrepreneurs—growing the government perpetually larger—was even more galling.⁵⁹

Napolitano calls the income tax “slavery” and “grand larceny,” insisting (falsely) “the original Constitution never contemplated that the federal government would have a financial relationship with individual persons.” While there were long-standing trends in that direction, in *Pollock v. Farmers' Loan & Trust* (1895), which found income taxes collected under an 1894 law to be unconstitutional, “the Supreme Court finally rallied to defend the integrity of the Constitution.” The Sixteenth and Seventeenth Amendments, authorizing the income tax and providing for the direct election of senators, were unconstitutional amendments because they “profoundly upset the structural framework of the federal government,” empowering it to blow past the Constitution's enumerated limits on national power and violate the Fifth Amendment's Takings and Due Process Clauses. By denying Americans the natural right to the fruits of their labor and provoking them to tax evasion, moreover, the income tax corrupted their morals.⁶⁰

The much-maligned *Lochner* Court attempted to hold the line for the protection of “individual freedom of choice and fundamental rights,” including natural rights like liberty of contract (violated by minimum-wage statutes and other labor laws).⁶¹ Only “the twisted rhetoric of the Progressives and their progeny,” Napolitano insists, “inject[ed] into the national psyche that the economic rights of business owners and workers, their natural rights to trade goods and services and money, and the natural economic laws of supply and demand did not exist or deserve protection.”⁶²

By contrast, Yarbrough shares TR's condemnation of “the vulgar excesses of the Gilded Age.” But she admonishes him, especially as “one who professed to admire *The Federalist*,” for “fail[ing] to appreciate the ways . . . America's commercial spirit might contribute to a distinctive form of democratic greatness and encourage ‘the capable, masterful, and efficient’ qualities he most admired.” It got worse as he began cultivating a “hostility to capitalism.” While TR called Lincoln a hero, he “did not share Lincoln's faith that individual talent and effort when protected by law were generally sufficient to produce just rewards and to give hope to those who had not yet prospered.” Instead, TR insisted that government supervise great wealth, tolerating it only when it was “honorably obtained and well-used.” Traditionally, Yarbrough explains, government's role was to supply the conditions of justice (such as the protection of property rights), and “each individual received according to his merit.”

TR newly held it government's job to secure a "just balance," a "Square Deal," between diverse classes and competing economic interests, to achieve (redistributionist) social justice. On these grounds, Yarbrough (no libertarian) defends *Lochner*—a decision that TR, like all Progressives, anathematized.⁶³

Finally, stories about Progressive racism have convinced many conservatives that they themselves are the country's most reliable antiracists, since only foundationalists are anchored in the timeless principle (here, the equality of natural rights) that makes antiracism possible. Historicists, evolutionists, pragmatists, and secularists are dangerously unmoored, with consequences these histories describe.⁶⁴

Contemporary conservatives frolic in the many Progressive allusions to Anglo-Saxon superiority (see TR) and Darwinism (see Wilson), observing that they "bear a striking resemblance to the arguments advanced by the supporters of slavery." Links to Nazism are even more direct.⁶⁵ Progressives—whom Yarbrough calls morally bankrupt—opened the space for this virulent racism by repudiating the Founders' natural rights philosophy as enshrined in the Declaration of Independence. In *On the Origin of Species*, Darwin "quietly unseated God as the author of creation, substituting chance and relentless random mutations that favored one species over another in the unceasing struggle for food and place," making it "no longer possible to speak intelligibly of natural rights," of "a fixed human nature." The nation's centennial set the stage for an apocalyptic encounter between "the emerging [Darwinian] progressive worldview" and "the Declaration's insistence that every human being was created equal and endowed with certain inalienable rights."⁶⁶

The terrible moral consequences of this framework were evident in the Progressive enthusiasm for eugenics. "Today," Napolitano reports, "it is generally known that the Nazis in Germany committed awful atrocities . . . because of a racial belief that the descendants of the Aryans . . . were destined to rule the world. . . . Less known is that much of the same ideology was shared by . . . Wilson and Roosevelt." The Supreme Court's infamous *Buck v. Bell* (1927) decision upholding compulsory sterilization for the mentally retarded (authored by the TR appointee Oliver Wendell Holmes Jr.) "could have been written by Adolf Hitler." The lone dissent was from the Court's only Catholic.⁶⁷ After describing *Buck*, Napolitano immediately segues into a discussion of *Roe v. Wade*, described as "the judicial culmination of Rooseveltian and Wilsonian eugenics."⁶⁸

Margaret Sanger's eugenics advocacy is spotlighted by many, citing her genius for "hitching the racist-eugenic campaign to sexual pleasure and female

liberation," or her campaign for birth control (to reduce the number of black babies). Goldberg contrasts Sanger's views with those of the Founders anchored in natural law (prefigured, he says, by Saint Thomas Aquinas), "which holds that rights are derived not from government but by our very humanity and ultimately from the Creator of humanity, God." He then rallies his readers, insisting that "conservative religious and political dogma—under relentless attack from the left—may be the single greatest bulwark against eugenic schemes" and their cousins: genetic engineering, euthanasia, and abortion. "Good dogma," he concludes, "is the most profound inhibiting influence against bad ideas and the only guarantor that men will act on good ones."⁶⁹

Few were as racist as the elite university professors so central to Progressivism. Goldberg takes E. A. Ross as illustrative. Ross "helped Roscoe Pound formulate the new 'sociological jurisprudence'—the foundation for 'living constitutionalism.'" He also advocated minimum-wage laws to prevent white workers from being undercut by blacks and "Coolies."⁷⁰ Napolitano champions *Lochner* for countering the Progressive racism that inspired the state maximum-hours law for bakers, which targeted the "small immigrant bakery owners whose habits the white Anglo-Saxon government elite wanted to change."⁷¹

Skins of Meaning

Individually, these themes are familiar to students (and critics) of Progressivism. Conservatives, however, have woven them together creatively to form a dense ideological matrix that bids to displace the dominant (liberal) matrix as the new common sense.⁷² This "recombinative cultural politics," in which "political identifications and social cleavages are made," also works to reinforce long-standing (conservative) political identities, forge new ones, and knit together diverse elements of an otherwise philosophically fractious political movement.⁷³

Recombinative cultural politics pervades these stories. By noting that only in God are legislative, executive, and judicial power united, for example, Kesler roots separation-of-powers formalism in religious foundationalism.⁷⁴ Pestrutto associates a professionalized civil service with racism (because Wilson argued that bureaucrats could best intuit and implement the public's objective will in a racially homogeneous society).⁷⁵ Appeals to "good science" by academics are relentlessly undercut by stories about how those appeals issue from the same unmoored intellectual and moral space that underwrote Progressive advocacy

of racism, eugenics, and assaults on contract and property rights.⁷⁶ Eugenics and abortion are presented as essentially the same issue—with dog-whistle implications for the establishment of a national health care system in which amoral, science-wielding bureaucrats would govern matters of life and death (including euthanasia for the old and sick).⁷⁷ Goldberg presents affirmative action as the spawn of Progressive racism in which “the state . . . pick[s] winners and losers based on accidents of birth” (the Founders’ natural rights philosophy, they teach, was color-blind). The same obsession with “organiz[ing] society on racial lines” that informed Wilson’s commitment to “self-determination” underwrites today’s “identity politics,” in which people “organize themselves into . . . spiritual and biological units.”⁷⁸

Within this matrix, economic and social conservatism are conjoined. The growth-killing income tax involves a repudiation of God’s laws that personally corrupts.⁷⁹ Before the Seventeenth Amendment, when senators answered only to state legislatures and not national interest groups, parties, or the press, senators didn’t need to cultivate interested power centers and demagogically appeal to mass publics. These are the dynamics, Napolitano explains, that have brought us runaway federal spending, the Patriot Act, Obamacare, and the Troubled Asset Relief Program, as well as the (racially biased) assaults on rights and liberties associated with the wars on drugs and terror.⁸⁰

These discursive links, associations, and recombinations transform a list of Progressive themes into a devil’s brew, setting the stage for the conservative movement’s comprehensive rejection of the long-dominant liberal Democratic political coalition.

Conclusion

Today’s conservatives read contemporary politics and modern liberalism through the scrim of a constructed memory of the Progressive era. The Progressives, they teach, were united by a foundational commitment to the “destruction of the political and moral authority of the U.S. Constitution,” a malign achievement carried forward by liberals, which, by “denying permanent principles of right derived from nature and reason,” has corrupted modern America.⁸¹ We cannot understand conservative reaction to, for example, Michelle Obama’s recommendations on healthy eating, or President Obama’s leadership on financial and health care reform, or calls for an active compassionate federal government, or Republican intransigence on the budget, or the defunding of social science grants, or skepticism about climate science without taking

into account the stories conservatives tell about Progressivism’s wholesale assault on the Constitution.

The mid-twentieth-century successors of the pre-New Deal Old Right—especially legal academics—were so immersed in the New Deal’s Progressive-liberal regime that they adopted Progressive yardsticks themselves, stumping for democratic majorities and decrying *Lochner*-ite judicial activism. This implied either accepting the New Deal or arguing that judges had no business stopping it. Many conservatives rejected rigid interpretive theories premised on the possibility of discovering and applying fixed constitutional dictates to present controversies.⁸² Straussians, however, started constitutional conservatism on a different path by all but ignoring—and implicitly denying—the alleged countermajoritarian problem. They insisted on the centrality of the founding, as a matter of structure and design, to contemporary constitutional questions. Beard had sought to discredit the broader political theory of the founding as mere rationalization and subterfuge. Diamond called for its redemption. Notwithstanding Diamond’s circumspection in this regard, we can see in retrospect that his demur from the Progressive critique laid the groundwork for a “new originalism” in which conservatives would seek the restoration of the Founders’ Constitution, understood literally and substantively. Outright repudiation of the Progressives’ handiwork makes aggressive use of (originalist) judicial review an unproblematic part of the process. The Straussian critique of Progressives has liberated conservatism from (Borkian, Progressive-conservative) hand-wringing about the antidemocratic nature of this practice and bolstered the reclamation project.⁸³

The charges lodged by contemporary conservatives against early-twentieth-century Progressives are familiar, and broadly accurate. They nevertheless present themselves in these histories as if through a fun-house mirror. Diamond and Storing (and a few of their more moderate contemporary successors) emphasized that Progressives faced genuine problems about how to live under the Constitution in a radically altered context where wrenching new problems troubled prevailing understandings. Whereas Diamond was open to intelligent criticism of—and even divergence from—the Founders, contemporary conservative histories of the Progressive era present the matter as a stark, Manichean—indeed, world-historical—choice. Like the Cold War framing of Whittaker Chambers’s *Witness* (1952) or Jaffa’s *Crisis of the House Divided* (1959), the choice between the Progressives and the Founders is transmogrified—literally—into a choice between God and man.⁸⁴ When joined with the spirit of legalist originalists like Bork and Berger, who alleged an abandonment of law for politics, they

transform (familiar) critiques of Progressivism into apocalyptic stories of faith and heresy, salvation and damnation, friends and enemies, loyalty and treason. This, at the far reaches, is constitutionalism as McCarthyism.

These histories present Progressives as a monolithic army on the march. In fact, as this volume's other essays demonstrate, the movement was diverse and often self-contradicting, and many of its participants challenged the same extreme formulations that agitate contemporary conservatives. Drawn to the role of truth tellers ministering to the hoodwinked masses, these conservatives—whether from calculation or ignorance—say next to nothing about the extensive academic literature (and political critique) from the modern liberal Left challenging Progressivism's statism, elitism, scientism, ethnocentrism, and racism. Conservatives never explain that modern American liberalism and the postwar Left were forged both as an outgrowth of, and in reaction against, Progressivism.

Whatever its virtues, contemporary conservative insistence on an oathlike allegiance to a natural law—natural rights foundationalism as our only stay against tyranny and barbarism is astonishingly naive about history. Time and again, foundationalist appeals to natural law have been used to justify the most tyrannical and barbaric oppression—including slavery and segregation.⁸⁵ The contemporary conservative compulsion to showcase the Progressives' smoking-gun philosophical-theological error and, having exposed them as "moral relativists," to denounce them as heretics amounts to a dogmatic refusal of history's teachings about the dangers of righteous pride. Thus, what began as a critique of man's sinfulness and pride ends up replicating it, reenacting the very egoism they hold damnable in their enemies.

These conservative stories about Progressivism, which are both accurate and distorted, provide an increasingly powerful template for a fundamental assault on the modern, post-New Deal American state, one that cuts much deeper than the standard legalist-originalist critique of judicial activism ever did or could. Efforts to sustain that state must aggressively challenge these histories, where meanings—and perhaps worlds—are made.

Notes

1. Thomas West and William A. Schambra, "The Progressive Movement and the Transformation of American Politics," Heritage Foundation First Principles Series Report 12 (July 18, 2007), 1.

2. See Robert Post and Reva Siegel, "Democratic Constitutionalism," in *The Constitution in 2020*, ed. Jack Balkin and Reva Siegel (Oxford, 2009), 26; Keith E. Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 2 (2004): 599–613.

3. See Johnathan O'Neill and Joseph Postell, "Introduction: The Conservative Response to Progressivism: Myth and Reality"; O'Neill, "Constitutional Conservatism During the Progressive Era: The National Association for Constitutional Government and *The Constitutional Review*"; and William Schambra, "The Election of 1912 and the Origins of Constitutional Conservatism," all in *Toward an American Conservatism: Constitutional Conservatism During the Progressive Era*, ed. Joseph W. Postell and Johnathan O'Neill (Palgrave Macmillan, 2013).

4. Leo Strauss, *Natural Right and History* (Chicago, 1953). See also John Marini, "Progressivism, Modern Political Science, and the Transformation of American Constitutionalism," in *The Progressive Revolution in Politics and Political Science: Transforming the American Regime*, ed. John Marini and Ken Masugi (Rowman and Littlefield, 2005), 235–43.

5. Kesler, *I Am the Change: Barack Obama and the Crisis of Liberalism* (Broadside, 2012), 230–31.

6. Douglass Adair, *Fame and the Founding Fathers*, ed. Trevor Colbourn (Norton, 1974), a collection of essays from the 1940s and 1950s; Robert E. Brown, *Charles Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution"* (Princeton, 1956); Forrest MacDonald, *We the People: The Economic Origins of the Constitution* (Chicago, 1958). See Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (Macmillan, 1913).

7. Catherine Zuckert and Michael Zuckert, *The Truth About Leo Strauss: Political Philosophy and American Democracy* (Chicago, 2006), 209–21.

8. Diamond, "The Declaration and the Constitution: Liberty, Democracy, and the Founders," *Public Interest* 41 (Fall 1975): 39–55, quotations on 39, 40, 42–45.

9. *Ibid.*, 45.

10. Zuckert and Zuckert, *Leo Strauss*, 211–12.

11. Martin Diamond, "What the Framers Meant by Federalism," in *A Nation of States*, ed. Robert Goldwin (Rand McNally, 1963), 25 (emphasis added).

12. Martin Diamond, "Liberals, Conservatives, and the Constitution," *Public Interest* 1 (Fall 1965): 96–97; Diamond, "What the Framers Meant," 25–26, 42.

13. Diamond, "Liberals, Conservatives," 96–97 (emphasis in the original).

14. *Ibid.*, 97–98, 106–8.

15. *Ibid.*, 109.

16. Diamond, "What the Framers Meant," 47–49.

17. *Ibid.*, 51–52 (emphasis in the original).

18. *Ibid.*, 55.

19. Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (Fall 1971): 1-35; Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard, 1977). See David E. Bernstein, "The Progressive Origins of Conservative Hostility to *Lochner v. New York*," in Postell and O'Neill, *American Conservatism*.
20. See David E. Bernstein, *Rehabilitating "Lochner": Defending Individual Rights Against Progressive Reform* (Chicago, 2011); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, 2004); Postell and O'Neill, *American Conservatism*.
21. The polemicists draw from scholarly sources, but their presentation is cruder and more provocative; see Victoria Hattam and Joseph Lowdes, "The Ground Beneath Our Feet: Language, Culture, and Political Change," in *Formative Acts: American Politics in the Making*, ed. Stephen Skowronek and Matthew Glassman (Pennsylvania, 2007), 199-219, 214, 217.
22. See, for example, Thomas West, *The Progressive Revolution in Politics and Political Science* (Rowman and Littlefield, 2005); Postell and O'Neill, "The Conservative Response to Progressivism," 3; O'Neill, "Constitutional Conservatism During the Progressive Era," 24-25; Schambra, "Election of 1912," 95-96, 116; West, "The Progressive Movement"; John Marini, "Abandoning the Constitution," *Claremont Review of Books*, Spring 2012, 27.
23. See <http://kirbycenter.hillsdale.edu>.
24. Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Rowman and Littlefield, 2005); Ronald J. Pestritto, "Woodrow Wilson: Godfather of Liberalism," Heritage Foundation, Makers of American Political Thought Series #1 on Political Thought (July 31, 2012). See Glenn Beck, "Progressivism Is the Poison That Is Killing Us," <http://mediamatters.org/video/2010/01/21/beck-progressivism-is-the-poison-thats-killing/159366>; R. J. Dennis Brady, "Woodrow Wilson, the Cancer of Progressivism, and the Dismantling of the Constitution: The History Lessons That the Progressives Don't Want You to Know," *BradyReports.com* (March 30, 2011); Steven Hayward, "Liberals and the Constitution," *powerlineblog.com* (February 7, 2012); Mark Levin, "We're Living in a Post-Constitutional America," www.realclearpolitics.com (January 19, 2012).
25. Pestritto, *Woodrow Wilson*, 2; Jean M. Yarbrough, *Theodore Roosevelt and the American Political Tradition* (Kansas, 2012), 6-7, 64, 83, 159, 220; Jonah Goldberg, *Liberal Fascism: The Secret History of the American Left from Mussolini to the Politics of Meaning* (Doubleday, 2008), 86, 88; Kesler, *Change*, 45-47, 49, 69, 75, 123-24.
26. Goldberg, *Liberal Fascism*, 86, 88; Kesler, *Change*, 33-34, 40-43, 73, 231-32; Yarbrough, *Theodore Roosevelt*, 43, 79, 106, 212, 230-31.
27. Kesler, *Change*, 75-76, 123-24, 187; Yarbrough, *Theodore Roosevelt*, 222-23.
28. See, for example, Peter Berkowitz, *Constitutional Conservatism: Liberty, Self-Government, and Political Moderation* (Hoover Institution, 2013), viii, 43-44, 90;

- O'Neill, "Constitutional Conservatism During the Progressive Era," 13-15; Ken I. Kersch, "Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in *National Review*, 1955-1980," *Studies in American Political Development* 25 (Spring 2011): 86-116.
29. As described in Kesler, *Change*, 158; Goldberg, *Liberal Fascism*, 8, 12-13, 15, 21, 87-88, 216-19; Marini and Masugi, introduction to Marini and Masugi, *Progressive Revolution*, 1-2. See also Richard M. Weaver, *Ideas Have Consequences* (Chicago, 1948); Eric Voegelin, *The New Science of Politics: An Introduction* (Chicago, 1952).
30. Andrew P. Napolitano, *Theodore and Woodrow: How Two American Presidents Destroyed Constitutional Freedom* (Thomas Nelson, 2012), 24.
31. Goldberg, *Liberal Fascism*, 12, 79, 81.
32. Napolitano, *Theodore and Woodrow*, 227-32, 234; Kesler, *Change*, 188; Goldberg, *Liberal Fascism*, 109, 112-13.
33. Napolitano, *Theodore and Woodrow*, xii, 7, 19-26. The final quotation is from Wilson.
34. Pestritto, *Wilson*, 112-27.
35. Kesler, *Change*, 170-71; Yarbrough, *Theodore Roosevelt*, 102; Napolitano, *Theodore and Woodrow*, 37; Pestritto, *Wilson*, 221-46; 227-28. See also Pestritto, *Wilson*, 72-73, 83-85, 100-103, 133-39.
36. Kesler, *Change*, 58-59, 62; Yarbrough, *Theodore Roosevelt*, 13, 19-24, 204-5, 208; Goldberg, *Liberal Fascism*, 52. See also Marini and Masugi, *Progressive Revolution*, 1, 3, 17, 222-33; Bradley C. S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (ISI, 2009), 95; James W. Ceaser, *Nature and History in American Political Development* (Harvard, 2006).
37. Goldberg, *Liberal Fascism*, 95-96; Yarbrough, *Theodore Roosevelt*, 220, 225. Yarbrough links American Progressives with Otto von Bismarck, but Kesler observes that World War I made ongoing associations with Germany more difficult, and that many drew also from socially conscious English liberalism, which made it easier for FDR to tie America's liberal future to the Founders and the nation's liberal past; see Kesler, *Change*, 111-13, 119-20.
38. Napolitano, *Theodore and Woodrow*, 137; Goldberg, *Liberal Fascism*, 11-17, 78-120, 132, 221.
39. Goldberg, *Liberal Fascism*, 31.
40. Yarbrough, *Theodore Roosevelt*, 61, 106, 233; Pestritto, *Wilson*, 71-75, 77-78, 104-7; Schambra, "Election of 1912," 96; Marini, "Abandoning the Constitution," 29-30.
41. Kesler, *Change*, 99-102.
42. Napolitano, *Theodore and Woodrow*, 5, 8; but see Kesler, *Change*, 96, 99.
43. Kesler, *Change*, 99-102; Goldberg, *Liberal Fascism*.
44. Pestritto, *Wilson*, 167-72, 206-16; see Jeffrey Tulis, *The Rhetorical Presidency* (Princeton, 1987).

45. Goldberg, *Liberal Fascism*, 80, 85–86, 89; Kesler, *Change*, 91–94, 121, 180–85; Pestritto, *Wilson*, 200–216; see Tulis, *Rhetorical Presidency*.
46. Yarbrough, *Theodore Roosevelt*, 102, 124, 133–37, 139–40, 149, 172.
47. *Ibid.*, 147–50.
48. Pestritto, *Wilson*, 188–201; see also Paul Carrese, “Montesquieu, the Founders, and Woodrow Wilson: The Evolution of Rights and the Eclipse of Constitutionalism,” in Marini and Masugi, *Progressive Revolution*, 149–57.
49. Kesler, *Change*, 52–55, 89; Pestritto, *Wilson*, 89–93.
50. Goldberg, *Liberal Fascism*, 6–8, 14; Pestritto, *Wilson*, 89.
51. Napolitano, *Theodore and Woodrow*, xii, 5, 8, 76–77; Goldberg, *Liberal Fascism*, 82.
52. See Napolitano, *Theodore and Woodrow*, 38–43 (on FDR); Richard Epstein, *How Progressives Rewrote the Constitution* (Cato, 2007); James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Liberty Fund, 1999 [1962]); Bernstein, *Rehabilitating “Lochner.”*
53. See, for example, John G. West, “Darwin’s Public Policy: Nineteenth-Century Science and the Rise of the American Welfare State,” in Marini and Masugi, *Progressive Revolution*, 253–86; Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (HarperCollins, 2007); Joseph W. Postell, “‘Roaring’ Against Progressivism: Calvin Coolidge’s Principled Conservatism,” in Postell and O’Neill, *Toward an American Conservatism*, 181–208, quotation on 192–93. See also Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* (Harcourt Brace, 1980); Thomas E. Woods Jr., *The Politically Incorrect Guide to American History* (Washington, D.C., 2004), 93–98.
54. Burton W. Folsom Jr., *The Myth of the Robber Barons: A New Look at the Rise of Big Business in America*, 6th ed. (Young America’s Foundation, 2010 [1987]), x, 1–2, 32, 39, 127.
55. *Ibid.*, 52, 54, 56. On rent seeking and governmental sponsorship of cartels, see Goldberg, *Liberal Fascism*, 291, 293, 303; Napolitano, *Theodore and Woodrow*, 9, 46–48, 64, 54–74; Epstein, *How Progressives Rewrote the Constitution*; see also William Graham Sumner, *What the Social Classes Owe to Each Other* (1883).
56. Folsom, *Robber Barons*, 87, 94–95; Kesler, *Change*, 64–65; Goldberg, *Liberal Fascism*, 258; Yarbrough, *Theodore Roosevelt*, 89; Friedman and Friedman, *Free to Choose*; see also Gertrude Himmelfarb, “Varieties of Social Darwinism,” in *Darwin and the Darwinian Revolution* (Ivan R. Dee, 1996 [1959]).
57. Napolitano, *Theodore and Woodrow*, 140–42, 144–46, 155; see also Folsom, *Robber Barons*, 35–39; Yarbrough, *Theodore Roosevelt*, 150–55; Woods, *Politically Incorrect Guide*, 103–8 (section entitled “Antitrust Idiocy” discussing “the absurd and arbitrary character of antitrust law”). Like Yarbrough (and Folsom), Napolitano adds: “Some businessmen of the time were genuinely crooks.”
58. See, for example, Folsom, *Robber Barons*, chap. 6; Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (HarperCollins, 2007), chap. 10, “Mellon’s

- Gift”; Amity Shlaes, *Coolidge* (HarperCollins, 2013); Postell, “‘Roaring’ against Conservatism,” 197–200.
59. Folsom, *Robber Barons*, 108, 112–14, 120.
60. Napolitano, *Theodore and Woodrow*, 235–37, 240, 242–43, 245, 247.
61. *Ibid.*, 126.
62. *Ibid.*, 130, 131, 133–35, 139; Yarbrough, *Theodore Roosevelt*, 169; see also Epstein, *How Progressives Rewrote the Constitution*.
63. Yarbrough, *Theodore Roosevelt*, 88–90, 127, 129, 187, 192, 214–16, 218.
64. Ken I. Kersch, “Beyond Originalism: Conservative Declarationism and Constitutional Redemption,” *Maryland Law Review* 71 (2011): 229–82. See also, for example, Peter C. Myers, “Frederick Douglass’s Natural Rights Constitutionalism: The Postwar Pre-Progressive Period,” in Marini and Masugi, *Progressive Revolution*, 74–75 (“Douglass’s postwar constitutionalism remains grounded in his continuing agreement with . . . the Founders’ fundamental principles. . . . Douglass was never a forerunner of Progressivism.”); Justin Buckley Dyer, *Slavery, Abortion, and the Politics of Constitutional Meaning* (Cambridge, 2013).
65. Yarbrough, *Theodore Roosevelt*, 60, 74–84, 197; Goldberg, *Liberal Fascism*, 115–16; Napolitano, *Theodore and Woodrow*, 107–8; West and Schambra, “Progressive Movement,” 7.
66. Kesler, *Change*, 78–81; Yarbrough, *Theodore Roosevelt*, 10–12, 79–81; Pestritto, *Wilson*, 104, 109; Watson, *Living Constitutionalism*, 38–48. Yarbrough, *Theodore Roosevelt*, 13–14; West and Schambra, “The Progressive Movement,” 3, 5. Kersch, “Beyond Originalism.” See, for example, Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (Doubleday, 1959).
67. Napolitano, *Theodore and Woodrow*, 106, 107, 109; see also Goldberg, *Liberal Fascism*, 257.
68. Napolitano, *Theodore and Woodrow*, 93–100, 104–7, 109–10, 132; Goldberg, *Liberal Fascism*, 15–16, 254, 272–73.
69. Goldberg, *Liberal Fascism*, 254.
70. *Ibid.*, 260–65.
71. Napolitano, *Theodore and Woodrow*, 93–100, 104–7, 110, 132; Goldberg, *Liberal Fascism*, 15–16, 254, 272–73.
72. Hattam and Lowndes, “Ground Beneath Our Feet,” 214, 217–18.
73. *Ibid.*, 201–4, 211; Adam Sheingate, “The Terrain of the Political Entrepreneur,” in Skowronek and Glassman, *Formative Acts*, 15, 18–19, 19–20. See also Anthony Grafton and Lisa Jardine, “‘Studied for Action’: How Gabriel Harvey Read His Livy,” *Past and Present* 129 (1990): 30–78; Bruce Miroff, “Leadership and American Political Development,” in Skowronek and Glassman, *Formative Acts*, 39.
74. Charles R. Kesler, “What Separation of Powers Means for Constitutional Government,” Heritage Foundation, First Principles Series Report #17 (December 17, 2007): “This precaution would not be necessary if reason and passion were utterly

harmonious. . . . These conditions, however, are unique to God, who alone justly unites the legislative, judicial, and executive powers in the same hands."

75. Pestritto, *Wilson*, 73.

76. Goldberg, for example, joins these issues seamlessly across a few short pages; see Goldberg, *Liberal Fascism*, 260–61, 264–65.

77. Napolitano, *Theodore and Woodrow*, 104–7; Goldberg, *Liberal Fascism*, 15–16, 100, 272–73. See C. Everett Koop and Francis Schaeffer, *Whatever Happened to the Human Race?* (Crossway, 1979).

78. Goldberg, *Liberal Fascism*, 254–55.

79. See Napolitano, *Theodore and Woodrow*, 242–43.

80. *Ibid.*, 75–78, 84–85, 87, 89, 172–83.

81. Marini, "Abandoning the Constitution," 27.

82. See, for example, L. Brent Bozell, *The Warren Revolution: Reflections on the Consensus Society* (Arlington House, 1966); Diamond, "What the Framers Meant," 25.

83. Whittington, "The New Originalism."

84. Whittaker Chambers, *Witness* (Random House, 1952); Jaffa, *Crisis of the House Divided*. As Jaffa saw it, Lincoln = God (natural law/natural rights); Stephen Douglas = Man (legal positivism). This is in Strauss from the outset.

85. See Mark Graber, "The Declaration of Independence as Canon Fodder," *Tulsa Law Review* 49 (2013): 469–84.

PART II

NATION BUILDING: PARTY POLITICS AND THE SEARCH FOR A NEW CONSENSUS

