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REVISION OF PROGRESSIVE ERA HISTORY CONTINUES

Paul Kens*

TOWARD AN AMERICAN CONSERVATISM: CONSTITUTIONAL CONSERVATISM DURING THE PROGRESSIVE ERA (Joseph W. Postell & Johnathan O'Neill, eds., 2013). Pp. 288. Hardcover \$100.00.

DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY (2013). Pp. 582. Hardcover \$ 85.00.

The two books featured in this review join the modern trend of revisionist scholarship that reassesses legal history inherited from the Progressive Era. Motivated by their belief that Progressives misrepresented conservatives of the era as mere apologists for the economic elite, the authors of *Toward an American Conservatism*¹ maintain that some conservative leaders of the era were actually advocates of a philosophy faithful to the Constitution. Similarly, *Laws History*² observes that misrepresentations by leading Progressive scholars helped sociological jurisprudence supplant history as a means of studying and understanding law. David Rabban's goal is to return the study of legal history to a prominent role. Beyond this similarity the books are vastly different in style, method, and purpose.

"*Towards an American Conservatism* joins an outpouring of revisionist scholarship that will eventually rewrite the whole history of twentieth century American politics and economics."³ So writes Charles R. Kesler, author of the epilogue to this edited volume. For Kesler, and the ten other authors who contributed to this book, this revision is necessary because the currently dominant depiction of the early twentieth century conservatives is seriously flawed.⁴

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1. TOWARD AN AMERICAN CONSERVATISM: CONSTITUTIONAL CONSERVATISM DURING THE PROGRESSIVE ERA (Joseph Postell & Jonathan O'Neill, eds., 2013) [hereinafter, AMERICAN CONSERVATISM].

2. DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN IN HISTORY (2013).

3. Charles R. Kesler, *Epilogue*, in AMERICAN CONSERVATISM, *supra* note 1, at 269.

4. The contributors are: David B. Bernstein, John W. Grant, Sidney M. Milkis, William A. Schambra, W. Taylor Reveley, Joseph Postell, Johnathan O'Neill, James R. Stoner, Jr., David Davenport, Gordon Lloyd, and Charles R. Kesler.

Each of their essays builds from the proposition that Progressive activists and historians misrepresented conservatives of the era as being small-minded and selfish apologists for the rich and powerful who used theories of social Darwinism and laissez-faire economics to block social reform. The stated goal of these historians is to set the record straight and revive the reputation of conservative leaders of the era who they call “constitutional conservatives.” Among those leaders are Presidents Herbert Hoover and Calvin Coolidge, along with William Howard Taft in his roles as President, Chief Justice of the U.S. Supreme Court, and governor of the Philippines.

The essays use a variety of approaches to make their point. One highlights the National Association for Conservative Government.⁵ Others focus on events like the controversial Supreme Court decision *Lochner v. New York*⁶ and the debate surrounding the League of Nations. An essay on the election of 1912 contrasts the conservative views of Taft and Elihu Root with the more progressive-leaning Theodore Roosevelt. Another reviews some of the opinions of the Progressive Supreme Court Justice Charles Evans Hughes.⁷

In the process the authors draw a stark contrast. Progressives, they assert, were willing to reject the Constitution in order to achieve their goals.⁸ Constitutional conservatives remained committed and faithful to the Constitution even in the face of major societal changes and the economic hardships of the years leading to the Great Depression.

The phrase “constitutional conservative” is used so much today that it is difficult to know what it means. Just about every conservative politician, interest group, or commentator claims it, although it is especially popular among those who define themselves as having Libertarian or Tea Party leanings. This collection, which grew out of a Heritage Foundation conference, is in large measure an attempt by the authors to define constitutional conservatism and set themselves apart from others who lay claim to the title.

In their introduction to the volume, Johnathan O’Neill and Joseph Postell explain that the basic tenets of constitutional conservatism were a firm commitment to the principles of the Constitution and the Declaration of Independence, and a devotion to a theory of natural rights through the constitutional system.⁹ O’Neill points out that fidelity and reverence to the Constitution and the Declaration set them apart, not only from Progressives, but also from other conservatives of the era.¹⁰ Drawing a contrast with three other strands of Progressive Era conservatism, he observes that Burkean conservatives “defended certain aspects of the constitutional order yet rejected its foundation in early American liberal theory of natural rights, popular sovereignty, and social contract.”¹¹ A commitment to the doctrine of states rights gradually caused Southern Agrarians to abandon natural rights as well. Similarly, Libertarians, in their defense of individual liberty above

5. See Jonathan O’Neill, *Constitutional Conservatism during the Progressive Era: The National Association for Constitutional Government and The Constitutional Review*, in AMERICAN CONSERVATISM, *supra* note 1, at 13-34.

6. *Lochner v. New York*, 198 U.S. 45 (1905).

7. See James R. Stoner, Jr., *Rational Compromise: Charles Evan Hughes as a Progressive Originalist*, in AMERICAN CONSERVATISM, *supra* note 1, at 209-34.

8. O’Neill, *supra* note 5, at 3.

9. *Id.* at 4.

10. *Id.* at 14-21.

11. *Id.* at 16.

all else, rejected “representative politics derived from natural rights and popular sovereignty.”¹²

Popular sovereignty held a curious place in the constitutional conservatives’ hierarchy of values. Many of the conservatives featured in this book display admiration for the ideal of popular sovereignty. John W. Grant, for example, writes that William Howard Taft was troubled with the fact that American rule of the Philippines ran afoul of the social contract theory that inspired the American founding. The principle that the right to govern comes from the consent of the governed presented an especially vexing problem. Even though Taft, acting as governor of the Philippines, compromised on this principle, Grant left no doubt that he took it seriously.¹³ But Taft’s admiration for popular sovereignty waned when it moved from the ideal—consent of the governed—to the practical—implementation of a democratic form of government. Writing about the election of 1912, Sidney M. Milkis contrasts the views of Taft and Theodore Roosevelt on the role of government. Roosevelt proposed the idea that “pure democracy” provided the means of securing rather than thwarting the absolute right of the people to rule themselves and provide for their social and industrial well-being.¹⁴ Taft, by contrast, held on to a brand of conservatism that would protect the right of property against “popular and populist” solutions to economic and social discontents of the day.¹⁵ Taft’s resistance to popular and populist solutions reflects a distrust of democracy that runs throughout the essays.

The constitutional conservative conception of natural rights had an undeniably religious aspect. In the courts it took the form of jurisprudence that built on and reinforced a religiously informed conception of a morally ordered world.¹⁶ The theme of religiously-informed morality runs throughout the essays. Coolidge, for example, believed that “the basis of all [our founding principles], historically and logically, is religious belief.”¹⁷ For constitutional conservatives of the era, religiously-informed morality meant Christian morality. In his chapter on the League of Nations, W. Taylor Reveley IV highlights the importance of classicism and Christianity, guided by Calvinist theology.¹⁸ Herbert Hoover also made the link unmistakable, maintaining that, “the Christian Faith” undergirds the “conception of individual freedom and brotherhood”¹⁹

Despite its admiration for the ideals of popular sovereignty and brotherhood, the predominant characteristic of the constitutional conservatives’ conception of natural rights was individualism. Individual liberty and property rights stood at the apex of the list of its values. Responding to the Progressives’ portrayals of the era’s conservatives, much of this

12. *Id.* at 20.

13. John W. Grant, *William Howard Taft on America and the Philippines: Equality, Natural Rights, and Imperialism*, in AMERICAN CONSERVATISM, *supra* note 1, at 121-22, 137-43.

14. Sidney M. Milkis, *William Howard Taft and the Struggle for the Soul of the Constitution*, in AMERICAN CONSERVATISM, *supra* note 1, at 75.

15. *Id.* at 86-87.

16. O’Neill, *supra* note 5, at 22 (citing MARK WARREN BAILEY, GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT 34 (2004)).

17. Joseph Postell, “Roaring” Against Progressivism: Calvin Coolidge’s Principled Conservatism, in AMERICAN CONSERVATISM, *supra* note 1, at 185-86.

18. W. Taylor Reveley, *Civilization versus Modernity: The League of Nations in the Crisis of World Civilization*, in AMERICAN CONSERVATISM, *supra* note 1, at 155.

19. Gordon Lloyd & David Davenport, *The Two Phases of Herbert Hoover’s Constitutional Conservatism*, in AMERICAN CONSERVATISM, *supra* note 1, at 256.

book is devoted to explaining why and how constitutional conservatives, despite their attachment to individualism and property rights, were not mere apologists for big business and advocates of laissez-faire. Several of the chapters emphasize that, unlike Libertarians, constitutional conservatives saw a role for government regulation within the individualist framework. Coolidge, for example, believed that liberty was intrinsically tied to the free enterprise system and property rights.²⁰ Yet he also encouraged dealing with some of the problems of industrialization, like maximum working hours for women and children, through sensible regulation.²¹ Likewise, Hoover distinguished his “rugged individualism” or “spiritual individualism,” which recognized a role for constructive government, from the “free for all and devil-take-the hindmost” attitude of laissez-faire.²²

Even as they strive to distinguish the individualism of constitutional conservatives from more radical ideas about entrepreneurial liberty, the various authors of this book stress that the constitutional conservatives believed that the proper role for constructive government was very limited. It presumed a wide separation between government and business. It held that, at most, government should provide rules of the road for private enterprise. It should encourage collaboration and voluntary cooperation between government and business. And it held that business should be guided by a moral duty of service to minister to the economic requirements of civilization.²³

Whether the constitutional conservatives convincingly distinguished themselves from proponents of laissez-faire may be a matter of one’s point of view. However, what may be more important to the authors is demonstrating that, in advocating their brand of individualism, constitutional conservatives were principled advocates of the Constitution and the ideals of the founding. For the most part they do this in broad theoretical terms. The constitutional conservatives’ advocacy of limited government was not motivated by expedience, but by a particular understanding of justice and a desire to preserve the wisdom of the past, observes Postell.²⁴ It was based on the individual rights that the founders had enshrined in the Constitution.²⁵ In the words of Herbert Hoover, these inalienable freedoms and protections that even government may not infringe were “incorporated in black and white into the Constitution” and were “as clear as the Ten Commandments.”²⁶ The constitutional conservatives’ advocacy of limited governmental involvement in the economy was built on the idea that liberty of property was preeminent among these rights. Our rights to property follow from our right to liberty, Coolidge reasoned, because without property rights liberty cannot be preserved.²⁷

Convinced that theirs was the only true interpretation of the Constitution, constitutional conservatives presented themselves as warriors in an epic struggle between individualism and collectivism.²⁸ For them, the Progressive reforms culminating in the New Deal

20. Postell, *supra* note 17, at 198.

21. *Id.* at 182.

22. Lloyd & Davenport, *supra* note 19, at 241-44.

23. Postell, *supra* note 17, at 192-97; Lloyd & Davenport, *supra* note 19, at 237-47.

24. Postell, *supra* note 17, at 191.

25. *Id.* at 194.

26. Lloyd & Davenport, *supra* note 19, at 256.

27. Postell, *supra* note 17, at 187.

28. *Id.* at 191-92.

would have the effect of supplanting individual liberty with servitude of the individual to the state. It thus represented a challenge to the Constitution itself.²⁹

In most of the essays, the claim that constitutional conservatives were principled defenders of the Constitution hinges on generalities. David Bernstein's contribution is different in that it focuses on one specific and controversial right, liberty of contract. Liberty of contract, of course, is not mentioned in the Constitution. It thus became the symbol of conservative judicial activism and a favorite target for Progressives who complained that the doctrine was simply the creation of judges who employed it to protect big business. Bernstein's goal is to demonstrate that, even though it is not expressly guaranteed, the doctrine reflects a firm commitment to the principles of the Constitution. Liberty of contract grows out of a particularly American form of individualism embedded in the Constitution, he writes.³⁰ It contains two ideals: hostility to class legislation, and the idea that government has no authority to violate the natural rights of the American people.³¹

Bernstein explains that the idea that liberty of contract sprouted from a long-standing Anglo-American tradition holding that government cannot arbitrarily deprive individuals of their liberty or property. Tracing back to the Magna Carta, the American version of the tradition found its way into most state constitutions and the Fifth Amendment of the United States Constitution as the guarantee that government could not deprive an individual of liberty or property without due process of law.³² In our early history, the application of the due process guarantee was relatively narrow: applying mainly to the protection of vested property rights.³³ But Bernstein maintains that a broader conception of due process as a prohibition on government interfering with a person's right to do what they want with their property was always percolating at the surface of American law. Only after 1868, when the Due Process Clause was included in the Fourteenth Amendment, did the theory begin to gain a firm foothold. It showed up in state court opinions in the 1880s. The United States Supreme Court eventually recognized it in the 1897 case of *Allgeyer v. Louisiana*.³⁴

Bernstein's history of liberty of contract is by-in-large a standard account from the point of view of those who claim the Due Process Clause places a severe limitation on the power of government to regulate business. It is unlikely to convince those who are skeptical. But skeptics do not appear to be his target audience. Instead, he seems to be aiming at those modern day conservatives whose political platforms attack judicial activism and advocate for strict construction of the text of the Constitution. He maintains that this "conservative originalist" position, which grew in response to the Warren Court's liberalism, is misguided. The reason goes back to his original precept, that the Constitution protected natural rights, such as liberty of contract, regardless of whether they were expressly enumerated in the document. What Progressive critics and some modern conservatives interpret as judicial activism, Bernstein turns into an example of fidelity to the original purpose of the Constitution. He thus concludes that conservatives should favor giving

29. Lloyd & Davenport, *supra* note 19, at 255-57.

30. David E. Bernstein, *The Progressive Origins of Conservative Hostility to Lochner v. New York*, in AMERICAN CONSERVATISM, *supra* note 1, at 40-41.

31. *Id.*

32. *Id.* at 41.

33. *Id.* at 43.

34. See *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); Bernstein, *supra* note 30, at 46-48.

judges and courts the latitude to effectively serve as the guardians of both the text of the Constitution and the theory of natural rights embodied in it.³⁵

Other contributors to this book agree. In his essay on the election of 1912, William Schambra emphasizes that William Howard Taft and Elihu Root agreed with Theodore Roosevelt on many issues, but split with him over his plan for recall of judicial decisions. Root observed that rights are not derived from any majority but are instead superior to all majorities. “The recall of judges and judicial decisions,” he said, “would be a dramatic blow to the protection of individual right against inflamed majorities.”³⁶ As Sidney M. Milkis adds, Taft never waivered in his devotion to courts and judges, and his dedication to them may have doomed his presidency.³⁷

This call for conservatives to put their faith in the courts provides a contrasting bookend to the work of Larry D. Kramer.³⁸ Kramer employs a similar historical approach to demonstrate that the framers intended that the power to determine constitutional questions resided with the people. Emphasizing the place of popular sovereignty in the American constitutional tradition, he reminds modern day liberals that their heritage lies in popular constitutionalism rather than in looking to the courts to guarantee liberty.

The contrast between these two views of the judicial role brings to mind a significant weakness in this collection of essays. Most of the authors describe the debates of the Progressive Era as a struggle between individualism and collectivism or communitarianism. Whatever else the authors may intend to imply by using collectivism and communitarianism, the terms are undoubtedly intended to represent ideas developed after the framing of the Constitution and contrary to its purpose. This may have been the view of constitutional conservatives of the era. By accepting it at face value, however, the authors ignore the lasting influence of popular sovereignty in the American constitutional tradition and the possibility that debates of the Progressive Era really reflected an ongoing struggle to balance the tension between individual liberty and democracy.

Evidence of the importance of popular sovereignty and democracy in constitutional interpretation of the late nineteenth and early twentieth centuries is not difficult to find. Two well known judicial opinions immediately come to mind. Writing for a majority to uphold a state economic regulation in *Munn v. Illinois*,³⁹ Chief Justice Waite stated his commitment to popular democracy in a number of ways. “Every statute is presumed constitutional,” he wrote.⁴⁰ “The Court ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the express will of the legislature should be sustained.”⁴¹ For protection against the possibility that the state might abuse its power, Waite said, “The people should resort to the polls, not to the courts.”⁴² Dissenting in *Lochner v. New York*,

35. Bernstein, *supra* note 30, at 51-55.

36. William Schambra, *The Election of 1912 and the Origins of Constitutional Conservatism*, in AMERICAN CONSERVATISM, *supra* note 1, at 103.

37. Milkis, *supra* note 14, at 68.

38. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

39. *Munn v. Illinois*, 94 U.S. 113 (1877).

40. *Id.* at 123.

41. *Id.*

42. *Id.* at 134.

Justice John Harlan expressed the same presumption in favor of democracy.⁴³ “The state is not amenable to the judiciary, in respect of its legislative enactments,” he wrote, “unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States.”⁴⁴

Ignoring this tradition, the authors of *Toward an American Conservatism* presume that because the constitutional conservatives’ natural law interpretation can be defended as being the product of a constitutional tradition, other interpretations cannot be defended on the same grounds. They imply that by demonstrating that constitutional conservatives were principled, they have shown that the Progressives were not. In other words, they fail to take the Progressives seriously.

James R. Stoner’s chapter on Charles Evans Hughes provides one exception. Stoner describes Hughes as a “Progressive originalist” who believed that the demands of early twentieth century society required an increased use of government in order to protect the very basis of individual opportunity.⁴⁵ Yet, despite his Progressive credentials, Hughes had “respect for the founding generation . . . and spoke of them as a living force.”⁴⁶ As Chief Justice, Hughes presided over the Court during the so-called constitutional revolution of 1937.⁴⁷ Nevertheless, Stoner marches through judicial opinions and speeches to demonstrate that “Hughes did not abandon constitutional principles in changing times.”⁴⁸ Rather, “he sought to apply established principles to new circumstances in a way that continued the vision of the framers in a modern, industrial economy.”⁴⁹ The value of Stoner’s work, from the point of view of the modern constitutional conservative, lies in showing how Hughes’s opinions reflected a “rational compromise.”⁵⁰ Although they upheld the policies of the Progressive Era and New Deal, Stoner maintains that they did so without overruling earlier precedent. Hughes therefore left open the possibility of a revival of “the classic doctrines of the Commerce clause and even of Due Process.”⁵¹ Opinions like *United States v. Lopez*⁵² and *National Federation of Independent Business v. Sebelius*⁵³ indicate that he might very well be right.

The editors of *Toward an American Conservatism* write that there is “much that today’s conservatives can learn from a careful study of [the Progressive Era] constitutional conservatives” featured in the book.⁵⁴ In fact there is much that everyone can learn. It is presented as a historical study, but, even more, it is a clear statement of principles for a particular brand of modern American conservatism. Taken in that light it is a valuable study. The essays remind us of the significance of certain leaders that history has tended

43. *Lochner v. New York*, 198 U.S. 45, 69-74 (1905) (Harlan, J., dissenting).

44. *Id.* at 72-73.

45. Stoner, *supra* note 7, at 209, 210.

46. *Id.* at 211.

47. *Id.*

48. *Id.* at 212.

49. *Id.*

50. *Id.* at 209.

51. *Id.* at 231.

52. *United States v. Lopez*, 514 U.S. 549 (1995).

53. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

54. Jonathan O’Neill & Joseph Postell, *The Conservative Response to Progressivism: Myth and Reality*, in AMERICAN CONSERVATISM, *supra* note 1, at 8.

to push to the background. Taken as a historical work, however, the book is incomplete.

Criticizing the work of historians of the Progressive Era and post New Deal eras in his epilogue, Charles R. Kesler writes that theirs “was history of, by, and for liberals.”⁵⁵ I have little doubt that if the version of history reflected in *Towards American Conservatism* were to take hold, sometime in the future a new generation of revisionists would be writing that it was history of, by, and for conservatives.

David Rabban’s book, *Law’s History* is ambitious, thought-provoking, and intended to demonstrate that “historical legal thought dominated legal scholarship from the 1870s until it was superseded by sociological jurisprudence promoted by Roscoe Pound in the decade before World War I.”⁵⁶ Rabban maintains that because sociological jurisprudence was the brainchild of Progressive scholars, judges, and reformers, their success resulted in this rich tradition of legal history being misrepresented and neglected.

Focusing on Roscoe Pound, Rabban writes that Progressives derisively characterized the views of their nineteenth century legal historians as “legal formalism”⁵⁷ or “mechanical jurisprudence.”⁵⁸ Progressive critics complained that the views of these earlier legal scholars were misguided attempts to use principles discovered through the study of history to create a “timeless structure of legal thought.”⁵⁹ These critics accused the historians of assuming that these principles could be applied using deductive legal reasoning based on formal logic to yield correct results. In the view of Progressive critics, the nineteenth century scholars’ belief in the timelessness of the law, at best, supported conservative goals by denying the possibility of consciously changing law to meet the needs of a changing society. At worst, it was a “pretext for justifying laissez-faire constitutionalism, a way to enforce individual economic rights to protect the wealthy while invalidating social legislation in the public interest.”⁶⁰ Rabban maintains that the thinking and record of nineteenth century legal historians was much more nuanced than this. His goal is to set the record straight through a detailed study of the use of history as a means of understanding, and perhaps defining, the law.⁶¹

In order to fully explain his point, Rabban provides a thorough history of the discipline of legal history from its origins in the work of German legal scholars to the present. Because of the organization and breadth of this book, it is important for the reader to keep in mind that Rabban sees the high point of historical legal thought in America as occurring in the period between the 1870s and 1930s. In Part II, he analyzes the writings of eight legal scholars who best reflect that sixty-year tradition of producing original scholarship in legal history. They are: Henry Adams, Henry Cabot Lodge, Ernest Young, J. Laurence Laughlin, Melville M. Bigelow, Oliver Wendell Holmes, Jr., James Bradley Thayer, and James Barr Ames. However, Rabban also includes another group of nineteenth century treatise writers: Francis Wharton, Thomas McIntire Cooley, James Coolidge Carter, John Norton Pomeroy, and William Gardiner Hammond. Although this second group did not

55. Kesler, *supra* note 3, at 267.

56. RABBAN, *supra* note 2, at 1.

57. *Id.* at 2.

58. *Id.* at 467.

59. *Id.* at 2.

60. *Id.*

61. *Id.* at 1.

produce original scholarship in history, he observes, they did emphasize the centrality of history in their legal analysis.⁶² This group is important to Rabban's project because Progressive reformers tended to target some of them, especially Carter, Cooley, and Tiedeman, as apologists for the interests of big business.⁶³

What makes this book most worthwhile is that Rabban does not simply comb through the writings of his chosen authors to mine shards of evidence that they were not committed to a timeless legal code, resistant to change, or working in the service of big business as their Progressive critics charged. Instead, he places his subjects within a much larger study of the origins and development of legal history as an academic discipline. In the process, he makes an effort to understand each successive generation of legal historians on the basis of what motivated them. He asks what the perceived errors, weaknesses, or fallacies of their predecessors were to which each generation was reacting. To accomplish this, Rabban methodically marches through the background and ideas of each of his subjects. Although he does this with a degree of detail that is difficult to capture in a review, several dominant themes stand out.

The most important of these themes is that the study of legal history emerged as a rejection of the "natural law" and "analytical" schools of thought that dominated legal scholarship at the beginning of the nineteenth century. Legal historians, beginning with the earliest German scholars, all thought of themselves as providing an alternative to these two flawed methods of legal reasoning.⁶⁴ For some, like Savigny, the turn to history was a reaction to the French Revolution and rejection of the natural law theories of the Enlightenment.⁶⁵ For others, like Carter and Holmes, it was a rejection of natural law theories based upon religious moral codes.⁶⁶ In either case, they believed the natural law method to be flawed because it was derived from mere abstraction and speculation. Explaining this point, Carter insisted that "those who view 'the law as a body of rules proceeding from a supposed Law of Nature – an invisible fountain of right . . . are simply indulging in hypothesis' that is not 'open to our observation, and, consequently, not to our knowledge.'"⁶⁷

The analytical school was different in that instead of seeing law as based on a conception of moral right, it saw it simply as the product of edicts from a "superior sovereign."⁶⁸ But it shared the characteristic of seeing law as derived from a fixed and irrefutable source. In the eyes of legal historians, both methods were unscientific.⁶⁹ As Hammond observed, they were also deductive in that "only 'a few axioms' are used 'to deduce all general principles of law,' which are then applied to decide particular cases."⁷⁰

By contrast, legal historians described themselves as "legal scientists" whose work involved gathering facts from original documents, careful empirical observation of phenomena, classifying the data, and observing changes over time.⁷¹ It was thus an inductive

62. *Id.* at 15-16, 377-78.

63. *Id.* at 18.

64. *Id.* at 364-65.

65. *Id.* at 78.

66. *Id.* at 227, 364-65.

67. *Id.* at 365.

68. *Id.* at 229.

69. *Id.* at 6.

70. *Id.* at 369.

71. *Id.* at 88-89, 327.

science akin to “astronomy, geology, [or] ornithology.”⁷² Rabban maintains that adoption of this scientific method not only distinguished nineteenth century American law writers from their predecessors, but it also demonstrates the inaccuracy of Progressive Era charges that their work was grounded in deductive reasoning from a priori principles.⁷³

Rabban’s demonstration that legal historians were not guilty of engaging in the kind of formal logic Progressives derided is interesting in itself. It certainly satisfies his stated goal of rescuing nineteenth century legal historians from the image Progressives had created. But his focus is on a debate among legal scholars, while the Progressives’ ire was primarily aimed at judges, especially Justices of the United States Supreme Court. Rabban recognizes this.⁷⁴ He does not, however, take a step farther to address the larger question of whether the Progressives’ complaint that cases like *Hammer v. Dagenhart*⁷⁵ and *Lochner v. New York*⁷⁶ amounted to mechanical jurisprudence was justified.⁷⁷

Legal scholars who adopted the historical method also rejected the belief that the principles underlying law were universal and unchanging. They believed instead that law evolved over time.⁷⁸ Speaking of nineteenth century historians in general, Rabban points out that they subscribed to evolutionary theories even before Darwin⁷⁹ and that their evolutionary theories took many different forms. “Some viewed evolutionary change as having a deterministic tendency to move in a particular pattern or direction. Others maintained, instead, that evolution is the contingent sum of unpredictable changes over time, which can only be understood retrospectively.”⁸⁰ Most American legal scholars fell into the latter category, believing that evolution of the law was “contingent rather than preordained.”⁸¹ Despite these substantial differences, legal historians all believed that law changed and some believed that history could be an agent of changes in the law. Yet Progressives vehemently maintained that the historical method as adopted by their predecessors was resistant to change.

Rabban’s discussion of British legal historian Sir Henry Maine helps explain why. Maine tended to use sweeping generalizations to explain changes in legal history over time. That tendency is reflected in his most famous statement, “the movement of progressive societies has hitherto been a movement from *Status to Contract*.”⁸² Maine’s original intention was to summarize his observation that societies progress from a period in which one’s rights and duties had their origins and rested in the family, to a period in which rights

72. *Id.* at 367.

73. *Id.* at 430.

74. *Id.* at 525.

75. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

76. *Lochner v. New York*, 198 U.S. 45 (1905).

77. Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383 (2013) (making this point in a review of BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010)); Brian Z. Tamanaha, *Mounting Evidence Against the “Formalist Age,”* (Washington University in St. Louis Sch. of Law Legal Studies Research Paper Series, Paper No. 14-06-03, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459657 (responding to Brophy). See Peter Karsten, *HEART VERSUS HEAD: JUDGE MADE LAW IN NINETEENTH-CENTURY AMERICA* (1997) (discussing the degree to which state court judges engaged in formalism).

78. RABBAN, *supra* note 2, at 68.

79. *Id.* at 325.

80. *Id.* at 69.

81. *Id.* at 378.

82. *Id.* at 116 (emphasis in original).

and duties were created by contract between individuals.⁸³ However, the phrase eventually became a mantra for individualism. By the turn of the twentieth century, advocates of laissez-faire used it “as a novel justification for opposing government restrictions on freedom of contract.”⁸⁴ Progressive critics consequently turned on Maine, complaining that his work portrayed individualism as the final stage in law’s evolution and thus unchangeable.⁸⁵

Advocates of laissez-faire may have misused or exaggerated Maine’s status to contract idea, but there is no doubt that he and other nineteenth century legal historians believed that the law had evolved in a way that emphasized individualism.⁸⁶ They worried that excessive democracy constituted a threat to individualism.⁸⁷ Thus, they were inclined to put their faith in law and judges protect it. Disagreements among them tended to be over what individualism meant and whether it represented the final stage in development of the law.

Citing recent scholarship, Rabban notes that the nineteenth century Progressive treatise writers most closely associated with laissez-faire were not blindly committed to individualism. Carter, for example, was a reformer who, concerned about increased concentration of wealth, favored the income tax.⁸⁸ As chair of the Interstate Commerce Commission, Cooley favored regulation of railroad rates.⁸⁹ Concern for the fate of small business led Tiedeman to favor policies that would reduce the impact of concentrated capital in large corporations.⁹⁰ These writers undoubtedly had a varied and nuanced approach to the meaning and application of individualism. At the same time, however, they continued to presume that the underlying purpose of the law was to protect individualism and continued to prefer that law be molded through a process of adjudication rather than legislation.⁹¹

Near the beginning of the twentieth century, Bigelow, Thayer, and Holmes differed from other writers associated with the historical school and anticipated the sociological jurisprudence championed by Pound. Bigelow directly challenged the primacy of individualism and the threat posed by popular rule. He asserted that “the destructive individualism and related inequality in the United States threatened democracy,” and, sounding very much like Pound, he “urged legal scholars to undertake ‘scientific’ study of the social and economic forces to which law must respond.”⁹² Thayer feared that excessive reliance on judicial review had a tendency to weaken democracy.⁹³ Although Holmes continued to view history as playing a key role in legal analysis, he began his turn to emerging social sciences as useful tools for analysis of policy and law reform.⁹⁴

83. *Id.* at 132.

84. *Id.* at 145.

85. *Id.* at 143.

86. *Id.* at 117.

87. *Id.* at 211.

88. *Id.* at 29-31.

89. *Id.* at 26.

90. *Id.* at 59.

91. *Id.* at 117, 141, 356.

92. *Id.* at 187.

93. *Id.* at 315.

94. *Id.* at 217.

Rabban quotes Christopher Tomlins as saying Holmes marked “the last gasp of historical jurisprudence—at least in its nineteenth century form—in the United States.”⁹⁵ Yet Rabban does not end his study with Holmes. It is not surprising that he continues by spending some time on a careful study of Roscoe Pound who is, after all, the antagonist in his account. He begins by observing that Pound, like Bigelow, was motivated by a “strong personal belief that the traditional individualism in American society had become dysfunctional.”⁹⁶ Pound explained that individualism linked with formal deduction created a lethal combination of resistance to change and support for laissez-faire economics.⁹⁷ His mistake, Rabban argues, was in attributing this characteristic of American jurisprudence to his immediate predecessors, the historical school.⁹⁸ He was also wrong in saying that historians ignored the social and economic influences on the law.⁹⁹

Rabban notes that, even though historical analysis of the law was a key component of Pound’s own method, his promotion of sociological jurisprudence had the effect of turning the study of legal history into a “peripheral part of legal scholarship, a minor, often undistinguished subfield.”¹⁰⁰ He concludes that subsequent generations have lost confidence in the power of the past to explain, and potentially reform, the present.¹⁰¹

Even though I am hesitant to deconstruct Rabban’s work, I draw a different lesson from his book. It seems to me that Pound’s attack on his predecessors did as much to help the evolution of legal history as a discipline as it did to set it back. The fact that historical analysis was a key component of Pound’s method indicates that he was part of that evolution. Furthermore, Rabban’s discussion of the trends in legal scholarship after Pound demonstrates that the evolution has continued. He covers Pound’s immediate successors who, while intensifying the attack on nineteenth century legal writers, used history to do so.¹⁰² Next, he discusses current scholars who join him in reassessing the role of historical analysis.¹⁰³ Then he discusses the growth of the “Law and Society” school of legal history.¹⁰⁴ Finally, he recognizes the emergence of “Critical Legal Studies.”¹⁰⁵ While these methodologies may not have developed in a straight line, each employed history, was reacting to perceived errors of another method, learned from the others, and likely overstated its case.

The product of this evolution is an expanded version of what legal history is. By bringing social and economic circumstances to the forefront, Pound may have set the stage for today’s large body of work, much of which treats the history of law as part of the organic whole of society. Rabban adds to it by reminding readers of the overlooked contribution the nineteenth century legal historians made to the evolution. In the process, he shows that the lines separating various methodologies and approaches are not very sharp.

95. *Id.* at 511.

96. *Id.* at 426.

97. *Id.* at 445.

98. *Id.* at 430.

99. *Id.* at 431.

100. *Id.* at 471.

101. *Id.* at 536.

102. *Id.* at 472.

103. *Id.* at 518-19.

104. *Id.* at 526-28.

105. *Id.* at 532.

The nineteenth century historians appear to have emphasized jurisprudence or an internal history of the law. But many of them considered the impact of social circumstances and custom on the development of the law.

Whatever lessons one draws, *Law's History* adds immensely to our understanding of the development of legal history and the ideas of its practitioners. It is sure to become a classic.

Toward an American Conservatism and *Law's History* are similar in the sense that they both use what they see as the misrepresentations of Progressives as their starting point. But they differ in purpose and style. Where *Towards an American Conservatism* is overtly political, Rabban is nuanced and academic. The most striking difference lies in what their subjects viewed as the source of the law. *Towards an American Conservatism* uses historians, judges, and legal writers to demonstrate that important conservatives of the Progressive Era were committed to the belief that the American Constitution is rooted in natural law theory. Rabban shows that, as early as the 1840s, legal scholars in Europe and the United States had rejected the idea that natural rights were the source of law. Interestingly, however, both the advocates of natural law, as explained in *Toward an American Conservatism* and the legal historians Rabban studies believed that the major goal of the law was protecting individualism. And both studies claim that the version of individualism their subjects favored was not laissez-faire.

Charles Kesler is certainly correct in one observation.¹⁰⁶ During the past twenty-five to thirty years there has been an outpouring of revisionist scholarship reassessing Progressive Era history. It has been so great an outpouring that the approach can hardly be called revisionist any more. These two books join that body of work, but they also show that it comes in a wide variety. Despite, and perhaps because of, their differences each of these books in its own way is likely to spark extensive debate, not only about constitutional interpretation and the course of legal history, but also about what the discipline of American legal history is and how it is practiced.

106. Kesler, *supra* note 3.