

Conservatives and the Constitution

Since the 1980s, a ritualized opposition in legal thought between a conservative “originalism” and a liberal “living constitutionalism” has obscured the aggressively contested tradition committed to, and mobilization of arguments for, constitutional restoration and redemption within the broader postwar American conservative movement. *Conservatives and the Constitution* is the first history of the political and intellectual trajectory of this foundational tradition and mobilization. By looking at the deep stories told either *by* identity groups or *about* what conservatives took to be flashpoint topics in the postwar period, Ken I. Kersch seeks to capture the developmental and integrative nature of postwar constitutional conservatism, challenging conservatives and liberals alike to more clearly see and understand both themselves and their presumed political and constitutional opposition. *Conservatives and the Constitution* makes a unique contribution to our understanding of modern American conservatism, and to the constitutional thought that has, in critical ways, informed and defined it.

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Cambridge University Press
978-0-521-19310-8 — Conservatives and the Constitution
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Conservatives and the Constitution

Imagining Constitutional Restoration in the Heyday of American Liberalism

KEN I. KERSCH

Boston College



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University Printing House, Cambridge CB2 8BS, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
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www.cambridge.org
 Information on this title: www.cambridge.org/9780521193108
 DOI: 10.1017/9781139022491

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First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Kersch, Kenneth Ira, 1964– author.

TITLE: Conservatives and the constitution : imagining constitutional restoration in the heyday of American liberalism / Ken I. Kersch.

DESCRIPTION: Cambridge, United Kingdom ; New York, NY, USA : University Printing House, [2019] | Series: Cambridge studies on the American Constitution | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2018056598 | ISBN 9780521193108 (alk. paper)

SUBJECTS: LCSH: Constitutional history – United States. | Conservatism – United States. | Law – United States – Christian influences. | Constitutional law – Religious aspects – Christianity. | United States – Politics and government – 1945–1989. | United States – Politics and government – 1989–

CLASSIFICATION: LCC KF4541 .K47 2019 | DDC 342.7302/9–dc23

LC record available at <https://lcn.loc.gov/2018056598>

ISBN 978-0-521-19310-8 Hardback

ISBN 978-0-521-13980-9 Paperback

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Preface – Voices from the Political Wilderness

From the late nineteenth-century stirrings of Populism, to early twentieth-century progressivism, and on through Franklin Roosevelt's New Deal, Harry S Truman's Fair Deal, John F. Kennedy's New Frontier, and Lyndon Baines Johnson's Great Society, the modern American state was constructed on a base of liberal, reformist political suppositions, ideals, ideas, and institutions committed to active government advancing the common good. The "American Century" in this sense was the liberal century. Left-leaning and reformist social movements spearheaded by farmers, workers, women, African Americans, college students, and antiwar activists pioneered the goals and, as refracted through the stewardship of "vital center" liberals,¹ forged the institutions of this durably ascendant but perpetually unfolding governing order.² This liberalism found a home in the modern Democratic Party.

The liberal century, however, was bookended by predominantly conservative eras. The first, which in constitutional histories took its name from a 1905 US Supreme Court decision striking down a progressive-inspired New York State maximum hours law for bakery workers, was dubbed the "Lochner Era." This first conservative era was defined by a public philosophy holding a narrow conception of the powers of the national government; an expansive understanding of the powers of the states, where constitutionally protected rights were not involved; and a robust conception of rights and

¹ See Arthur M. Schlesinger Jr., *The Vital Center: The Politics of Freedom* (Boston: Houghton Mifflin, 1949).

² See, e.g., Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877–1917* (Chicago: University of Chicago Press, 1999); Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004); John Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Belknap Press of the Harvard University Press, 2004).

prerogatives of private property owners, whether individuals or businesses.³ The second conservative era, foreshadowed by the proud failure of Barry Goldwater's 1964 presidential campaign and the ideologically ambidextrous Richard Nixon's 1968 victory that ascended on the wings of a campaign promising law and order, a renewed patriotism, a "new federalism," and "strict construction" of the Constitution on behalf of the nation's "silent majority," triumphed with the election of Ronald Reagan at the beginning of the 1980s. This conservatism found a home in the modern Republican Party.

This tripartite developmental framework, to be sure, was not without anomalies. Republican President Dwight D. Eisenhower's two terms sit near the temporal heart of the regnant "consensus" New Deal liberalism of the 1950s, for example, just as Democratic Presidents Bill Clinton's and Barack Obama's two-terms sit squarely in the heart of late-century conservatism. As many have noted, Richard Nixon's truncated two terms in the White House did not challenge the fundamentals of the liberal New Deal order and in some respects extended it.⁴ Other anomalies can be found in what in retrospect look like ideological mismatches between the period's causes, constituencies, and parties. For many of these years, conservative segregationists were unwavering Democrats. Virulent anticommunism – and anti-anticommunism – were as likely to be Democratic as Republican causes. Liberal, northeastern "Rockefeller Republicans" were a core Republican constituency and, in many respects, helped define the party until the 1980s. But, as the political scientist Walter Dean Burnham and others have long noted, these sorts of intraparty coalitions and tensions are common in party systems structured like that of the United States.

By 1980, however, a fundamental change was at hand. The conservative movement's staunch anticommunism, hostility to liberals and governmental bloat and overregulation, and conviction that civil rights and civil liberties, as defined by liberals, had been taken too far (or transmogrified, through corrupted understandings, into their opposites) came to define the core of a newly ideological Republican Party. At roughly the same time, the

³ The era got its name from the case of *Lochner v. New York*, 198 US 45 (1905), a *bête noire* for progressives, in which the Supreme Court voided the New York baker's hours law on Fourteenth Amendment due process "liberty of contract" grounds. See generally Arnold Paul, *The Conservative Crisis and the Rule of Law: Attitudes of the Bar and Bench, 1887–1895* (Gloucester, MA: Peter Smith, 1976); Robert McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 2000).

⁴ By the lights of sophisticated models of "regime politics" advanced by political scientists, these ostensible aberrations do not undermine the core nature of the underlying governing order. See, e.g., Stephen Skowronek, *The Politics Presidents Make* (Cambridge, MA: Belknap Press of the Harvard University Press, 1997); Keith Whittington, *The Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Law* (Princeton: Princeton University Press, 2007). See also David Plotke, *Building a Democratic Political Order: Reshaping American Liberalism in the 1930s and 1940s* (New York: Cambridge University Press, 1996).

Democratic Party realigned itself with ideological liberalism.⁵ On the cusp of the twenty-first century, the country re-sorted itself and settled into its current ideological, partisan polarization, divided between “Red” and “Blue.” In this new order, Democrats were liberal and Republicans were conservative. The formerly muttish and mongrel political order was re-launched in the form of a dogfight between snarling purebreds.⁶

Over time, it became clear to an increasing number of observers that the two parties had arrived at not only distinct sets of principles and policy preferences but also at very different intellectual and rhetorical frameworks for doing and talking about politics. Twentieth-century liberalism spoke the language of the “policy state”⁷ it had created, which imagined politics as a meliorist, problem-focused practice in which political, social, and economic problems were first identified and then put on the path to solution through the formulation of government-initiated public policy aimed at the pragmatic, practical achievement of stated policy goals and objectives. Both the early and late twentieth-century conservatisms, by contrast, spoke the language not of pragmatic, meliorist policy, but of the foundational, constitutional rule of law.

These discourses operated no more independently of each other than did the contending parties themselves. Liberals had risen to power in significant part by arguing that the conservative preoccupation with strict adherence to the constitutional rules, as conservatives understood them, was leading to an unconscionable quietism in the face of a new set of massive – and addressable – social problems. For their part, late twentieth-century conservatives had risen to power in significant part by arguing that the liberal preoccupation with government problem solving through public policy had amounted to either an actual or *de facto* abandonment of the nation’s foundational constitutional commitments, evincing not only a disregard of the

⁵ See Bruce Miroff, *The Liberals’ Moment: The McGovern Insurgency and the Identity Crisis of the Democratic Party* (Lawrence: University Press of Kansas, 2007); Eric Schickler, *Racial Realignment: The Transformation of American Liberalism, 1932–1965* (Princeton: Princeton University Press, 2016).

⁶ See Alan Abramowitz, *The Disappearing Center: Engaged Citizens, Polarization, and American Democracy* (New Haven: Yale University Press, 2010); Matthew Levandusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* (Chicago: University of Chicago Press, 2009); Pietro Nivola and David Brady, editors, *Red and Blue Nation? Consequences and Correction of America’s Polarized Politics* (Washington, DC: Brookings Institution Press, 2008); Barbara Sinclair, *Polarization and the Politics of National Policy Making* (Norman: University of Oklahoma Press, 2006); Thomas Mann and Norman Ornstein, *It’s Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism* (New York: Basic Books, 2012); Matt Grossman and David Hopkins, *Asymmetric Politics: Ideological Republicans and Interest Group Democrats* (New York: Oxford University Press, 2016); Hans Noel, *Political Ideologies and Political Parties in America* (New York: Cambridge University Press, 2014).

⁷ Karen Orren and Stephen Skowronek, *The Policy State: An American Predicament* (Cambridge, MA: Harvard University Press, 2017).

terms of the nation's social contract concerning the powers of government but also of the substantive principles, such as limited, divided government and the protection of rights that that contract had been instituted to protect.

The core argument of this book, *Conservatives and the Constitution*, is that the defense of and restoration of the Constitution played a critical role, and served as a politically effective rallying cry, for postwar twentieth-century movement conservatives, many of whom angrily alleged that the Constitution had been abandoned by liberals – first, they said, in the New Deal (1933–1939); then by the liberal Warren Court (1953–1969); and, as conservatives have most recently emphasized, even before that, in the Progressive Era (1890–1920), when the progressive progenitors of modern liberalism had, they said, substituted pure will, under the guise of (mere) politics or policy, for a foundational, national commitment to the rule of law. While this critique in many places echoed the conservative constitutional understandings of Lochner Era constitutional conservatism, *Conservatives and the Constitution* argues, moreover, that – many movement and scholarly understandings to the contrary notwithstanding – postwar conservative constitutional argument was diverse, multivocal, contested, mutable, and developmental: put otherwise, it was perpetually constructed and reconstructed across time in response to perpetually changing problems, contexts, and challenges posed by a changing policy and political landscape. In this sense, conservative constitutional argument in the postwar period extended well beyond what in time became known as the (anti-modern, anti-New Deal) reactionary fringe of what has been called the “Old Right.”⁸ By looking at the deep stories told either *by* identity groups (Conservative Evangelical and Fundamentalist Christians, Conservative Roman Catholics) or *about* what conservatives took to be flashpoint topics (free markets, communism) in the postwar period that shaped and informed the development of their constitutional understandings across time, I seek to capture the developmental and, ultimately, integrative nature of postwar constitutional conservatism. Perhaps most interestingly, and intriguingly, these theories and stories within the movement – or, perhaps more accurately, in conjunction with an incipient, inchoate, or forming movement – did not exist on separate tracks, hermetically sealed off from one another or, for that matter, from liberal constitutional theory and thought: the critical feature of this developmental trajectory was that it involved a coalescing across time of diverse and at time divergent theories, narratives, and memories in a way that led these diverse strands and strains to imagine themselves as part of a coherent community and identity, pursuing a common political (and constitutional) cause. Over time, this “living” conservative constitutionalism – to provocatively apply the epithet rule-of-law conservatives contemptuously

⁸ See, e.g., Albert Jay Nock, *Memoirs of a Superfluous Man* (New York: Harper and Bros, 1943); John E. Moser, *Right Turn: John T. Flynn and the Transformation of American Liberalism* (New York: New York University Press, 2005).

hurled at their opponents – amounted to a robust, intellectually elaborated critique of the modern liberal American state, with constitutionalist visions to back it.

The variegation and sophistication of the postwar constitutionalist Right, however, did not last. *Conservatives and the Constitution* additionally argues that these features – one might even say virtues – proved to be luxuries of conservatism in its wilderness years during the heyday of mid-century American liberalism. As the prospect of actual political power loomed, constitutional theory on the Right was narrowed and weaponized for service in the mass mobilization of votes and the disciplining of Republican Party cadres. While it is fair to say that the right-wing constitutional theory of the wilderness years recurred frequently to arguments and achievements of the nation's Founders, the turn in the 1980s to "originalism" – helped along, to be sure, by a belated invitation to conservative constitutional theorists to become participating members of the formerly all but exclusively liberal professional legal academy, and party to its sometimes arcane debates – led conservative constitutional theory to harden into a relatively narrow orthodoxy and then, more recently, into a form of scholasticism – with all the attendant virtues and successes that orthodoxy allows for when enlisted in mass mobilizations, politics – and academic careers.

CREATING A CONSTITUTIONAL CONSCIOUSNESS

Conservatives and the Constitution makes what I believe is a unique contribution to our understanding of modern American conservatism in general, and conservative constitutional thought more specifically.⁹ In recent years, there has been an outpouring of historical, sociological, psychological, political science, journalistic, and legal academic scholarship on modern American conservatism. This study could not have been written without that work. That said, however, something very important is still missing – an account that takes as its primary focus what conservatives themselves have repeatedly attested is the chief thematic touchstone of their movement: the US Constitution.

The claim that the championing of the principles and obligations of the Constitution – "the best arrangement yet devised for empowering government to fulfill its proper role, while restraining it from the concentration and the abuse of power"¹⁰ – was not only one but *the* chief thematic touchstone of the

⁹ There has been no shortage of books on originalism, and an entire subliteration is now devoted to "the history of originalism." See Logan Sawyer III, "Principle and Politics in the New History of Originalism," *American Journal of Legal History* 57 (2017): 198–222. But, as this book will make clear on virtually every page, that is parochial and anachronistic, and not at all the same thing.

¹⁰ Young Americans for Freedom, "The Sharon Statement" (1960), in Isaac Kramnick and Theodore J. Lowi, editors, *American Political Thought: A Norton Anthology* (New York: W.W. Norton, 2009), 1281.

modern conservative movement, and, hence, the contemporary Republican Party, is far from idiosyncratic. Even the most casual glance at movement manifestos like Barry Goldwater's *The Conscience of a Conservative* (1960), "The Sharon Statement" of the Young Americans for Freedom (1960), Ronald Reagan's "A Time for Choosing" speech supporting Goldwater's presidential candidacy (1964), and, more recently, the rise of the Federalist Society and the Tea Party movement underline the centrality of the constitutional frame. To be sure, many contemporary scholars assume, if they do not state explicitly, that the constitutional frame is epiphenomenal – a stand-in for the "real" forces driving the American Right, be it racism, the advancement of the rich, or, more generally, the reinforcement of the hierarchies that promote the interests of society's "haves."¹¹ From this perspective, to focus on the Right's constitutional arguments and visions is to get distracted by the sideshow – to foreground the movement's *post hoc* rationalizations and self-justifications in place of the fundamental forces driving its politics.

Conservatives and the Constitution, by contrast, takes these arguments, frames, and rhetorics seriously as a major force in the postwar American conservative ascendancy. It does so for the simple reason that movement members believe them and, hence, act on them in the public sphere. This is not to deny the dynamics of self-interest, rationalization, and self-justification. It is only to say that such self-conscious dissembling is relatively rare, and not enough on which to build a broad political movement – or, for that matter, to allow most members of that movement to maintain a positive self-conception of who they are and what they are doing. For conservatives, a constitutional consciousness served important personal and collective functions and, in many cases, rose to the level of a quasi-independent motivating force.

While this book glances backward to the Old Right's rejection of Franklin Roosevelt's New Deal and forward to the "Reagan Revolution" and the election of Donald Trump as president for a critical sense of antecedents and implications, its center of gravity is on the formative years of the modern Right's constitutional consciousness, its wilderness years between the beginning of the Warren Court to the Reagan election. These were the years in which the conservative movement built an infrastructure of idea incubators, disseminators, and forums in which, in essence, the movement created a new world in which its members, and members-to-be, could live – an alternative

¹¹ See, e.g., Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Sarah Palin* (New York: Oxford University Press, 2011); Nancy MacLean, "Neo-Confederacy Versus the New Deal: The Regional Utopia of the Modern American Right," in Matthew D. Lassiter and Joseph Crespino, editors, *The Myth of Southern Exceptionalism* (New York: Oxford University Press, 2009); Rick Perlstein, "I Thought I Understood the American Right: Trump Proved Me Wrong," *New York Times* (April 11, 2017), www.nytimes.com/2017/04/11/magazine/i-thought-i-understood-the-american-right-trump-proved-me-wrong.html.

intellectual and emotional universe, a counterculture, positioned outside of the era's predominating or, if you will, hegemonic liberalism. Chapter 1 provides an overview of the establishment of the financial and institutional architecture that worked to both generate and disseminate conservative constitutional ideas in the postwar period. Chapter 2 introduces readers to the rich world of constitutional theory on the Right in the postwar United States – a world that, until now, has been almost entirely unmapped by scholars, hidden in plain sight. It has been unmapped and hidden because during these years, legal academia, the home of academic constitutional theory, was entirely dominated by political liberals, and these liberals identified the constitutional theory that they did with the essence of constitutional theory itself. Excluded from this world, most serious conservative constitutional theory was undertaken outside legal academia, by political philosophers (along with scholars in a smattering of other disciplines and operating independently, high-level journalists, and independent intellectuals) rather than by legal academics. Only recently has this work assumed a broader public profile, where it is now poised to serve as the basis for the emergent constitutional understandings not only of movement conservatism and the Republican Party but also of the country itself. If this relatively sophisticated constitutional argument on the postwar Right is the movement's gemstone, the book's subsequent chapters take a step back and describe the various rings in which the gemstone of high-level constitutional theory was set – the stories that conservatives and proto-conservatives of diverse identities brought to the table that made them ripe for and receptive to these constitutional arguments, whether in their original or, most often, popularized forms. Fundamentalist and Evangelical Christians, right-wing Roman Catholics, fervent anti-communists, and anti-statist libertarians all told passion-laden and memory-drenched stories in their own ways about the country's history and trajectory and their place within it, which served as a motivation for, and prologue to, imagining the country's future, should they reclaim the power to direct it. These stories provided the frame within which they imagined constitutional restoration.

The constructivist approach I adopt in *Conservatives and the Constitution* emphasizes the ways in which each of the diverse communities and identities that converged to form the modern conservative movement did so while, and through, narrating America. Each forged narratives with the aim of arriving at both self- and collective understandings of who they and we were and are. These stories were actively fashioned and shaped discursively across time, in part in response to ongoing provocations and events. That fashioning was a complicated process, involving highly selective remembering and forgetting, spotlighting and minimizing, downplaying and ignoring, interpreting and reinterpreting, anathematizing and celebrating.

Tessa Morris-Suzuki has observed that the study of history has “affective dimensions” involving, to varying degrees, not simply the interpretation of events but also a bid for identification, implicating imagination, empathy, and

other emotions.¹² As such, especially as enlisted by identity-forging political movements, history is told in a way designed to make target audiences “more conscious of certain historical periods and places [and events] than others, more readily able to identify with some fragments of the past than with others.” This is the case, inevitably, even when all the facts are “true.” History and historical facts are thus never simply one thing: they are heavily dependent on the narrative and choice.¹³ Members of the diverse strands of the conservative movement, like others who live their politics, shaped their stories to suit their own agendas and needs, both personal and collective. As such, they both blamed and condemned, excused and exculpated. Through these stories, they coped, bonded, and inspired.

While I have described this process rather abstractly here, in its political guise – and implications – it is anything but. These stories underwrote – political scientists would say “cued” – the full slate of concrete reactions to real-world agendas, crises, and struggles.¹⁴ They provided the framing impetus for extant and would-be legislation, judicial rulings, political and policy agendas and programs, and electoral campaigns, reminding, evoking, enraging, motivating, inspiring, and urging. Whereas each of the more intellectual constitutional arguments I survey in the book’s first chapters set out a logic, the stories I subsequently describe, by contrast, are more aptly described as having *logics*. Considered as such, the goal of *Conservatives and the Constitution* is to set the logic within the logics.

THE MOBILIZATION OF MEMORY

In addition to making arguments, postwar American movement conservative elites mobilized history – that is, memory – “to support contending visions of the national identity.”¹⁵ Rogers M. Smith has argued that political elites play an important role in leading individuals toward a sense of their own identity and

¹² Tessa Morris-Suzuki, *The Past Within Us: Media, Memory, History* (London: Verso, 2005), 22–23, 24–25 (“[O]ur understanding of history is never just an intellectual matter; any encounter with the past involves feeling and imagination as well as pure knowledge. Since our knowledge of the past is something from which we derive personal identity, it also helps to determine how we act in the world.”).

¹³ Morris-Suzuki, *Past Within Us*, 43. See also Murray Edelman, *Constructing the Political Spectacle* (Chicago: University of Chicago Press, 1988), 6.

¹⁴ See, e.g., Martin Gilens and Naomi Murakowa, “Elite Cues and Political Decisionmaking,” *Political Decision Making, Deliberation and Participation* 16 (2002): 15–49. See also Rogers M. Smith, *Political Peoplehood: The Role of Values, Interests, and Identities* (Chicago: University of Chicago Press, 2015), 44–45, arguing that the stories of peoplehood he posits “are not natural . . . [but] created by asymmetrical interactions between potential leaders and . . . members.” “[B]oth . . . have agency” – are engaged in an “always ongoing” process of “people-building,” which involves both an aspiration to power and efforts “to promote ways of life they regard as good” (pp. 44–45).

¹⁵ Morris-Suzuki, *Past Within Us*, 4, 104–105.

their membership in political groups (forged, in part, through the creation of intragroup trust) by offering “people-making,” “ethically constitutive stories.” These stories are historically interpretive: they are rooted, that is, in interpretations of the group’s (or nation’s) past and offer shared readings of the group’s mores, understood in light of where it has been in the past and where it is going in the future. Political elites fashion and endeavor to sell these people-making, ethically constitutive stories in the roiling political marketplace, where they are placed on offer against competing, rivalrous stories of peoplehood.

While it is often said that Americans have little interest in history, this has certainly not been true of the postwar American Right, whose politics has been saturated with historically-rooted, movement-making, ethically constitutive stories. Legions of books by conservative and mass circulation commercial publishers; magazine articles; and more recently cable television shows, websites, YouTube videos, newsfeeds, and podcasts have recurred extensively to American history, with a special interest in the American Founding, Civil War, and most recently the Progressive Era. Whether in the form of videos, online courses, or vetted bibliographies listing canonical works, conservatives currently offer hundreds if not thousands of instructional courses on American history and American constitutionalism on the web for interested ordinary citizens.¹⁶ The narratives offered in these histories provide “a distinct perspective on responsibility” and “imagined landscapes” within which to live. Intergenerational stories about the nature of the nation’s legal/constitutional order are perhaps the preeminent component of the postwar American Right’s stories of peoplehood. These movement-making stories lend meaning to individuals’ lives, associations, and identities. They rationalize, direct, motivate, and “provid[e] grounds or warrants” for political behavior.¹⁷

Since the 1980s, at least, the most familiar of such stories on the modern constitutionalist Right have been those associated with originalism, which,

¹⁶ See, e.g., Bill O’Reilly and Martin Dugard, *Killing England: The Brutal Struggle for American Independence* (New York: Henry Holt and Co., 2017); Bill O’Reilly and Martin Dugard, *Killing the Rising Sun: How America Vanquished World War II Japan* (New York: Henry Holt and Co., 2016); Bill O’Reilly and Martin Dugard, *Killing Reagan: The Violent Assault that Changed a Presidency* (New York: Henry Holt and Co., 2015); Bill O’Reilly and Martin Dugard, *Killing Patton: The Strange Death of World War II’s Most Audacious General* (New York: Henry Holt and Co., 2014); Bill O’Reilly and Martin Dugard, *Killing Jesus* (New York: Henry Holt and Co., 2013); Bill O’Reilly and Martin Dugard, *Killing Lincoln: The Shocking Assassination That Changed America Forever* (New York: Henry Holt and Co., 2011). The liberal Left seems much less interested in history; to the extent that the interest is there, it seems to be in the history of the civil rights movement. Hobsbawm once observed, “History is the raw material of nationalistic or ethnic or fundamentalist ideologies, as poppies are the raw material of heroin addiction.” Eric Hobsbawm, *On History* (London: Weidenfeld and Nicolson, 1997), quoted in Morris-Suzuki, *Past Within Us*, 7.

¹⁷ Morris-Suzuki, *Past Within Us*, 13–15, 17, citing and drawing upon Saul Friedländer, “Historical Writing and the Memory of the Holocaust,” in Berel Lang, editor, *Writing and the Holocaust* (New York and London: Holmes and Meier, 1988).

Cambridge University Press
 978-0-521-19310-8 — Conservatives and the Constitution
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generally speaking, holds that the nation was formed and defined by the fundamental law of the Constitution, as drafted and handed down by the nation's Founders – both the text's authors and the Founding generation of Americans who adopted it: that is, those who, through the exercise of popular sovereignty, made it law – and that modern liberals/progressives had abandoned that Founding anchor and sought to obliterate the faithful heritage layered upon it by succeeding generations of patriotic Americans. This book treats the arrival of originalism (in its modern sense, at least), perhaps the modern conservative movement's most significant ethically constitutive story, as a point in the line of its temporal development.¹⁸

While the Right's recent convergence on constitutional originalism suggests lockstep unity, most studies of modern conservatism have appropriately underlined the intellectual and political diversity of the modern conservative coalition composed of, among others, traditionalists, the "Religious Right," libertarians, neoconservatives, populists, and business conservatives. While much has been written about how, given their disagreements on important matters of principle, this coalition is fraught and fragile and on the verge of falling apart, much less has been written seriously reflecting on how, despite their disagreements on important matters of principle, this coalition has proved so enduring and, indeed, as I write, seems only to be expanding. On this durability, two main explanations have been offered, both from within the movement itself. The first, associated most prominently with the conservative intellectual Frank Meyer, argues that the movement developed a theoretical synthesis called "Fusionism" that reconciled traditionalism and libertarianism.¹⁹ The second – not necessarily mutually exclusive – focuses on *National Review* editor William F. Buckley Jr.'s relatively early decision to expel the fringe elements of the Far Right (for Buckley, the conspiracy theorist John Birch Society, but also anti-Semites and other racists) from the postwar movement, the suggestion being that once these elements had been shut out, a core of principled agreement remained, capable of sustaining the movement long into the future.²⁰

Conservatives and the Constitution offers a different explanation for the movement's strength and durability that speaks to the possibilities for its expansion. That explanation, I argue, is found in the power of stories – of memory-saturated, ethically constitutive stories of peoplehood that forge, motivate, and sustain movements in the face of disagreements (within limits, to be sure) over policy and principle. Indeed, as will become clear over the course of this book, disagreements over principle are often managed, if not

¹⁸ See Smith, *Political Peoplehood*, 23–24.

¹⁹ See George H. Nash, *The Conservative Intellectual Movement in America Since 1945* (New York: Basic Books, 1976).

²⁰ See George Hawley, *Right-Wing Critics of American Conservatism* (Lawrence: University Press of Kansas, 2016).

Conclusion

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superseded, by stories. This process involves dynamics like the building – and destabilizing – of feelings of trust and worth, and the fashioning of constitutive stories about who the people being addressed are and should aspire to be across time. These dynamics are as likely to require ambiguity as clarity, contradiction as consistency, emotion as rationality.²¹ Those tethered to the usual concepts and categories of political, legal, and constitutional theory will typically miss these important and influential dynamics.

The ethically constitutive story about original meaning and fundamental law that the Right eventually converged on at least since the 1980s worked by “establishing or symbolizing social cohesion or the membership of groups, real or artificial communities ... establishing or legitimizing [or delegitimizing] institutions, status or relations of authority” and had as its “main purpose ... socialization, the inculcation of beliefs, values systems, and conventions of behavior.”²² Despite their many disagreements and diverse preoccupations, by the time that the modern conservative movement converged on originalism as an “ism” and as its constitutional calling card in the early 1980s and sought to implement and enforce that originalism institutionally through the leadership provided by the Reagan Justice Department,²³ the diverse elements of conservative thinking about the Constitution and constitutional interpretation surveyed here came to understand themselves as tribunes of the American Founding and positioned themselves as locked in an epic battle with their faithless liberal (and, later, progressive) antagonists who were committed to unmooring the American polity from its Founding commitments and traditions.

CONCLUSION

Conservatives and the Constitution will set out a basic overview of my understanding of the development of conservative constitutional thought in its generative “wilderness” years – that is, its years out of power during postwar liberalism’s heyday between 1954 and 1980 (with some contextualizing extensions backward to the Old Right and forward to Reagan and Trump). The book will canvas the development of the main lines of “big picture” conservative constitutional theory in these years and situate that theory within what I take to be the postwar conservative movement’s major constitutive narratives. As such, this book is not a comprehensive history of postwar conservative constitutional argument on the Right. Absent, most notably, will be a sustained presentation of the constitutional argument on specific constitutional issues during those same years – civil rights and civil

²¹ Smith, *Political Peoplehood*. ²² Hobsbawm, “Inventing Traditions,” 9.

²³ James Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms* (New York: Oxford University Press, 2015); Steven Teles, “Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment,” *Studies in American Political Development* 23 (2009): 61–83.

Cambridge University Press
978-0-521-19310-8 — Conservatives and the Constitution
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liberties; federalism; and legislative, executive, and judicial power. I will cover that subject, as it relates to the overarching framework, arguments, and constitutive movement narratives presented here, in two subsequent books, the first focused on the conservative confrontation with the consolidated modern American state through the advancement of arguments and framing stories about the constitutional structures of American government in these years, and the second focused on the conservative confrontation with arguments for modern civil rights and civil libertarian freedom. The first of these subsequent books will show the ways that, as it developed across time in response to both events and ongoing political competition with liberals and, in time, the Democratic Party, a broad and intellectually diverse conservative movement narrowed the focus of its constitutional vision to attacking an out-of-control, activist federal judiciary. It will then show how, as the movement moved from the wilderness to take the reigns of power, it expanded outward again to a more broad-ranging, substantive constitutional vision, de-centered once again off the judiciary, and relatively unconcerned with the aggressive exercise of judicial power. The second subsequent book on civil rights and civil liberties will depart from the usual claims about or characterizations of conservative racism and opposition to civil liberties and chart, through a developmental lens, how the contemporary conservative movement moved beyond opposition to civil liberties and civil rights to understand itself, at least, as the polity's most fervent champions of the twin causes of constitutional liberty and equality. Collectively, if not strictly speaking comprehensive, these three books, each of which I hope will be readable on its own, will present at least a rounded picture of the development of the conservative movement's constitutional argument in the postwar United States.

Acknowledgments

As this book has been gestating for the better part of a decade, my debts to individuals and institutions are countless: conversations, comments, criticisms, and suggestions by the hundreds informed, shaped, altered, and inspired my thinking along the way. Perhaps the most long-standing debt on the project is to my research assistant Matthew Karambelas, Boston College (BC) '10 – now a Boston lawyer – whose extensive original source research provided the backbone for both this and the two related books to follow. Additional research assistance was provided at BC by Michael Coutu, Heitor Gouvea, Hillary Thomson, David Levy, John Louis, and Dustin Sebell. The hawk-eyed Ryan Towey, BC '16, generously copyedited the full manuscript in its late stages. My BC Political Science Department chair, Susan Shell, has been consistently supportive and accommodating. The department's administrator, Shirley Gee, helped in countless ways throughout.

Many institutions around the country graciously invited me to give lectures and presentations on various parts of this project at every stage of its development. These included the James Madison Program in American Ideals and Institutions; the Program in Law and Public Affairs (LAPA); and the American Studies Workshop at Princeton University (with particular gratitude to Brad Wilson, Kim Scheppele, Dirk Hartog, and Paul Frymer); the Princeton and University of Maryland Law School constitutional law “schmoozes” (directed by Kim Scheppele and Mark Graber, respectively); the Program on Science, Technology, and Society at Harvard's John F. Kennedy School of Government in conjunction with Harvard Law School's Institute for Global Law and Policy (Sheila Jasanoff and David Kennedy); Yale University's Institute for Social and Policy Studies; the Drake University Constitutional Law Center (Miguel Schor and Mark Kende); The New York Historical Society's Institute for Constitutional History; the Center for Political and Economic Thought at St. Vincent College (Bradley C. S. Watson); the University of Wisconsin Center for the Study of Liberal Democracy (Howard Schweber, Don Downs); the National Autonomous University of Mexico (UNAM) (Imer Flores); and Boston

College's Intersections Program, which supported my participation in a faculty writing retreat in York Beach, Maine.

A number of colleges and universities invited me to give public lectures which, in conjunction with the conversations surrounding them, allowed me to test out new ideas associated with the project. These included Brigham Young University; The University of Nevada, Las Vegas; the University of Montana; Drake University; the College of the Holy Cross; Union College; and Bates College. I also benefited by presenting work-in-progress at conferences and/or faculty seminars at the Harvard Law School, Yale Law School, UNLV's William S. Boyd School of Law, University of Texas at Austin Law School, Boston University Law School, Tulane University Law School, Drake University Law School, the University of Montana Law School, Syracuse University Law School, the University of Missouri, and Florida International University, as well as the Legal History Colloquia at the University of Virginia Law School, Boston University Law School, and Boston College Law School. I also benefited from presenting related papers at the meetings of a number of professional associations, including the American Political Science Association, the American Historical Association, the Law and Society Association, the New England Political Science Association, the Western Political Science Association, the Policy History Conference, and the Shawnee Trail Regional Conference on American Politics and Constitutionalism sponsored by the University of Missouri's Kinder Institute on Constitutional Democracy, with the assistance of the Political Science Department of the University of Colorado, Colorado Springs.

I owe a special debt to the University of Missouri's Kinder Institute on Constitutional Democracy under the founding directorship of Justin Dyer, which, in conjunction with Boston College, not only funded a year-long sabbatical that allowed me to bring this project to completion but also hosted a two-day book manuscript workshop that was of immense help in shaping the contours of both this book and the two related books to follow. Among the many who participated in that unusually productive conference – which drew upon Missouri's Political Science and History Departments, and Law School and Honors College – were Jack Balkin, Keith Whittington, Richard Izquierdo, Adam Seagrave, Carli Conklin, Janelle Beavers, David Golemboski, and Catherine Rymph. I received some early financial support for the project from Boston College's Clough Center. I am especially grateful for the sustained support, financial and otherwise, of Boston College's Political Science Department and BC's Morrissey College of Arts and Sciences.

Many individuals have been helpful and supportive along the way, who I will try to list rhythmically rather than alphabetically: Linda McClain, Kim Scheppele, Sheila Jasanoff, David Kennedy, Paul Frymer, Akhil Amar, Brad Hays, Nancy Scherer, Bruce Ackerman, Richard Bensel, Ron Kahn, Karen Orren, Steve Skowronek, Gary Jeffrey Jacobsohn, Nick Salvatore, Julie Novkov, Dan Carpenter, Mark Tushnet, Steve Griffin, Carol Nackenoff, Jeff

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Pasley, Dan Geary, Steve Engel, Dirk Hartog, Shep Melnick, Richard Hamm, Greg Burnep, Sandy Levinson, Jim Fleming, Logan Sawyer, Tom Packer, Bob Faulkner, Kevin Kruse, Elizabeth Sanders, David Tanenhaus, Mary Bilder, Meg Jacobs, Amy Wallhermfecht, Tim Fuller, Sophia Lee, Mary Ziegler, Joe Postell, Jeremy Rabkin, Steve Teles, Sot Barber, Mark Graber, Brad Wilson, Lisa Miller, Aziz Rana, Jesse Merriam, Justin Dyer, Intisar Rabb, Bradley C. S. Watson, Eldon Eisenach, Sean Beienburg, Barry Cushman, Larry Solum, Ted White, Paul Herron, Keith Bybee, Patrick Peele, Tom Keck, Miguel Schor, Mark Kende, Clem Fatovic, Emily Zackin, and Justin Crowe.

I remain profoundly grateful to Keith Whittington and Jack Balkin, who have been supportive of this project, and engaged interlocutors of my work more generally, from the beginning to now, which will soon tally as decades. The same goes, in a different way and even further back, to my Teagle Hall lifting partner Clem Fatovic (with spots on the neck scratcher and head popper ...), and, since sophomore year at Williams College, to Ted Holsten. I have also appreciated the ongoing support and friendship of Dan Peris, Jan van Eck, Carol Nackenoff, Linda McClain, Jim Fleming, and my parents Barbara and Robert Kersch.

At Cambridge University Press, I am grateful to Lew Bateman, who commissioned this project based on a short book proposal, but who retired before I belatedly submitted the manuscript. Lew's successor Sara Doskow skillfully shepherded that manuscript to publication. I am also grateful to the anonymous reviewers of both the initial book proposal for Cambridge and, later, of the completed manuscript, who were both supportive and brimming with criticisms and apt suggestions. Thanks to both Sara and those reviewers, this is a better book than it otherwise would have been.

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