

## Judicial Review and American Conservatism

The Christian Right of the 1980s forged its political identity largely in response to what it perceived as liberal “judicial activism.” Robert Daniel Rubin tells this story as it played out in Mobile, Alabama. There, a community conflict pitted a group of conservative evangelicals, a sympathetic federal judge, and a handful of conservative intellectuals against a religious agnostic opposed to prayer in schools, and a school system accused of promoting a religion called “secular humanism.” The twists in the Mobile conflict speak to the changes and continuities that marked the relationship of 1980s’ religious conservatism to democracy, the courts, and the Constitution.

By alternately focusing its gaze on the local conflict and related events in Washington, DC, this book weaves a captivating narrative. Historians, political scientists, and constitutional lawyers will find, in Rubin’s study, a challenging new perspective on the history of the Christian Right in the United States.

ROBERT DANIEL RUBIN is an independent scholar.

Cambridge University Press  
 978-1-107-06055-5 — Judicial Review and American Conservatism  
 Robert Daniel Rubin  
 Frontmatter  
[More Information](#)

## Cambridge Historical Studies in American Law and Society

Recognizing legal history's growing importance and influence, the goal of this series is to chart legal history's continuing development by publishing innovative scholarship across the discipline's broadening range of perspectives and subjects. It encourages empirically creative works that take legal history into unexplored subject areas, or that fundamentally revise our thinking about familiar topics; it also encourages methodologically innovative works that bring new disciplinary perspectives and techniques to the historical analysis of legal subjects.

*Series Editor*

Christopher Tomlins, *University of California, Berkeley*

### Previously Published in the Series:

- Matthew Crow, *Thomas Jefferson, Legal History, and the Art of Recollection*  
 Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790–1909*  
 Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787–1857*  
 Castañeda Anastacio, Anna Leah Fidelis T., *The Foundations of the Modern Philippine State: Imperial Rule and the American Constitutional Tradition in the Philippine Islands, 1898–1935*  
 Robert Deal, *The Law of the Whale Hunt: Dispute Resolution, Property Law, and American Whalers, 1780–1880*  
 Sandra F. Vanburkleo, *Gender Remade: Citizenship, Suffrage, and Public Power in the New Northwest, 1879–1912*  
 Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism*  
 Ely Aaronson, *From Slave Abuse to Hate Crime: The Criminalization of Racial Violence in American History*  
 Stuart Chinn, *Recalibrating Reform: The Limits of Political Change*  
 Ajay K. Mehrotra, *Making the Modern American Fiscal State*  
 Yvonne Pitts, *Family, Law, and Inheritance in America: A Social and Legal History of Nineteenth-Century Kentucky*  
 David M. Rabban, *Law's History*  
 Kunal M. Parker, *Common Law, History, and Democracy in America, 1790–1900*  
 Steven Wilf, *Law's Imagined Republic*  
 James D. Schmidt, *Industrial Violence and the Legal Origins of Child Labor*  
 Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941*  
 Tony A. Freyer, *Antitrust and Global Capitalism, 1930–2004*  
 Davison Douglas, *Jim Crow Moves North*  
 Andrew Wender Cohen, *The Racketeer's Progress*  
 Michael Willrich, *City of Courts, Socializing Justice in Progressive Era Chicago*  
 Barbara Young Welke, *Recasting American Liberty: Gender, Law and the Railroad Revolution, 1865–1920*  
 Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*  
 Robert J. Steinfeld, *Coercion, Contract, and Free Labor in Nineteenth Century America*  
 David M. Rabban, *Free Speech in Its Forgotten Years*  
 Jenny Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery*  
 Michael Grossberg, *A Judgment for Solomon: The d'Hauteville Case and Legal Experience in the Antebellum South*

Cambridge University Press  
978-1-107-06055-5 — Judicial Review and American Conservatism  
Robert Daniel Rubin  
Frontmatter  
[More Information](#)

---

# Judicial Review and American Conservatism

*Christianity, Public Education, and  
the Federal Courts in the Reagan Era*

ROBERT DANIEL RUBIN



CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
 978-1-107-06055-5 — Judicial Review and American Conservatism  
 Robert Daniel Rubin  
 Frontmatter  
[More Information](#)

## CAMBRIDGE UNIVERSITY PRESS

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  
 4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi – 110002, India  
 79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org  
 Information on this title: www.cambridge.org/9781107060555  
 10.1017/9781107447202

© Cambridge University Press 2017

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2017

Printed in the United States of America by Sheridan Books, Inc.

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

### *Library of Congress Cataloging-in-Publication Data*

NAMES: Rubin, Robert Daniel, author.

TITLE: Judicial review and American conservatism : Christianity, public education, and the federal courts in the Reagan era / Robert Daniel Rubin.

DESCRIPTION: New York : Cambridge University Press, 2016. | Series: Cambridge historical studies in American law and society | Discussing cases: Wallace v. Jaffree, 472 U.S. 38 (1985) and Smith v. Board of School Commissioners of Mobile County, 827 F.2d 684 (11th Cir. 1987) | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2016041115 | ISBN 9781107060555 (hardback : alk. paper)

SUBJECTS: LCSH: Jaffree, Ishmael—Trials, litigation, etc. | Religion in the public schools—Law and legislation—Alabama—History—20th century. | Religion in the public schools—Law and legislation—United States—History—20th century. | Smith, Douglas T.—Trials, litigation, etc. | Mobile County (Ala.). Board of School Commissioners—Trials, litigation, etc. | Hand, W. Brevard.

CLASSIFICATION: LCC KF228.J34 R83 2016 | DDC 344.73/0796—dc23 LC record available at <https://lcn.loc.gov/2016041115>

ISBN 978-1-107-06055-5 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press  
978-1-107-06055-5 — Judicial Review and American Conservatism  
Robert Daniel Rubin  
Frontmatter  
[More Information](#)

---

*This book is dedicated to my wife, Sarah, and my son,  
Jonathan. They are the lights of my life.*

Contents

|                                                 |                |
|-------------------------------------------------|----------------|
| <i>Acknowledgments</i>                          | <i>page ix</i> |
| Introduction: Conservatism and the Constitution | i              |
| 1 Massive Resistance                            | 30             |
| 2 The Moral Majority of Alabamians              | 72             |
| 3 Justice Made Political                        | 122            |
| 4 Accommodation                                 | 164            |
| 5 Showdown                                      | 201            |
| 6 The Trouble with Secularism                   | 234            |
| 7 Religion by Any Other Name                    | 275            |
| Conclusion: The Constitution and the People     | 309            |
| <i>Index</i>                                    | 339            |

## Acknowledgments

I wish to thank my colleagues Michael Grossberg, Daniel Conkle, and Steven Stowe, as well as my editors, Christopher Tomlins and Deborah Gershenowitz. Thanks to Kirsti Sandy, Mark Long, and Katherine Hermes. Thanks also to Joseph Butwin and Joseph Newman for helping me carry out this project. I thank Susan Armeny, the finest critic of writing I have ever known. I am especially grateful to Julia Eulenberg and Michael Eulenberg for their boundless support, and to Barbara, Marvin, and Evan Rubin for their enduring love.

This book could never have been written without the generosity of Brevard Hand. Graciously, Judge Hand created space for us to disagree amicably. I will always appreciate his kindness.