WHAT IS CONSERVATIVE CONSTITUTIONALISM? A FRACTURED HISTORY REVEALS AN UNCERTAIN PATH FORWARD*

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A review of JOHNATHAN O'NEILL, CONSERVATIVE THOUGHT AND AMERICAN CONSTITUTIONALISM SINCE THE NEW DEAL (Johns Hopkins University Press 2023)

I. CONSERVATIVE SCHOOLS OF THOUGHT

Conservative thought is vexed. The debates that animated the birth of modern American conservatism in the 1950s, and gave it enormous intellectual energy through the 1980s, often seem like quaint anachronisms. Whatever their divisions, the schools of thought that constituted the early conservative intellectual movement shared a healthy suspicion of the domestic power and competence of the national state. They all sought to re-ground America in principles or practices that antedated the progressive intellectual revolution and the New Deal.

Nowadays, "new conservatives" are drawn to discussions and advocacy of the vigorous use of state power for non-progressive ends. Their rejection of the liberal reconfigurations of politics, law, and morality over the last several decades has a tone of exasperation, and it evinces impatience with conservative efforts that have gone before. They have become convinced that American

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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constitutionalism, even properly understood, is no prophylactic against policy and moral outcomes they deplore. In fact, some go so far as to claim that the American constitutional order, with its purported attachment to a radical Enlightenment liberalism, was front-loaded to guarantee those outcomes. Hence, their disposition is to reject the framers' Constitution and seize the tools that progressives forged, hoping they can somehow keep them in the right hands.

A new book by historian Johnathan O'Neill directly addresses the manner in which various American conservative thinkers brought to bear their understandings of American constitutionalism as a response to the New Deal and its progeny. As such, it serves not only as a valuable intellectual history, but as a vital aid to understanding our own intellectual and constitutional moment.

O'Neill's book is a major intellectual achievement. It is the first to offer a systematic account of the influence of the main strains of modern American conservative thought—traditionalist, libertarian, neoconservative, and Straussian—on the most important constitutional questions and controversies that arose from the triumph of progressive thought in the 20th century. These include the theory and growth of the administrative state, the erosion of federalism, the rise of the imperial presidency, and the status of judicial review.

Unlike so many intellectual historians, O'Neill is fully conversant with constitutional matters. As he notes, "Historians have been preoccupied with social and cultural modes of analysis and have mostly ceded constitutional questions to political scientists and law professors."[1] He therefore understands his task as a historian to include retrieving "the neglected subject of constitutional history and combin[ing] it with the examination of distinctly conservative ideas."[2] But the scope and ambition of his work is even greater than that. He is a more than competent scholar of American political thought, continually evincing deep familiarity with the works of countless intellectual conservatives. It is difficult, in a review, to do justice to the breadth of his argumentation.

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[1] JOHNATHAN O'NEILL, CONSERVATIVE THOUGHT AND AMERICAN CONSTITUTIONALISM SINCE THE NEW DEAL 2 (2022).

[2] *Id*. When historians have directed their minds to constitutional history, for the most part they have cleanly missed progressivism's profound assaults on the framers' Constitution. For a detailed account of this phenomenon, see BRADLEY C. S. WATSON, PROGRESSIVISM: THE STRANGE HISTORY OF A RADICAL IDEA (2022/2020).

Broadly speaking, traditionalist conservatives in the post-New Deal era saw the American constitutional order as an outgrowth of what had gone before, rather than a modern innovation. In their view, it developed the rights of Englishmen in an American context. The American Revolution was therefore a profoundly conservative moment, to the extent a revolution can be such a thing. While the Revolution effected structural changes to the modes of American governance, not to mention a shift of sovereignty, the Constitution itself in no way dedicated the new nation to the pursuit of natural rights or the recognition of natural human equality. From the traditionalist point of view, it was the unmoored pursuit of rights and equality that largely accounted for the post-New Deal massification of government, which was so profoundly disconsonant with American political and cultural traditions, not to mention the dignity of the human person.

Libertarians, by contrast, wished to maximize individual liberty, understood as the absence of coercion. They saw the growth of government as the primary enemy of that liberty. While traditionalists were willing to embrace the marketplace within certain moral limits, libertarians embraced it simply, as the best means to human flourishing. They could make peace with the Constitution to the extent it could be understood to be a minimalist document, demanding little more than the rule of law as against arbitrariness and coercion, as well as decentralization of power conducive to voluntary exchange.

A small but influential number of conservatives took their bearings from the German-American philosopher Leo Strauss (1899-1973). In doing so, they rejected modern philosophical developments that too casually foreclosed the search for truth. Straussians engaged, questioned, and in some cases outright rejected historicist dogmas that insist all truth claims are just that—mere representations of the "values" of those asserting them, or epiphenomena of their time and place.[3] Straussianism is a notoriously riven intellectual movement, but Straussians in general were far more sympathetic to the American constitutional order than their colleagues on the philosophical left. Some Straussians embraced the American regime as the political expression of natural rights that transcend historical relativity. Others were at least circumspect in their criticisms of the regime, due to deep familiarity with alternative regime types that were—for philosophers and ordinary citizens alike—far more likely to be vile. On the whole, "Straussians were thus conservative defenders

[3] *See, e.g.*, LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953).

of American constitutionalism who nevertheless thought it had weaknesses or blind spots that must be actively addressed."[4]

Neoconservatism arose less from deep cultural attachments or philosophical study and more from a suspicion of communism abroad, and a disenchantment with the workings of Great Society programs at home. Neoconservatives reflected on the inherent limitations of national domestic policies that seemed to misunderstand human nature, not to mention local conditions. They launched withering critiques of the extra-constitutional "new class" of educated professionals who increasingly designed, defended, and perpetuated manifestly failing policies, yet enjoyed various forms of insulation from both feedback and pushback. Neoconservatives were less directly concerned with constitutional questions than were members of other schools of conservative thought, yet their rejection of the pieties and practices of the intellectual left often led them to consideration of the forgotten virtues of the framers' Constitution.

II. THE ADMINISTRATIVE STATE

Bureaucracy—"rule from the desk," literally—became a central feature of American life as a consequence of the New Deal. For the better part of a century, Congress has seen fit to delegate vast amounts of governing authority to thousands of faceless actors spread over myriad politically unaccountable departments and agencies. These entities sometimes go so far as to combine functionally legislative, executive, and judicial powers. This large-scale shadow regime, often referred to as the "administrative state," remains in obvious tension with the framers' Constitution, which was premised on the consent of the governed and dedicated to protecting the natural rights of all. The Constitution therefore limited and enumerated the powers of the national government, and it vested each of them in one of the three constitutional branches. As O'Neill notes:

> conservative critiques of the administrative state proceeded from several angles. These critiques were theoretical, considering the progressive liberal regulatory-bureaucratic state as a form of social and political order; historical, assessing how and why that order managed to displace much of the old

[4] O'Neill, *supra* note 1, at 12. *See* LEO STRAUSS, LIBERALISM, ANCIENT AND MODERN (1968).

> constitutionalism; and legal, attempting to legitimate, constrain, and direct it within the terms of post-New Deal constitutional law.[5]

For traditionalists, the administrative state crowded out the realm of the private and destroyed civil society, thereby undermining the old constitutional order. O'Neill rightly observes that Russell Kirk, in his seminal book *The Conservative Mind*, "identified the administrative state with more clarity than he is usually credited."[6] He was joined by Robert A. Nisbet and others in seeing the centralized bureaucratic state as an enervating enemy of community. By bulldozing local and sub-political communities, it cleared a path for its own expansion. Neoconservatives including the likes of Daniel Patrick Moynihan, James Q. Wilson, and Irving Kristol offered complementary critiques that emphasized the growth and power of the "new class" of managerial elites, while also launching theoretical and empirical attacks aimed at the hubris of social-scientific pretensions. O'Neill notes that both traditionalists and neoconservatives tended to eschew technical legal analysis.[7]

Libertarians built an economistic critique of the administrative state, relying on the work of thinkers such as Friedrich Hayek.[8] In substituting the planning of political elites for the cues of the marketplace, bureaucratic rule suffered from massive information deficits. Libertarians also insisted that rule from the desk was not only inefficient and self-interested, but was a direct challenge to the rule of law. Later thinkers like Richard Epstein would go so far as to defend a different kind of elite rule—judicial supremacy—as a check on administrative discretion and a guarantor of classical liberalism.[9]

Straussians launched particularly deep and sustained attacks on the administrative state, which continue to animate much conservative thinking today. Early critiques, such as Herbert J. Storing's, revealed the impossibility of a "value neutral" social science or managerial expertise, and they argued that bureaucrats should be educated in constitutional norms as well as the nature

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[5] O'Neill, *supra* note 1, at 20.

[6] *Id*. at 24. *See* RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO SANTAYANA (1953).

[7] O'Neill, *supra* note 1, at 23.

[8] FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

[9] RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014). For a critique of this argument, see Bradley C. S. Watson, *Limiting Government, But Not Judges*, XIV CLAREMONT REV. OF BOOKS, No. 4, Fall 2014, *available at* https://claremontreviewofbooks.com/limiting-government-but-not-judges/, and my extended exchange with Epstein in *A CRB Discussion of Classical Liberalism and the Constitution*, CLAREMONT REV. OF BOOKS, Jan. 12, 2015, https://claremontreviewofbooks.com/digital/a-crb-discussion-of-classical-liberalism-and-the-constitution/.

and necessity of prudential judgment in pursuit of the public good. Other Straussians, coming especially from the "West Coast" or "Claremont" school of thought, concluded that the administrative state—with its positivism and historical relativism—was ineradicably hostile to the theory and practice of natural rights constitutionalism, and that it could not be redeemed through education. This line of Straussian critique, launched by John Marini and others, has now more or less completely supplanted earlier Straussian efforts to make peace with the administrative state within the confines of American constitutionalism.

Broadly consonant with Straussian concerns as to the legitimacy of the administrative state were conservative legal efforts in support of a "unitary executive." These efforts grew in earnest during the Reagan years. If Congress delegates to an unelected, self-interested, partisan, and captured bureaucracy, the most effective source of control will be a coherent executive directing the discretion of administrative decision-makers for the public good. Conservative presidents since Reagan have, with varying degrees of emphasis and success, tried to claim and effectuate this constitutional populism. But as O'Neill notes, "the unitary executive made policy victories somewhat hostage to the next election" and "undercut the traditional conservative preference for political stability."[10] It also put at risk "the orthodox constitutionalist concern with limits on all official power."[11]

In the end, "conservatives' diagnoses and emphases varied in accord with their own ideas, but all saw in the administrative state challenges to the elements of American constitutionalism they most valorized."[12]

III. FEDERALISM

With respect to federalism, what O'Neill calls the New Deal constitutional settlement has never been upended. This settlement has effectively guaranteed congressional power to regulate vast swaths of the economy and fund large-scale social programs whose efficacy is widely contested. Conservative criticism of this settlement has been loud and persistent, but largely feckless. And despite concerted efforts on the part of conservatives to bend the judiciary in a constitutionalist direction, O'Neill accurately observes that on

[10] O'Neill, *supra* note 1, at 71.
[11] *Id.*
[12] *Id.* at 50.

"the long historical view, the Court was drawing lines only at the margins—contestable to be sure—in an era of centralized, positive government."[13]

He is also correct to point out that none of the various shades of traditionalism—whether segregationist in the manner of the Southern Manifesto of 1956, Southern Agrarian in the manner of Richard Weaver or M.E. Bradford, or communitarian in the manner of Kirk or Nisbet—was well equipped to be a serious challenge to the nationalization of politics, economics, and culture. This remains true even though localist concerns are still an important undercurrent of contemporary conservative thought.

Neoconservatives, for their part, were hardly effective allies of localism, "having accepted the New Deal expansion of national power as quite properly settled and irreversible."[14] O'Neill shows that he understands well some of the tensions that continue to permeate the conservative movement: "As a viewpoint born primarily of eastern urban intellectuals, neoconservatism simply did not register federalism as a pressing issue."[15] More interested in questions of policy design and implementation, many neoconservatives found federalism and localism to be of relatively minor concern.

The most serious intellectual engagements with the federal principle were left to the libertarians and Straussians. The libertarian goal of maximizing individual freedom, minimizing coercion, and incentivizing efficiency fit well in principle with the idea of a republic of states competing for the affections and dollars of citizens who were free to move as they saw fit. "Competitive federalism" became a locus of research for economists such as James M. Buchanan, although libertarians often argued the success of this idea would require assertive judicial enforcement of economic rights in the face of the post-New Deal reality of state governments having been co-opted by federal largesse. Because of the ideological character of libertarian arguments, their exponents often "struggled to root them in the historical experience and political theory of American constitutionalism."[16] As a result, the political purchase of those arguments has been far less than libertarians think it should be.

Straussians such as Martin Diamond, Herbert Storing, Walter Berns, and Harry V. Jaffa tended to defend a strong national government as being in accordance with the framers' intentions. The Constitution was designed to tame the injustices and instabilities of a loose union of sovereign states. Such

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[13] *Id.* at 81.
[14] *Id.* at 102.
[15] *Id.*
[16] *Id.* at 120.

a theoretical emphasis, aside from its grounding in the framers' constitutional design, proved, practically speaking, to be useful and ultimately necessary in the mid-20th century for the purpose of supporting the struggles for civil rights at home and against communism abroad.

But they did not think such an emphasis should be understood to license Leviathan. Jaffa in particular spent his long career emphasizing that a proper account of both limited government and the Constitution itself depended first and foremost on recognizing the equal natural rights of all—which could not legitimately be infringed by any level of government. "Jaffa's arguments helped reorient much conservative opinion away from the traditional emphasis on hierarchy and prescriptive liberty," even as "[f]ederalism as such garnered little attention in Jaffa's subsequent scholarship or his frequent quarrels with other conservatives."[17]

O'Neill emphasizes that "Straussians' generally nationalist posture did not make them mere apologists for post-New Deal centralization."[18] The Great Society and the growth of the administrative state prompted many Straussians to consider seriously the federalist elements of the framers' Constitution, not to mention the Antifederalist arguments against it. By the end of the 20th century, it was clear that Straussian scholarship betrayed a "robust appreciation of federalism."[19]

IV. THE PRESIDENCY

Theoretical and practical debates over the modern presidency were another field onto which conservatives poured their fire. But as in other areas of constitutional development, they were hardly firing in unison or even aiming at the same targets. Traditionalists tended to maintain an oppositional stance toward the modern presidency, with respect to both domestic and foreign affairs. By contrast, Straussians and neoconservatives (though O'Neill is careful to maintain the distinction between the two) often supported the robust exercise of executive power for foreign policy purposes. Straussians in particular maintained a healthy skepticism of the domestic exercise of presidential power, stemming from their philosophical reflections on tyranny and demagoguery. Libertarians for the most part paid scant attention to the presidency as such, at least until 9/11 and its aftermath.

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[17] *Id.* at 128.
[18] *Id.* at 129.
[19] *Id.* at 135.

The New Deal and the Cold War virtually assured the steady growth of the executive branch—if not always executive power per se—for the better part of a century. In retrospect, early post-World War II efforts by traditionalists, including Senator Robert A. Taft, to pare back the presidency in relation to the other branches seem doomed from the outset. At a scholarly level, concerns about the managerial-bureaucratic revolution, the plebiscitary presidency, centralized administration, and liberal ideological dominance never disappeared—but neither did these ideas gain the traction needed to resist the whirlwinds of modernity. Punctuating the quixotic nature of the traditionalists' quest were the muting of their doubts in the face Reaganism and the theory of the unitary executive.

Straussians, including the likes of Harvey C. Mansfield Jr., meditated on the teachings of modern philosophers such as Machiavelli and Locke.[20] Each of them highlighted the role of necessity in politics—a necessity that law can never fully tame or overcome. Straussians therefore saw that there was an ineradicable tension between executive power and the rule of law. Constitutionalism must somehow take account of this tension, walking a fine line between limiting the dangers of demagoguery and encouraging bold statesmanship to do good in a dangerous world. We might wish to deny prerogative and force in the name of "the rule of law," but they can never be wrung out of politics, and a workable constitutional order must allow for them prudentially to be brought to bear. Straussians were convinced the framers created such an order.

The Straussians' philosophical awareness was quite different, and ultimately more restrained, than the neoconservative disposition to support wide-ranging international interventions. Seeking purpose after the Cold War, thinkers such as William Kristol ofttimes appeared more invested in the affairs and interests of other nations than their own. Libertarians, for their part, differed radically from both Straussians and neoconservatives. For them, the modern presidency had become an imperial executive in toto, far removed from both the abstract principles of limited government and the old republican order of America. Some libertarians such as Murray Rothbard and Llewellyn H. Rockwell Jr. saw the Constitution itself as a grand failure and aligned themselves with traditionalist isolationists—to very little effect.

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[20] HARVEY C. MANSFIELD JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER (1989).

V. JUDICIAL REVIEW

Conservatives were confronted by a Supreme Court that chose to ratify rather than challenge the New Deal constitutional settlement. "Together, pragmatism, Progressive political science, and legal realism redefined how law, interpretation, and the Constitution itself were understood."[21] Under the influence of progressive intellectual categories, the New Deal Court turned its back on judicial review when it came to the infringement of economic liberties and instead began to devote its energies to the explication and invention of new so-called civil rights. This turn accelerated rapidly under the Warren Court and has never been decisively halted. O'Neill accurately notes that while "the Rehnquist Court marked an end to judicial review as a thoroughly reliable adjunct to New Deal-Great Society liberalism," it is fair to say that "progressive liberalism still set the boundaries within which the Court operated."[22] And this remains true today, despite the concerns—bordering on moral panic—of many progressive legal analysts.

Conservative criticisms of the judiciary came to sight as a criticism of power simply—power concentrated in the hands of men who could not be held to account through the normal give-and-take of politics. Whether by usurping properly legislative functions, furthering the reach of the administrative state, undermining the federal principle, or proclaiming liberal platitudes in support of newly-minted "rights" that conservatives found to be, at a minimum, morally suspect, the post-New Deal Court seemed to go out of its way to attract conservative ire. By the 1980s, this ire was given additional intellectual foundation through the growing prominence and rigorous development of a new "constitutional originalism." But as O'Neill sagaciously points out, "[o]riginalism was always latent in American political discourse and Supreme Court decision making in the eighteenth and nineteenth centuries, though it was usually untheorized because it was so thoroughly accepted."[23] In other words, explicating the precise meaning of constitutional words as they were written was simply what judges did. It took the hubris of progressive "living constitutionalism" to alter this basic judicial orientation and infuse judges with the sense that it was their task—rather than that of

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[21] O'Neill, *supra* note 1, at 199. For an account of the influence of these and other strains of progressive thought on contemporary constitutional jurisprudence, see BRADLEY C. S. WATSON, LIVING CONSTITUTION, DYING FAITH: PROGRESSIVISM AND THE NEW SCIENCE OF JURISPRUDENCE (2022/2009).

[22] O'Neill, *supra* note 1, at 205.

[23] *Id*. at 205.

the people and their legislators—to update constitutional meanings. The new originalism developed in such a way as to emphasize the "original public meaning" of words, rather than any idiosyncratic subjective interpretation of them.

A version of originalism informed some early traditionalist opposition to the Court's decision in *Brown v. Board of Education*. James J. Kilpatrick and others argued that the Fourteenth Amendment clearly did not forbid segregated schools. And indeed, the reasoning in *Brown* was hardly a model of analytical rigor, and it seemed to rely more on the Justices' reading of contemporary social science than on the words of the Constitution. Commencing with this case, the Court had decisively "transformed constitutional interpretation into amendment," according to Kilpatrick.[24] Conservative opponents of segregation, such as L. Brent Bozell Jr., emphasized the extent to which the deliberative character of the Constitution, including both its capacity for legislative compromise and its devolution of decision-making to local authorities, were being destroyed by judicial supremacy.[25] Other traditionalists, including Kirk, Bradford, and Nisbet, did not deal with judicial review in a systematic way, but saw the Court as a profound threat to custom and community, which they associated with the older republican form.

In short, well before there was a doctrine of originalism with all its contemporary legal-professoriate significations, intellectual conservatives were making legal arguments in defense of the original Constitution, largely as a response to the Warren Court's transgressions. Unfortunately for traditionalists—and for the conservative movement generally—some, though by no means all, early criticisms of judicial power got off on the wrong foot by seeming to oppose legitimate demands for the protection of both civil and natural rights.

Neoconservatives too had their qualms about the direction of modern judicial review, but their embrace of originalism was less clear. Much of the neoconservatives' disquiet stemmed from their sense of the limits to judicial capacity. Courts from *Brown* onward had become far too confident in both the power of social science and their own ability to understand it and implement its findings. According to Nathan Glazer, judges brought to the bench the peculiarities and predilections of the "new class," confidently intervening

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[24] *Id.* at 212. *See* JAMES J. KILPATRICK, THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA (1957).

[25] L. BRENT BOZELL JR., THE WARREN REVOLUTION: REFLECTIONS ON THE CONSENSUS SOCIETY (1966).

in matters of social policy only to make outcomes demonstrably worse. Putting questions of constitutional propriety aside, "[a]n important element of the new class dynamic, said Glazer, was that judges often yearned for the approval of the right-thinking educated public opinion represented by this class."[26] There was much on which both traditionalists and neoconservatives could agree: "the policy results of numerous unpersuasive judicial decisions were disastrous," and "[t]he judiciary had become a major force in disrupting self-government and the religiously informed culture of community and moral self-restraint that America had historically sustained at the local level."[27]

In keeping with Strauss's emphasis on understanding political things in light of the high rather than the low, and in light of acts of statesmanship rather than petty politics—as well as his insistence that we must understand writers as they understood themselves—Straussians had long evinced an interest in grasping the framers' Constitution on its own terms. Though not primarily legal philosophers or analysts, early Straussians "anticipated originalist thinking by inquiring into the true meaning of the Constitution (and its limits)."[28]

Storing insisted that the intent of the framers was key to a full and honest account of American constitutionalism. Diamond had rescued the Constitution from the reductionism of progressives who saw it as protecting the material interests of its framers. "Walter Berns was the first Straussian to study the Court extensively. He argued that First Amendment jurisprudence had strayed from the founders' sounder understanding of speech and public morality. . . "[29] Berns argued that libertarians as much as liberals were trapped within the corrosive horizon of free speech absolutism, without regard to virtue.[30] Meanwhile, Jaffa insistently criticized constitutional originalists as much as liberals, claiming that both camps were ultimately beholden to legal positivism, and therefore were equally nihilistic. "Positivist originalism was philosophically impoverished because, despite its majoritarianism, it lacked an account of what originally made consent, and with it limits on majority

[26] O'Neill, *supra* note 1, at 222.
[27] *Id*. at 235.
[28] *Id*. at 236.
[29] *Id*. at 238. *See* WALTER BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT (1957).
[30] O'Neill, *supra* note 1, at 238.

rule, the basis of legitimate government."[31] For Jaffa, the Constitution is grounded in the natural right of consent, which is in turn derivative from the observable natural truth of human political equality. Mere majoritarianism, absent an understanding of natural rights, cannot place limits on the consent principle.

Straussians have continued to argue over whether judicial review, and constitutional limitations thereon, is best grounded in the legal positivism of a fundamentally majoritarian Constitution, or on a full understanding of natural rights and natural law—which might, on occasion, support a vigorous judicial activism in defense of those rights. O'Neill does not dilate on the West Coast Straussian account of how progressive philosophy merged with New Deal liberalism to make "living constitutionalism"—which is at odds with both conservative legal positivism and natural rights theory—dominant in constitutional adjudication.[32]

Despite the tensions within Straussian thought, O'Neill rightly concludes that "Straussians consistently understood themselves as originalists of one kind or another, even as they argued among themselves."[33] Furthermore, the "definitive Straussian focus on political founding and regime principles ensured that claims about the proper role and extent of judicial authority would necessarily be expressed in terms of original constitutional meaning."[34]

As mentioned earlier, in the discussion of the administrative state, libertarians often defended a form of judicial supremacy in pursuit of libertarian or classical liberal governance. For example, Bernard H. Siegan insisted that "the Framers' generation viewed the judiciary as another means for achieving libertarian objectives of government. The Framers surely never would have accepted judicial review if they thought it would have been used in an antilibertarian fashion."[35] The problem with this libertarian claim, of course, is that the framers did not accept judicial review—or if they did, it was in very attenuated form and certainly not in pursuit of "libertarian" objectives.[36]

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[31] *Id*. at 256. *See* HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994); HARRY V. JAFFA, STORM OVER THE CONSTITUTION (1999).

[32] *See* Watson, *supra* note 21.

[33] O'Neill, *supra* note 1, at 259.

[34] *Id*. at 259-60.

[35] *Id*. at 266 (quoting BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980)).

[36] *See* Watson, *supra* note 9.

Nonetheless, O'Neill writes, "[l]ike Siegan, Epstein rejected the traditional conservative presumption of judicial restraint and called for more active judicial intervention on behalf of property and economic rights: it should be 'far greater than we now have, and indeed far greater than we have ever had.'"[37] It is undoubtedly true that within the conservative movement, "libertarians stood apart in consistently seeing courts as the institution best able to advance their basic political philosophy. This view abided from libertarians' first foothold in law schools in the 1980s to their growing presence in constitutional theory and Supreme Court litigation in the twenty-first century."[38] In doing this, libertarians ran the risk of becoming living constitutionalists by another name. As non-libertarian conservatives argued,

> Judicial engagement elevated the libertarian beau ideal of the unencumbered sovereign individual against the menacing state, but the theory had no real place for self-governing communities that wanted to safeguard their principle in law. As all public questions were increasingly distorted into a conflict between individual rights and state power and were left to judges to resolve, eventually political deliberation about the common would become impossible.[39]

Despite quite fundamental disagreements within the conservative camp on the nature, extent, and ultimate grounding of rights—not mention to role of the judiciary in articulating and enforcing them—"[c]onservative and libertarian public interest litigation now appears to be a permanent feature of the constitutional landscape."[40] And while conservatives have failed to roll back the rights revolution, they continue to attempt to develop and expand their own catalog of rights.[41]

VI. CONGRESS AND CONSTITUTIONAL REFORMATION

O'Neill ends his book by noting an obvious lacuna in conservative thought: serious attention to Congress. His concluding chapter is a combination of observation and plea: "American conservatives, and citizens in general, must again see that their ability to be a self-governing people is tied to the fate of Congress. Its shortcomings are real, as all major schools of

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[37] O'Neill, *supra* note 1, at 268-269. *See* RICHARD EPSTEIN, TAKINGS (1985).
[38] O'Neill, *supra* note 1, at 274.
[39] *Id*. at 279.
[40] *Id*. at 280.
[41] *Id*.

conservatism accept, but it must be re-engaged and reinvigorated if the republic is to endure."[42] How this might happen, when everything has failed, is unclear.

So at the end of his impressive account of conservative thought, O'Neill seems to come back to a pessimism, if not fatalism, that he introduced at the beginning. It is surely the case that "irresponsible bureaucracy, centralized governance that destroys federalism, a plebiscitary and imperial presidency, and modern judicial review cannot sustain republican self-governance."[43] But as he suggested in his introduction, conservatism was doomed to failure in opposing these things, both because of the extent of the New Deal's reconfiguration of American constitutionalism, and because of the principled disagreements among conservatives themselves, which prevented the adoption of a unified posture.[44]

All this of course points to cracks in the constitutional order that are not likely to be fixable. Nor is the old conservatism likely to sit well with the new. As O'Neill notes, some conservatives "now think that the constitutional system may be at—or beyond—a tipping point at which basic reform is necessary if a recognizably constitutional regime is to endure."[45] Along with this, "notable liberal and Progressive theorists increasingly pronounce the Constitution a failure that should be changed wholesale, or disobeyed, or radically democratized."[46]

His book ultimately points to the need for conservatives to take the hard-won lessons—including lessons in failure—of earlier generations and apply them to fundamental reform of our institutions, including amendment of the Constitution itself. Only a formally amended charter is likely to be conducive to encouraging the virtues necessary to sustain republican government in the face of the evils that earlier generations of conservatives confronted, but failed to halt. As the centralized bureaucratic state melds with the security state, and thought itself is increasingly cabined along progressive lines, the time for action is short. Conservatives might once again unite, and republican

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[42] *Id*. at 298.

[43] *Id*.

[44] *Id*. at 15.

[45] *Id*. at 284. In this camp he places Peter Augustine Lawler and Charles R. Kesler, among others. *See* PETER AUGUSTINE LAWLER & RICHARD M. REINSCH II, A CONSTITUTION IN FULL: RECOVERING THE UNWRITTEN FOUNDATION OF AMERICAN LIBERTY (2019); CHARLES R. KESLER, CRISIS OF THE TWO CONSTITUTIONS: THE RISE, DECLINE, AND RECOVERY OF AMERICAN GREATNESS (2021).

[46] O'Neill, *supra* note 1, at 284.

government be saved, if they can concentrate their minds on how our governing institutions can be redirected to republican ends. This would include innovations to make our national legislature both representative and effective—which would also require attention to the accountability and powers, formal and implied, of the other branches and the states.

America began in revolution, but it need not end that way if conservatives honestly and openly lead the charge in demanding attention to the full range of legal solutions to large and enduring constitutional problems. In the meantime, O'Neill's erudite book is unlikely to be surpassed as the definitive guide to conservative thought and American constitutionalism.

Other Views:

- J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1171 (2021), *available at* https://virginialawreview.org/articles/liberalism-and-disagreement-in-american-constitutional-theory/.
- Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.
- Richard Epstein & Bradley C.S. Watson, *A CRB discussion of Classical Liberalism and the Constitution*, CLAREMONT REV. OF BOOKS (Jan. 12, 2015), https://claremontreviewofbooks.com/digital/a-crb-discussion-of-classical-liberalism-and-the-constitution/.
- Bruce P. Frohnen, *Our Republic and How We Lost It: Philip Hamburger on the Structure of Self-Government*, UNIV. BOOKMAN (Aug. 6, 2023), https://kirkcenter.org/reviews/our-republic-and-how-we-lost-it-philip-hamburger-on-the-structure-of-self-government/.