

AMERICAN CONSERVATISM

NOMOS

LVI

NEW YORK UNIVERSITY PRESS  
New York  
www.nyupress.org

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Library of Congress Cataloging-in-Publication Data

Names: Levinson, Sanford, 1941– editor. | Parker, Joel, 1968– editor. | Williams, Melissa S., 1960– editor.

Title: American conservatism / edited by Sanford V. Levinson, Joel Parker, and Melissa S. Williams.

Other titles: American conservatism (Levinson, Parker, and Williams) | Nomos ; 56.

Description: New York ; London : New York University Press, [2016] | "2016 | Series: Nomos ; LVI | Includes index.

Identifiers: LCCN 2015047791 | ISBN 9781479812370 (cl : alk. paper) | ISBN 1479812374 (cl : alk. paper)

Subjects: LCSH: Conservatism—United States. | LCGFT: Essays.

Classification: LCC JC573.2.U6 A45 2016 | DDC 320.520973—dc23

LC record available at <http://lcn.loc.gov/2015047791>

New York University Press books are printed on acid-free paper, and their binding materials are chosen for strength and durability. We strive to use environmentally responsible suppliers and materials to the greatest extent possible in publishing our books.

Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1

Also available as an ebook

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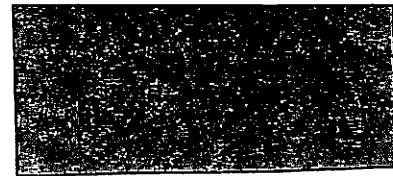
not use “a mistaken version of the idea”—terminology that implies one solution to the meaning of the church-state separation. It is hard to imagine the long-term viability of this essential conception if there were one “correct” way to carve up political-social-religious space!

6. Robert Bellah’s term for religious faith as a form of self-expression.

7. Noah Feldman, “A Church-State Solution,” *New York Times Magazine* (July 3, 2005): 32.

8. Lewis Coser, *The Functions of Social Conflict* (New York: Free Press, 1956), 151–152.

9. As this chapter was being prepared for submission, I read David Brooks’s column “Movement on the Right,” *New York Times* (January 10, 2014), which holds out promise for a different and less hostile approach to the idea of government.



## 6

## CONSTITUTIVE STORIES ABOUT THE COMMON LAW IN MODERN AMERICAN CONSERVATISM

KEN I. KERSCH

It is a commonplace to describe modern American conservatism as comprised of diverse—and, apparently, theoretically incompatible—ideological strands.<sup>1</sup> Some have insisted that these strands—traditionalism, libertarianism, and neoconservatism—stand in such tension with each other that their centrifugal force would inevitably, and soon, pull the movement apart.<sup>2</sup> Others within the movement were impelled by the difficulties occasioned by the tensions to attempt to forge a theoretical synthesis.<sup>3</sup> I have argued, however, that placing too much emphasis on the philosophical tensions within the movement has led us to underplay the immense power of symbolism, emotions, and identity as a unifying force in contemporary conservative politics. The symbol of the U.S. Constitution as a document traduced, betrayed, and (potentially) redeemed has played a major role in forging an ecumenical conservative movement that transcends its logical, philosophical contradictions.<sup>4</sup>

In this chapter, I supplement my account of the role of the Constitution-as-symbol in forging an ecumenical conservative movement with the very important role that many on the right have accorded to the common law as an adjunct means of

motivating, unifying, and fortifying their ranks, while simultaneously distinguishing themselves sharply from their antagonists. The commitment to the common law trumpeted by conservatives is nearly as important to the movement as its commitment to the Constitution itself.

After a brief introduction to the common law and its place in American law, I provide an overview of the understandings of the common law of three important—and quite philosophically distinct—strands of the contemporary conservative movement: (1) Christian conservatives; (2) Hayekian free-market advocates; and (3) public choice theorists. I conclude with some reflections on the significance of the commitment to the common law (as each of these understands it) to the movement's ecumenicalism. I argue, moreover, that within the movement, the commitment to the *lex non scripta* of the common law serves ideological functions that are distinct from, but complementary to, the movement's parallel commitment to the *lex scripta* of the Constitution, functions for which the Constitution is, by its nature, ill-suited. The dual commitment to the common law and the Constitution, forged and conveyed not as matters of abstract political philosophy but rather in the form of "constitutive stories," I contend, are foundational to the political ideology of contemporary American conservatism.<sup>5</sup>

#### THE COMMON LAW IN AMERICA, BRIEFLY

The common law was the primary source of legal rules in the Anglo-American legal tradition for private law (real property, contracts, torts, for example) prior to the rise and routinization of statutory law (legislation) in the mid- to late nineteenth century.<sup>6</sup> In contrast to legislation, common law rules are introduced, accrue, and develop incrementally as a by-product of judges deciding bilateral disputes in concrete individual cases—that is, by case law.<sup>7</sup> Although it incorporated elements of Roman and Canon law, English common law is largely *sui generis*, with its origins in twelfth-century rulings by judges dispatched by the king to the countryside to resolve real-world disputes consistently and dispassionately, with the aim of securing the king's peace against the disturbances of the disputatious, while standing outside the deformations wrought by local loyalties and prejudices—in the process, and not

incidentally, forging loyalty to the crown over potentially competing centers of political power. Over hundreds of years, these rulings generated a remarkably intricate and sophisticated body of law that, even today, serves as the foundation of much—indeed, probably most—of the private law structuring economic and social relations in Great Britain, the United States, and in common law countries worldwide.

Much of the operative private law in the American colonies (and some of its public law) was rooted in English common law. Many colonial assemblies passed reception statutes specifically declaring the English common law to also be their law. Other colonies—populated and presided over by Englishmen, of course—simply applied English common law in their courts as a matter of course.<sup>8</sup> Even after independence, and the fervent reaction by many against all things English, the common law was understood to be, in many respects, indispensable. Some states enacted reception statutes after independence. Most others simply assumed that, unless otherwise stated, common law principles remained in effect. English common law also informed the new nation's public law.<sup>9</sup> In its assimilation of common law writs, like habeas corpus, with other criminal process protections in the Bill of Rights (most explicitly in the Seventh Amendment, which mentions the common law expressly), the Constitution is clearly the outgrowth of the English common law culture.<sup>10</sup>

In the early republic into the first half of the nineteenth century, with little access to law books, Americans availed themselves of William Blackstone's lucid and magisterial four-volume summary of the (otherwise famously arcane) English Common law (1765), which had been published fortuitously on the eve of the American Revolution. With the early-nineteenth-century appearance of indigenous American law, reports compiling the case decisions of domestic courts and the publication of learned legal treatises by homegrown giants of legal scholarship like James Kent of Columbia University and Joseph Story of Harvard, both of whom venerated the common law inheritance, American law remained strongly influenced by its starting point in the centuries-old English common law tradition.<sup>11</sup>

From the beginning—and, indeed, even before Independence—however, Americans, while often starting from English common

law, frequently (and often subtly) innovated within it in ways that took account of the country's unique situation, needs, and political principles. Over the course of the nineteenth century, many of these adaptations helped promote the country's rapid economic development. As such, the common law in the United States was a modernizing force that responded flexibly to changing conditions in the service of important economic and social objectives.<sup>12</sup>

Although it has in parts been remade in America (and, in many cases, re-enacted through statutes), the fundamentals of English common law remain the basis of American private law. The center of gravity in American legal education—now via the case method of instruction developed by Christopher Columbus Langdell at Harvard Law School, rather than through apprenticeship in a law office—continues to be instruction in common law methods, with the still-standard first-year curriculum focusing on honing common law reasoning skills as applied to traditional common law subjects.

This is not to say that the predominance of the common law as a source of law has not been repeatedly challenged, at least in some subject areas, over the course of American history. In the period immediately after independence, some vociferously objected on nationalistic and patriotic grounds to the reception in the United States of English common law. The Codification Movement of the late early- to mid-nineteenth century, led by figures like Robert Rantoul, Jr., and David Dudley Field, was of more practical significance. While retaining the nationalistic and patriotic elements of the post-Independence reaction against the transplantation of English common law, the Codification Movement was also driven by characteristically Jacksonian political concerns. The common law, after all, was made by judges not by the people (through their elected representatives) and was, hence, undemocratic. Its intricacies were so arcane, and its innovations so obscure, that, in a very real sense, the content of the law was accessible only by and through lawyers, whom many regarded as elitist and, as such, unsuited to a republic.<sup>13</sup>

In the late nineteenth and early twentieth centuries, common law doctrines—most prominently, perhaps, as they governed the relationship between employer and employee—came under assault from populist and progressive reformers (as did the judges

and the legal profession more generally, the body of which remained tributaries of the common law tradition).<sup>14</sup> The rise of the modern administrative ("statutory") state succeeded in replacing common law rules with modern statutory and administrative regimes anchored in the new social sciences and theories of interest group liberalism.<sup>15</sup> Today, American law is suffused by both statutes and the common law, in a mixed system in which the common law heritage and influence remains clear.

#### THE STORIES OF LAW AND ECONOMICS AND PUBLIC CHOICE

Although "originalism" is the public face of contemporary conservative legalism,<sup>16</sup> attentive scholars understand that the law and economics movement and public choice analysis have played an equally, if not more, important role in contemporary American legal conservatism. Arguments about the common law are at the heart of the law and economics, and (by implication) play a significant part in the public choice movement as well. Law and economics scholars hold that law is best understood in a positive sense—and, for many, is best assessed normatively—through economic analysis. Public choice scholarship studies the nature and effects of rules through the prism of the rational, individualistic actor pursuing his own self-interest; it is radically skeptical of any concepts that assume broader, more collective, social actors or interests (such as "society," "the community," or "the public interest"). A simultaneous commitment to the Founders, originalism, law and economics, and public choice is instantiated institutionally in conservative law schools like George Mason University Law School, in the work of seminal public choice scholars like James Buchanan, and promoted by educative conservative foundations like the Liberty Fund.<sup>17</sup>

The nineteenth century stands as a touchstone for conservative law and economics scholars, because, prior to the rise of the statutory state, the country was largely governed by common law rules. These rules, both in England and the United States, these scholars argue, performed their regulatory function remarkably well, promoting efficiency and underwriting the creation of wealth on a scale unique in human history. That Great Britain was able to "take off" and develop industrially without an active legislature is

remarkable, and a puzzle to be explained. Many, and not just conservatives, have long credited the common law for this uniquely successful "release of energy."<sup>18</sup>

The virtues of the common law as a system of regulation are best appreciated, for conservatives, by looking beyond what the common law is, and does, to what it is not, and does not do. An affinity for regulation by common law is the other side of the coin of conservative hostility to regulation by legislation. Public choice scholars have emphasized that legislation is a relatively new (read: alien) innovation in the Anglo-American legal-political tradition. Before the late nineteenth century—before progressivism—the English and the Americans lived the (Edenic) dream of governance without government. In this prelapsarian world, the seemingly timeless problem animating liberalism—how to reap the benefits of law without having to submit to the will of another—had been all but solved. A world without legislatures was a world without politicians imposing their personal views on how individuals should act and officiously instructing them on what was best for them. These the individual was free to determine for himself.

In England, prior to its ascendancy as a regular lawmaking body, Parliament was called into session primarily, and periodically, to raise revenue—to levy taxes (public choice scholars have observed that, historically in England, the consolidation of the constitutional doctrine of parliamentary supremacy was a recipe for the rapid growth of government expenditure and debt).<sup>19</sup> In the United States too, before the rise of the (progressive) statutory state (that is, during the classical or formalist period of American constitutional law), common law governance was largely the rule. Although legislatures were present in the United States from its inception, the judicial review power was wielded by judges to void any legislation contaminated by rent-seeking—one of judicial review's major purposes (here, rent-seeking came in the form of what American lawyers called "class legislation," or redistributionist legislation, designed to advance the interest of one class of people or interests at the expense of others—or, put otherwise, that served private rather than public interests).<sup>20</sup> Common law, and, by derivation, constitutional law, thus served as a veto upon redistributionist public policy, holding such policies to violate the due process clauses of the Fifth and the Fourteenth Amendments,

and, later, the Fourteenth Amendment's equal protection clause, because redistributionist laws transgressed the rule of law principles holding that only rules aimed at advancing the public interest (as opposed to special or particular interests) are worthy of the title "law."<sup>21</sup>

Conservatives observe that the United States prospered under the guidance of only a minimal state (in the European sense)—that is, with almost no centralized, rationalist bureaucracy.<sup>22</sup> We in the present, the story goes, are thus confronted with a monumental, existential question: are we better off under a statutory law system, with an active, governing, problem-solving legislature, or a common law system, where the government—the legislature and the bureaucracy—do little? Evidence from the nineteenth century, many conservatives insist, clearly suggests the latter.<sup>23</sup>

Seminal work in law and economics by Richard Posner and his successors surveyed and analyzed a range of common law rules, contrasting them to hypothetical rules which (it was claimed), from the standpoint of modern economics, would be the most efficient means of allocating resources. They claimed to find a remarkable level of correspondence between the two, underlining the wonder of common law governance. These findings were held to reinforce Lord Mansfield's dictum that a glory of the common law was that, over time, it "works itself pure": parties will litigate inefficient common law rules until they get the (efficient) rules they seek.<sup>24</sup> The more recent "origins" debate amongst law and economics scholars considers the question of whether societies with English common law origins are more prosperous, or wealthier, than those anchored in (statutory, legislative) civil law tradition. Law and economics scholars have found that indeed they are.<sup>25</sup>

The culmination of this story about governance in prelapsarian nineteenth-century America is the legend of the fall. Beginning in the late nineteenth century, statist progressivism (with its legal adjunct, sociological jurisprudence) inspired a transfer of governing authority out of the de-centralized courts and into Congress and centralized bureaucracies. To make matters worse, this transfer of institutional authority also corrupted the thinking of the judges, prying them away from their traditional common law moorings and tutoring them in a novel redistributionist ethos. These modern judges, now a part of the New Class knowledge

elite, conversant in social science, statism, and a redistributionist ethos, transformed the areas of law ostensibly remaining under common law governance into engines of redistributionism and inefficiency.<sup>26</sup>

Contemporary law and economics scholars, like George Mason's Todd Zywicki, compare the traditional to the new common law and detail the ways in which the latter differs from the former.<sup>27</sup> Is contemporary common law now infested with the same interest group pressures that typically corrupt legislation? "In recent years . . . this process of self-correction [noted by Lord Mansfield]," Zywicki has argued, "seems to have gone awry, leading to increased concerns about inefficiency in many areas of the common law and heightened calls for legislative tort reform and restoration of freedom of contract."<sup>28</sup> Zywicki laments:

The historic system of weak precedent, a competitive legal order, freedom of contract, and customary law insured that judges would be unable to pursue their personal preferences at the expense of the public. As these factors changed over time, however, the legal system became more vulnerable to influence by judges' ideological preferences, thereby creating opportunities for greater judicial control over the path of the law.<sup>29</sup>

Stated in the language of public choice, twentieth-century common law, unlike its nineteenth-century progenitor, is more susceptible to the sort of rent-seeking that has typically been associated (in anti-statutory public choice literature) with legislation. Now, as has long been the case through legislative lobbying, private parties are able to leverage the process of common law adjudication to redistribute wealth to themselves at the expense of overall efficiency.<sup>30</sup>

The seminal public choice critique of the post-common law state is James Buchanan and Gordon Tullock's *The Calculus of Consent: Logical Foundations of Constitutional Democracy*.<sup>31</sup> For Buchanan and Tullock, legislation, far from representing the apotheosis of democracy (the perspective which animated both the Jacksonian Codification Movement and the progressive model), is often little more than legalized theft. To the extent that there is a state (worst of all centralized) or a legislature, there is a readily accessible tap at which self/rent-seekers can position themselves to draw down

the resources provided by others, through taxes, to advance their personal, as opposed to the public, good.

Buchanan animadverted against "the normative delusion, stemming from Hegelian idealism . . . [that] the state was . . . a benevolent entity and those who made decisions on behalf of the state were guided by consideration of the general or the public interest."<sup>32</sup> Indeed, the term "public interest" is, for public choice theorists, a *bête noire*: the concept (along with the related concepts of "social welfare" and the "general welfare") is not only chimerical but founded upon dangerous assumptions. "The public" or "society" is not "organismic," Buchanan insists. It is not a unified entity, with a readily identifiable "interest."<sup>33</sup> Public choice theorists insist that an "individualistic" as opposed to an "organismic" perspective must be the starting point for all future considerations of constitutions and the state.<sup>34</sup>

For public choice theorists like Buchanan, then, drawing and building upon the work of their predecessors including Anthony Downs's *An Economic Theory of Democracy* and Kenneth Arrow's work in social choice, the study of politics is an individualistic science aimed at the study of self-interested individuals pursuing their own self-seeking objectives.<sup>35</sup> Positioning themselves squarely in the liberal contractarian tradition, Buchanan and Tullock proceed from the position that constitutions are constructed by individuals to advance their individual interests. Significantly, they insist, moreover, that this understanding was inherent in the theory of the American founding as advanced, for instance, in *The Federalist Papers*, the Constitution itself, and other key founding texts.<sup>36</sup> As such, later developments in the trajectory of the American constitutional tradition—crucially, the nationalization of politics, policy, and rights occasioned by the Civil War Amendments and the subsequent construction of the modern administrative state (whether properly authorized or not)—corrupted original constitutional design and moved the nation away from its foundational individualism and toward socialism. In S. M. Amadae's words, Buchanan and Tullock's book is "an unprecedented contribution to political theory that reinvents the logical foundations of constitutional theory so that it resembles the logic of the marketplace."<sup>37</sup>

Notably, public choice theory positions itself as non-normative and scientific. Against the charges of its critics, it does not see itself

as especially pro-business; rather, public choice scholars are preoccupied with the perils of regulatory capture, a focus that lends it interesting affinities with critiques from the left of the modern liberal state.<sup>38</sup> That said, the temperament of many, if not most, public choice theorists is decidedly conservative. Typically tagged as libertarians, seminal public choice scholars could not resist the temptation to tie a story of moral decline to their critique of the modern statutory/administrative state. James Buchanan, for instance, has speculated about the connection between the growth of the state (and the decline of the concept of a disinterested state) and the rise of the sort of lax political thinking that can lead to moral latitudinarianism (ostensibly) yielding a decline in the work ethic and rampant sexual promiscuity.<sup>39</sup>

#### FRIEDRICH HAYEK'S STORY OF "GROWN LAW"

While often characterized as both a libertarian and a neo-classical economist, Friedrich von Hayek's understanding of the nature of law is anchored neither in a theory of self-interest, as is the public choice paradigm, nor in a theory of economic efficiency, as with law and economics.<sup>40</sup> It is rather, distinctively, rooted in a theory of knowledge.<sup>41</sup>

This understanding was richly informed by Hayek's reading of English legal and political history, particularly his appreciation for the uniquely successful way that the English had grappled with what Hayek considered the central fact of the social condition—"the fragmentation of knowledge."<sup>42</sup> Hayek's work consistently emphasized "the fact of the necessary and irremediable ignorance on everyone's part of most of the particular facts which determine the actions of all the several members of human society."<sup>43</sup>

Hayek's appreciation for the dynamic by which "[the] structure of human activities constantly adapts itself, and functions through adapting itself, to millions of facts which in their entirety are not known to anybody," was informed by his appreciation for the development of English common law, an influence shared by both Mandeville and Hume, Hayek noted (via the exposition of that development by Matthew Hale, written in opposition of Thomas Hobbes's (statist) legal positivism).<sup>44</sup>

The fragmentation of knowledge has implications for the exercise of our reason in legal and political life:

Complete rationality of action in the Cartesian sense demands complete knowledge of all the relevant facts. A designer or engineer needs all the data and full power to control or manipulate them if he is to organize the material objects to produce the intended result. But the success of action in society depends on more particular facts than anyone can possibly know. And our whole civilization in consequence rests, and must rest, on our believing much of what we cannot know to be true in the Cartesian sense.<sup>45</sup>

"The fact of our irremediable ignorance of most of the particular facts which determine the processes of society is . . . the reason why most social institutions," like the common law, "have taken the form they actually have," Hayek continued. "To talk about a society about which either the observer or any of its members knows all the particular facts is to talk about something wholly different from anything which has ever existed—a society in which most of what we find in our society would not and could not exist and which, if it ever occurred, would possess properties we cannot even imagine."<sup>46</sup>

Common law governance, Hayek explained, did not presume the accessibility of relevant knowledge that it didn't have. Relatedly, it did not propose to create new laws but rather proposed to find the law that was already extant—that had emerged. It involved "discovering something which exists, not . . . creating something new." As such, it "was not conceived as the product of anyone's will but rather as a barrier to all power, including that of the king." In this way, Hayek observed, "the common law jurists [in England] had developed conceptions somewhat similar to those of the natural law tradition but not couched in the misleading terminology of that school."<sup>47</sup> Thus, he observed, the doctrines of legal positivism were developed "in direct opposition to a tradition which, though it has for two thousand years provided the framework within which our central problems have been mainly discussed . . . the conception of a law of nature."<sup>48</sup> Elsewhere, Hayek specifically notes the affinities between these features of the common law and the medieval religious view that the state cannot be the ultimate source of law.<sup>49</sup> He adds:



What all the schools of natural law agree upon is the existence of rules which are not of the deliberate making of any lawgiver. They agree that all positive law derives its validity from some rules that have not in this sense been made by men but which can be "found" and that these rules provide both the criterion for the justice of positive law and the ground for men's obedience to it. Whether they seek the answer in divine inspiration or in the inherent powers of human reason but constitute non-rational factors that govern the working of the human intellect, or whether they conceive of the natural law as permanent and immutable or as variable in content, they all seek to answer a question which positivism does not recognize. For the latter, law by definition consists largely of deliberate commands of the human will.<sup>50</sup>

The found nature of the common law, moreover, underwrites its predictability. "[J]udicial decisions," Hayek observed, "may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from those among accepted beliefs which have found expression in written law."<sup>51</sup>

By contrast, legal positivism amounts to a return to the concept of a "police state."<sup>52</sup> This renders common law, which typically involves the transposition of custom into law, "without deliberate organization by a commanding intelligence." As such, it intimates the possibility of Law without command—law without Leviathan.<sup>53</sup>

Hayek's work, like that of public choice and law and economics scholars (and, we shall see, the thought of prominent conservative evangelical Christians), repeatedly emphasizes the novelty and modernity of legislation.<sup>54</sup> "Unlike law itself, which has never been 'invented' . . . the invention of legislation came relatively late in the history of mankind," he wrote in *Law, Legislation, and Liberty*.<sup>55</sup> "[L]aw is older than law-making," he underlined. It "existed for ages before it occurred to man that he could make or alter it. . . . It is," moreover, "no accident that we still use the same word 'law' for the invariable rules which govern nature and for the rules which govern men's conduct. They were both conceived at first as something existing independently of human will."<sup>56</sup> In England, Parliament was first understood as a law-finding, not a law-making, body. With the birth of the modern state in the fifteenth and

sixteenth centuries, however, came the notion that states (Leviathans) make policy.<sup>57</sup>

One of the defining features of the common law was its purposelessness. In contradistinction to French étatism, Hayek explained, the history of the development of the English common law demonstrates that "purposive institutions might grow up which owed little to design, which were not invented but arose from the separate actions of many men who did not know what they were doing."<sup>58</sup> Progressive critics of the common law insisted that it substituted the will of the judge for the will of the legislature. Hayek, however, defended common law judges, citing their unique position as government officials learned in law, but ruling without "particular aims."<sup>59</sup> "The judge," Hayek explained, "serves, or tries to maintain and improve, a going order which nobody has designed, an order that has formed itself without the knowledge, and often against the will of authority, that extends beyond the range of deliberate organization on the part of anybody, and that is not based on the individuals doing anybody's will, but on their expectations becoming mutually adjusted." In so doing, he is "not a creator of a new order but a servant endeavoring to maintain and improve the functioning of an existing order."<sup>60</sup> He aims not at a particular state of things, but rather at "the regularity of a process which rests on some of the expectations of the acting persons being protected from interference by others." In a common law order, the developmental process is one of gradual adaptation by which "[t]he parts of a legal system are not so much adjusted to each other according to a comprehensive overall view, as gradually adapted to each other by the successive application of general principles to particular problems—principles, that is, which are often not even explicitly known but merely implicit in the particular measures that are taken."<sup>61</sup> "[T]he spontaneous formation of a 'polycentric order' . . . involving an adjustment to circumstances, knowledge of which is dispersed among a great many people, cannot be established by central direction. It can only arise from the mutual adjustment of the elements and their response to events that act immediately upon them."<sup>62</sup>

In his thinking on these matters, Hayek explained that he was anti-rationalist, but not anti-reason. He expressly rejected "the rationalist tradition [which] assumes that man was originally

endowed with both the intellectual and the moral attributes that enabled him to fashion civilization deliberately.<sup>63</sup> He, in contradistinction, is an "evolutionist" who insists that "civilization was the accumulated hard-earned result of trial and error; that it was sum of experience, in part handed down from generation to generation as explicit knowledge, but to a larger extent embodied in tools and institutions which had proved themselves superior—institutions whose significance we might discover by analysis but which will also serve men's ends without men's understanding them."<sup>64</sup> While "rationalistic design theories were necessarily based on the assumption of the individual man's propensity for rational action and his natural intelligence and goodness . . . evolutionary theory . . . showed how certain institutional arrangements would induce man to use his intelligence to the best effect and how institutions could be framed so that bad people could do the least harm."<sup>65</sup> Once again, pointing out the affinities between his atheological outlook and religious perspectives, Hayek emphasized that, "[t]he antirationalist tradition is here closer to the Christian tradition of the fallibility and sinfulness of man, while the perfectionism of the rationalist is in irreconcilable conflict with it."<sup>65</sup> That said, his antirationalism is not an appeal to mysticism or irrationalism. "What is advocated here is not an abdication of reason but a rational examination of the field where reason is appropriately put in control."<sup>66</sup>

Hayek's "evolutionary empiricist" perspective harnesses reason in the only way that it is sensible—in its full social context:

The first condition for . . . an intelligent use of reason in the ordering of human affairs is that we can learn to understand what role it does in fact play in the working of any society based on the cooperation of many separate minds. This means that, before we can try to remold society intelligently, we must understand its functioning; we must realize that, even when we believe that we understand it, we may be mistaken. What we must learn to understand is that human civilization has a life of its own, that all our efforts to improve things must operate within a working whole which we cannot entirely control, and the operation of whose forces we can hope merely to facilitate and to assist so far as we understand them. Our attitude ought to be similar to that of the physician toward a living organism: like him, we have to deal with a self-maintaining whole which is kept going by forces which we cannot replace and which

we must therefore use in all we try to achieve. What can be done to improve it must be done by working with these forces rather than against them. In all our endeavors at improvement we must always work inside this given whole, aim at piecemeal, rather than total, construction, and use at each stage the historical material at hand and improve details step by step rather than attempt to redesign the whole.<sup>67</sup>

(Progressive) historicism, by contrast, "claimed to recognize necessary laws of historical development and to be able to derive from such insight knowledge of what institutions were appropriate to the existing situation." That tradition, which underwrites welfare state liberalism, rejects all rules that cannot be rationally justified, or that were not deliberately designed. In this way, he argues, it is fueled by its positivist presuppositions.<sup>68</sup>

Hayek's opposition to historicism and positivism has constitutional implications. He explained that:

From this it follows that no person or body of persons has complete freedom to impose upon the rest whatever laws it likes. The contrary view that underlies the Hobbesian conception of sovereignty (and the legal positivism deriving from it) springs from a false rationalism that conceives of an autonomous and self-determining reason and overlooks the fact that all rational thought moves within a non-rational framework of beliefs and institutions. Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey.<sup>69</sup>

Once a bastion of the common law and constitutionalism, in the early-twentieth-century United States the rationalist, positivist "public administration movement," buttressed by support of "progressives," "directed their heaviest attack against the traditional safeguards on individual liberty, such as the rule of law, constitutional restraints, judicial review, and the conception of a fundamental law."<sup>70</sup> This culminated in the 1920s and 1930s in "a flood of anti-rule-of-law literature" associated with the legal realist

movement. "It was the young men brought up on such ideas," in turn, "who became the ready instruments of the paternalistic policies of the New Deal."<sup>71</sup>

Though staunchly anti-socialist, anti-progressive, and anti-New Deal, Hayek was quick to insist that he was not a proponent of laissez-faire, or a worshipper of unregulated markets. It "is important not to confuse opposition against this kind of planning with a dogmatic laissez-faire attitude," he insisted. "It does not deny, but even emphasizes, that, in order that competition should work beneficially, a carefully thought-out legal framework is required and that neither the existing nor the past legal rules are free from grave defects."<sup>72</sup> He denied that *homo economicus* constituted an indigenous part of his much-admired British evolutionary tradition. Indeed, he considered laissez-faire doctrine to be a paradigmatic example of rationalism, introduced as a foreign element into the tradition by such figures as John Stuart Mill. Hayek favored, rather, a respect—but never a blind respect—for traditions and customs.<sup>73</sup>

Although a hero to libertarians, and a staunch opponent of positivistic statism, Hayek believed it was the proper business of the state to regulate morality.<sup>74</sup> He held moral rules to be "the most important" of society's customs and traditions.<sup>75</sup>

Next to language, [moral rules of conduct] are perhaps the most important instance of an undesigned growth, of a set of rules which govern our lives but of which we can say neither why they are what they are nor what they do to us; we do not know what the consequences of observing them are for us as individuals and as a group. And it is against the demand for submission to such rules that the rationalistic spirit is in constant revolt.<sup>76</sup>

"Like all other values," he explained, "our morals are not a product but a presupposition of reason, part of the ends which the instrument of our intellect has been developed to serve."<sup>77</sup> He challenged the "rationalistic" attack on the moral rules as set out by religion as mere "superstition." "That we ought not to believe anything which has been shown to be false does not mean that we ought to believe only what has been demonstrated to be true," he argued. "There are good reasons why any person who wants to live and act successfully in society must accept many common beliefs,

though the value of these reasons may have little to do with their demonstrable truth." Moral restraint, for him, was both socially useful and sensible in light of the underlying theory of knowledge and information upon which his political and legal theories are premised.<sup>78</sup>

#### EVANGELICAL CHRISTIAN CONSERVATIVE STORIES ABOUT THE COMMON LAW

For many contemporary social conservatives, the commitment to the common law stems from their understanding of it as inherently, and foundationally, Christian. Since, as most conservatives acknowledge, the Constitution does not mention God, and is thus to all appearances secular, this understanding of the common law, while rarely discussed, is an indispensable component of social conservatism's ideology of law and its peculiar form of Christian constitutional nationalism.<sup>79</sup>

The belief in the inherent Christianity of the common law is long-standing in the United States, advanced across the nineteenth century not only by countless evangelicals, but also by a handful of leading conservative legal scholars like Chancellor James Kent and Justice Joseph Story.<sup>80</sup> Current articulations of this understanding fit neatly into this history and are simply a reiteration of its familiar (if, nevertheless, consistently contested) claims. Within the contemporary conservative movement, one of the most influential purveyors of this view has been John W. Whitehead, a leading evangelical Christian conservative author, activist, and litigator, whose views I survey here as illustrative.

In 1982, Whitehead founded The Rutherford Institute, a pioneering evangelical Christian litigation group designed to counteract the influence of liberal legal groups like the ACLU. Like many of the liberal public interest litigation groups that preceded it, The Rutherford Institute recruited evangelical Christian lawyers in private practice to donate their time to cases central to the group's mission: the advancement of (their understanding of) religious freedom. The Institute has been particularly active in cases involving religion and the schools.<sup>81</sup>

In the year he founded Rutherford, Whitehead published *The Second American Revolution* (1982), which has sold more than

100,000 copies and was also made into a documentary film. *The Second American Revolution*, along with Francis Schaeffer's *A Christian Manifesto*, played a signal role in igniting the constitutional activism of contemporary evangelical Christian conservatives.<sup>82</sup> Under the manifest influence of R. J. Rushdoony's *Christian Reconstructionism* (Rushdoony is cited repeatedly as a source), the book is an attack on the role that American courts have played in creating and advancing "the pagan state."<sup>83</sup>

In *The Second American Revolution*—which gives an account of American history and constitutionalism that, while powerfully presented, is highly idiosyncratic, selective, and distorted—Whitehead opens with the assertion that an absolute, eternal, and fixed foundation is indispensable to government.<sup>84</sup> "[M]an cannot escape his religiousness," Whitehead announced. "This principle is inherent in the Second Commandment, prohibiting idolatry. In it the concern is not with atheism but with the fact that all men, Christian or not, seek something outside themselves to deify."<sup>85</sup> Since man is a deifying animal, in forming a society he faces a stark and momentous decision: he can either deify and worship God or Man. To deify man (including under the guise of the separation of Church and State) is to commit the sin of idolatry. Thus, the state must be anchored in the belief in (a Christian) God. A state founded on the worship of God will be a Christian state. A state founded on the worship of man will be pagan.

There is no such thing as a religious pluralism (in its "new," modern sense) consistent with Christianity, Whitehead explains. Since the truth is absolute, uniform, and Christian, religious pluralism is a step backwards into pagan polytheism. At the time he wrote, he complained that in the United States, "a new polytheism exists: the state tolerates many religions and, therefore, many gods. . . . The position of the American state is increasingly that of pagan antiquity," he warned, "in which the state as god on earth provides the umbrella under which all institutions reside."<sup>86</sup> Whitehead insisted that the American Founders were clear about these matters, and that they intended to institute a Christian state. The First Amendment's prohibitions on the Establishment of religion and protection for religious liberty were added to the body of the Constitution for one reason only, he instructed: to ensure that the newly powerful national state would have no authority over the

Church and religion. The First Amendment's religion clauses were fashioned to protect "denominational pluralism—a healthy coexistence between the various Christian denominations." Whitehead explained, "[s]uch practical denominational pluralism is not to be confused with the new concept of pluralism, which commands complete acceptance of all views, even secular humanism."<sup>87</sup> "The principal religion to be protected by the First Amendment was Christian theism," he stated. Through its rulings, however, the Supreme Court has demoted Christianity from its historically preferred constitutional position.<sup>88</sup>

Although it forbade the establishment of a national church, the Constitution secured the "blessings of liberty" by licensing the states to be "openly Christian."<sup>89</sup> As evidence for this, Whitehead cited the preambles and bodies of the various state constitutions at the time of the Founding, which, he noted, all clearly manifested the theistic grounding of their governments—all sovereign under the American federal system. Thus, "when the federal constitution was drafted, the principle of faith in God was presumed to be a universal for healthy civil government."<sup>90</sup> The nation's Christian grounding was also evident in the text of the Seventh Amendment, which expressly incorporated the common law—"which applied biblical principles in judicial decisions"—into the constitutional system.<sup>91</sup> By incorporating the common law, Whitehead concluded, "the Constitution was acknowledging that a system of absolutes," accessible only through Biblical revelation, exists "upon which government and law can be founded."<sup>92</sup>

The American Founding, he explained, was a restoration of (Protestant) Christianity to its proper role in government after its influence had been attenuated through the corrosive effects of Roman Catholic theology. The modern crisis began with the work of Saint Thomas Aquinas, who had argued in error "that man could discover at least some truth without revelation." Fortunately, "the Reformation thinkers of the sixteenth century, notably Martin Luther and John Calvin, fought against Aquinas's concept of the Fall. They revived the old Christian suspicion of human reason and once again made the Bible the sole reference point for truth."<sup>93</sup>

*The Second American Revolution* explained that the "fundamental principles" of the Reformation were bequeathed to the American colonists "without significant alteration" through the influence of

*Lex Rex*, or the Law and the Prince (1644), written by the Scottish clergyman Samuel Rutherford. "Rutherford's assertion [was] that the basic premise of government and, therefore, of law must be the Bible, the Word of God rather than the word of any man." "All men, even the king," Rutherford argued, "were under the law and not above it." Whitehead (strangely) elevated the significance of Rutherford to American political thought, placing Rutherford's influence on the American Founding over and above that of John Locke (he treats Locke and John Witherspoon as mere conduits for Rutherford's views, though Witherspoon is an especially significant conduit in Whitehead's stations-of-the-Constitution iconography since he was the teacher of James Madison—"the Father of the Constitution"—at Princeton). Whitehead (oddly) insisted, moreover, that it was Rutherford who first "established the principle of equality and liberty among men, which was later written into the Declaration of Independence." Rutherford's influence on the Founding was thus, by Whitehead's account, pervasive.<sup>94</sup>

William Blackstone, whose study of the common law (genuinely) had a major influence on the Founders and on nineteenth-century American law, was, Whitehead emphasized, likewise "a Christian, [who] believed that the fear of the Lord was the beginning of wisdom"—as is evidenced by his decision to open his Commentaries "with a careful analysis of the law of God as revealed in the Bible."<sup>95</sup> As Blackstone and the American founders understood:

Law in the Christian sense implies something more than form. Law has content in the eternal sense. It has a reference point. Like a ship that is anchored, law cannot stray far from its mooring. If the anchor chain breaks, however, the ship drifts to and fro. Such is the current state of law in our country. Law in the true sense is bibliocentric, concerned with justice in terms of the Creator's revelation.<sup>96</sup>

"[B]ecause law establishes and declares the meaning of justice and righteousness," he continued, "law is inescapably religious."<sup>97</sup> "Acts of the state that do not have a clear reference point in the Bible are . . . illegitimate and acts of tyranny."<sup>98</sup>

Like legislative power, properly understood, judicial power in its true sense consists of enacting into positive law principles that were already inherent in God's commands. Whitehead explained:

Essentially, common law is an age-old doctrine that developed by way of court decisions that applied the principles of the Bible to everyday situations. Judges simply decided their cases, often by making explicit reference to the Bible, but virtually always within a framework of biblical values. Out of these cases rules were established that governed future cases.<sup>99</sup>

"To some extent," Whitehead instructed his readers, "the common law has been present with us ever since the teachings of Moses, in that common law is essentially biblical principles adapted to local usage. It was an application of biblical principles—essentially the Ten Commandments—to the problems of everyday life."<sup>100</sup>

The common law, moreover, is biblical not simply in substance, but in process as well. For instance, "[t]he doctrine of stare decisis," he insisted, "is clearly based upon biblical principles."<sup>101</sup> Whitehead continued:

This precedent of precedents was based upon Christian principles as they had been expressed in judicial opinions. Past decisions provided a ground for deciding present cases because past decisions were developments of the implications of the basic principle that was based on biblical absolutes. Common law rules then were conceived as founded in principles that were permanent, uniform, and universal.<sup>102</sup>

*The Second American Revolution* detailed how the English common law arose out of:

[John] Wycliffe's contention that the people themselves should read and know the law of the Bible (hitherto the province of the clergy) and that they should in some sense govern as well as be governed by it. From this thesis . . . emerged a set of principles based upon the Bible and applied by the courts that came to be known as the common law or the law of the people. The common law became established in the English courts, and when the Constitution was being drafted, much of it was incorporated as part of that document.<sup>103</sup>

Whitehead explained that, given that some of it was peculiar to the English system, English common law was not imported into the United States in its entirety. It was, however, "in its Christian form, substantially implanted in the American legal system."<sup>104</sup>

Whitehead argued that the United States is governed by three basic systems of law. The first is Fundamental Law, which is "clearly expressed in God's revelation as ultimately found in the Bible." The second is Constitutional Law, which provides "the form of civil government to protect the God-given rights of the people." The Constitution, he emphasized, "presupposes the Declaration and the higher, fundamental law to which the Declaration witnesses." Popular sovereignty governs in the sense that "[t]he people can base their institutions upon constitutional law, in conjunction with the higher or fundamental law. . . . Such biblical principles as federalism, separation of powers, limited authority, and liberty of conscience found in the Constitution" make sense only if we understand that the Constitution rests on the foundation of Fundamental Law. "They did not arise in a vacuum."<sup>105</sup> The same is true for rights, which Whitehead defines as "a benefit or lawful claim recognized by the law itself in recognition of principles of the biblical higher law."<sup>106</sup>

The third kind of law is comprised of "laws enacted by the political body having legislative power"—positive law. Legislators, in Whitehead's account (as in Hayek's), do not make law; they pronounce it. "The very term legislator," he notes, means "not one who makes laws but one who moves them—from the divine law written in nature or in the Bible into the statutes and law codes of a particular society. Just as a translator is supposed to faithfully move the meaning from the original language into the new one so the legislator is to translate laws, not make new ones." Democracy and freedom are consistent with each other for Whitehead only in the sense that true freedom consists in enacting laws consistent with God's will. "In the last analysis," he insists, "we would be far freer under an absolute monarch who saw his authority as subject to God's law in the Bible and in nature than under a democratically elected assembly that took the arbitrary will of the majority as its highest value."<sup>107</sup>

Whitehead condemned "[m]odern legal scholars" who "have rejected the views of Blackstone because they have rejected his faith in God and his reliance upon the Genesis account of creation and the origin of man and the universe."<sup>108</sup> The seminal act of treachery in this regard was committed by Christopher Columbus Langdell, who, through his invention of the case method of

law teaching at Harvard in the 1870s, re-imagined law along evolutionary scientific lines. "Langdell's real impact on law education," Whitehead wrote, "was his belief that basic principles and doctrines of the law were the products of an evolving and growing process over many years. Langdell believed that this evolution was taking place in opinions written by judges. This meant that what a judge said was law, and not what the Constitution said."<sup>109</sup> In prelapsarian America:

Before Langdell's influence became dominant in the legal education system, the law had primarily been taught by practicing lawyers in law offices throughout the country. William Blackstone's *Commentaries* were often the basic legal treatise. The prevailing opinion was that the principles and doctrines of the law were unchanging; law was based on absolutes in the biblical sense. All the student had to learn was to apply those legal principles and doctrines. Beginning with Langdell, however, law education shifted to the classroom, where students were taught that the principles and doctrines of the law were being developed in the appellate courts by judges across America. Justice Hughes was merely echoing Langdell's philosophy when he remarked that "the Constitution is what the judges say it is."<sup>110</sup>

Langdell's views were reinforced by the scholarship of Oliver Wendell Holmes, Jr.:

In Holmes's theory—summed up in the expression that the law is not logic but experience—law was the product of man's opinion, supported by the absolute rights of the majority. Thus, the principles of the common law, which had guided courts and governments for centuries before America was settled, were to be left in the dust of history for the concept of evolving law. As a consequence common law is virtually ignored in legal education today.<sup>111</sup>

Whitehead explained to his readers that they were living under a system ruined by the intellectual, moral, and historical corruptions of legal positivism. Such positivism, "unknown in early American law . . . has resulted in a decline of American liberties. . . . Justice itself has become a remote concept, which is the esoteric concern of a group of legal technicians and professionals who codify the concerns of almost every area of life in some form of state

or bureaucratic regulation."<sup>112</sup> Moreover, "with the rise of legal positivism and sociological law, the flexibility once reserved to the common law judge is given over to the legal technician—or the modern judge who sits without the Bible as his guide and who, in fact, is often openly hostile to the Bible and Christian principles."<sup>113</sup>

Today, law schools hide the truth from their students: "Very few attorneys even have an understanding of what the common law is."<sup>114</sup> Whitehead called upon Christian law students to study the "true law." They had a duty to remind their professors "that much of law is still based on the Bible," and to demand courses on Blackstone and the common law, and to commit themselves to the study of "the true legal roots of American society."<sup>115</sup>

*The Second American Revolution* called for a renewed commitment by judges as well. Whitehead reminded them, and us, that, as the apostle Paul declares in Romans 13: 1–4, "all civil authorities are ministers of God."<sup>116</sup> As civil authorities, judges must employ higher law as their ultimate reference point. Courts must act as ministers of God, and, in this sense, are religious establishments.<sup>117</sup>

At one time, American judges understood that the United States is a Christian nation. Today, however, they proceed in accord with the whims of man. They are humanists—devotees of a pagan religion "opposed to any other religious system."<sup>118</sup> It is the obligation of Christians to act now to reclaim their country for Christ. "When a [pagan] state claims divine honors, there will always be warfare between Christ and Caesar, for two rival gods claim the same jurisdiction over man. It is a conflict between two kingdoms, between two kings, each of whom claims ultimate and divine powers . . . [O]ur government has . . . become a religion and is . . . involved in a bitter conflict with the religion of Christ. Christianity and the new state religion of America cannot peacefully coexist." In a state with Christian foundations, Whitehead concluded, "man's law must have its origin in God's revelation. Any law that contradicts biblical revelation is illegitimate."<sup>119</sup>

#### DISCUSSION

The perspectives of the strands of conservative legalism I have briefly canvassed here—law and economics, public choice, Hayekian thought, and evangelical Christianity—are different in many

ways, and take different positions on foundational issues that political theorists would characterize as fundamental. Hayek condemned understandings of law based on homo economicus—central to the law and economics movement—as a variety of the rationalism he consistently inveighed against. John Whitehead aggressively condemned (Gilded Age) laissez-faire capitalism for being "without compassion," adding apropos of the Supreme Court's late-nineteenth/early-twentieth-century, pro-business/anti-regulatory substantive due process decisions that "the so-called right to contract is not found in the Constitution or even the English common law."<sup>120</sup> Whitehead also provided an extended critique of *Lochner v. New York* (1905), a decision that has been aggressively defended in recent years by prominent libertarian and public choice scholars. There is no trace of theism either in Hayek or in law and economics or public choice scholarship.<sup>121</sup> Those writing from these diverse perspectives also take different positions and evince different sensibilities on matters that many legal and constitutional theorists would hold to be categorically defining. For many years, the category of legal "conservative" has been synonymous with an "old" originalism rooted in a positivist understanding of the Constitution as a binding contract, deriving its authority from the sovereign act of its ratification by "We the People," aimed at "politicized" judges and courts, and meant and understood as a theory and instrument of judicial restraint through an adherence to "law." Some of the conservatives I survey here carry on these preoccupations and commitments—evincing a positivism, I would note, that is actually derived from early-twentieth-century progressivism (rather than any philosophic conservatism).<sup>122</sup> Many conservatives, however (consistent with what has been called the "new" originalism), are neither preoccupied with courts and judges as problems, nor consistently committed to forging theories of judicial restraint—at least as defined by a general rule of deference to legislatures, as opposed to assessing the constitutionality of legislation by a yardstick of substantive, foundational "law."<sup>123</sup>

Many political and legal theorists would take it as their job to anatomize and critique these contrasts, tensions, and contradictions within the conservative movement, with legal scholars especially spotlighting their diverse attitudes toward judges and courts and a default rule of deference. My objective here is to

do something different, if not the opposite: to focus instead on how, despite these tensions and disagreements, conservatives have come to find common ground, to the point where all came to see themselves—whatever their differences and disagreements—as part of a common intellectual and political endeavor. In different contexts, disagreement on issues that once might have marked someone as not a member of the group—that is, a disagreement that is a deal-breaker or sign of “exit”—might come to be considered a point of legitimate disagreement within the group.<sup>124</sup> So long as it is not considered a deal-breaker, the differences and disagreements—even about fundamentals—might ultimately benefit and reinforce the collective endeavor and the political movement associated with it. Far from being something that needs to be ultimately resolved, worked out, or made consistent, the manifest fact of ongoing disagreement allows the movement to understand itself collectively as an intellectual endeavor, operating according to scientific norms of cordial questioning, empirical inquiry, intellectual diversity, disagreement, and debate. The disagreement is, stated differently, constitutive of the movement’s identity, and of the identity of its participant members. As such, what Cass Sunstein has called “incompletely theorized agreement” is more than a make-do, pragmatic concession to pluralism: it is constitutive of the very idea of a discursive community. In political parties and movements, which, if successful, are inevitably coalitions and alliances (at least in a two-party liberal democratic system like the United States), it is less acknowledged than it should be that the valorization of disagreement—and not agreement—is what makes politics possible. In the contemporary United States, where conservatives have been long criticized as “the stupid party,” mired in emotions and prejudices as opposed to thought and reason—the construction of a collective political identity that valorizes disagreement will be of particular value—indeed, a matter of pride.<sup>125</sup> It goes without saying that this identity-forging, constitutive pride in incompletely theorized agreement is a commitment made not in the abstract, but to deliberation and disagreement within an historically constituted, discursive community, with many agreements already in place on matters of concrete public policy.<sup>126</sup>

The commitment to the American Constitution, properly understood, as law, symbol, and historical/mythic constitutive story

about origins, fidelity, betrayal, and redemption, has long been apparent as a constitutive touchstone of modern American conservatism. This chapter has emphasized the degree to which a complementary commitment to the common law has served as its adjunct. Constituent parts of modern legal conservatism—law and economics, public choice, Hayekian thought, and evangelical Christianity—all afford the common law a prominent place in their understandings. The twin commitments to the common terrain of Constitution and common law work in tandem to provide an intellectual foundation that serves to simultaneously motivate, unify, and fortify the contemporary conservative movement.

What is that common ground’s content? All of the perspectives surveyed here understand themselves to be tribunes of the American Founding and the U.S. Constitution. Many of their practitioners understand themselves as locked in an epic battle with their faithless, liberal/progressive antagonists (enemies?) who are committed to unmooring the American polity from its Founding commitments and traditions. All are preoccupied with the unique virtues of the pre-New Deal/nineteenth-century American form of governance, which, in many respects, came close to achieving the benefits of governance without the oppressions and coercions of government. For law and economics and public choice scholars, this prelapsarian America (in which the common law, as opposed to legislatures, governed) was unusually prosperous and efficient. Law and economics and public choice scholars emphasize the ways in which this era preserved the freedom of individuals to pursue their own self-interest, in the process advancing, additively, the collective good of society. Hayek, by contrast, emphasized the ways in which common law governance worked to coordinate local knowledge in a way that advanced social interests. For Christians, this was the order that consistently recognized God as the foundation of all law, and was thus anchored against drift into heresy and evil. Collectively and respectively, then, nineteenth-century American society—following the template as set out by the Founders—was efficient, knowledgeable, and grounded.

All of the perspectives I have presented here devote considerable attention to the fall of this Edenic phase of American life. All agree that the culprit was the corrupting influence of legal positivism, or the idea that it was up to society, acting collectively,



and through legislation (worst of all, centralized legislation). The legal Constitution—as opposed to the Constitution read willfully—placed aggressive limits upon this sort of rule by positivism, and created an expansive space for governance through the common law.<sup>127</sup>

Both Hayek and conservative Christians placed a heavy emphasis on the nature of true law as *found* rather than *made* (Hayek famously distinguished the *law* from *command*). Each of these perspectives apprehended the dangers of a conception of law as made rather than found in a different way. Law and economics and public choice scholars assume that individuals are perpetually and aggressively self-seeking. If society hands selfish and self-seeking men the immense powers of a legislative and administrative state, they will inevitably use that power to advance themselves at the expense of others—that is, they will abuse it. Hayek emphasized the ignorance of man. If you hand society the powers of a legislative and administrative state, Hayek emphasizes that it will fly blind and coerce others, where these others would be best off availing themselves of local knowledge and law and governing themselves. Conservative Evangelical Christians, by contrast, root their profound concerns about a powerful state in Original Sin. Assuming—as legal positivism does—that government can rest on the desires and preferences of man will lead to moral decline, if not evil. Statist positivism, for conservative evangelicals, is more than bad policy or bad theory: it is idolatry and paganism. Hayek expressly recognized the affinities between his emphasis on man's inherently limited ken and Christian conceptions of Original Sin. He also observed the similarity of his understanding of law as found rather than made to religious understandings of natural law. It is, of course, relatively easy to see the homo economicus of law and economics, or the selfish, self-seeking man of public choice, as what Evangelical Christians take to be man-as-fallen—corrupted, that is, by Original Sin.

For public choice scholars, legislation introduced rent-seeking and rent-appropriation as the primary modus operandi of government. Individuals and groups leveraged the coercive powers of the state through legislation and regulation to take what belonged to others and forcibly redistribute it to themselves. For Hayek, the statutory state legislated in spite of its ignorance of the detailed

knowledge it would need to advance the public interest (most effectively). For conservative evangelical Christians, the statutory state represented the displacement of God by man, of the prideful notion of man-as-lawgiver. What's worse, the modern administrative state was staffed by a small, unrepresentative—and, indeed, alien—"new class": an administrative, governing elite comprised of professors, bureaucrats, and politicians. Law and economics and public choice scholars understood this elite as redistributionist, as partial, self-seeking, and inefficient. Hayek understood it as *dirigiste*, as ignorant and rationalist. Evangelical Christian conservatives understood it as Godless and secular.

The common law state, by contrast, minimized or avoided many of these pitfalls and corruptions. In the common law state, where judges instantiated and enforced the rule of law, if there is legislation (the United States, after all, has a Congress) it will be strictly confined through judicial review to a limited sphere that maximizes common law governance (in the United States, via a robust federalism). In addition, even where the national legislature is operating in its proper sphere, judges will aggressively wield their judicial review powers to void attempts at rent-seeking. Hayek explained that unlike the (rationalist) legislator, the common law judge was purposeless (in his role, properly understood, at least) without a politics or a theory, operating in the limited sphere of case-deciding to instantiate the rule of law. Unfortunately, with the rise of the statutory state, judges became infused, and corrupted, by the redistributionist, *dirigiste*, and secularist ethos of the new, elitist, governing class. These corrupted, unmoored judges now followed not the rule of law, but the inclinations of ideology and their personal biases and preferences.

All of these groups find common ground in their defense of the promotion of traditional morality. While the law and economics and public choice scholars—allegedly libertarian—often avoid or downplay the issue, seminal proponents of these views (like public choice scholar James Buchanan) take what (even) they see as the current moral laxity of society as, in some way, an outgrowth of the decline of a sense of individual duty and responsibility that is a consequence of the rise of the "nanny state." Hayek celebrates moral rules as a form of tradition, which instantiates, often unconsciously, deep, de-centered human knowledge and experience.

Christian conservatives find the law's origins in God's command, as set out in the Bible, the basis for all law.

It should be clear from this brief overview that, ostensible philosophical differences notwithstanding, there is an enormous amount of ideological and political common ground to be found amongst these diverse perspectives. Indeed, the commonalities of these supposedly divergent perspectives, if apprehended in the right spirit, all but dwarf the differences.

Appeals to the nation's common law heritage and practice serve certain ideological and symbolic functions that are not served by the parallel commitment to the Constitution. To the extent that the U.S. Constitution, written and ratified in a precisely identifiable time and place, takes its authority from an act of popular, democratic will, the document's authority stems in significant part from human action, understood positivistically.<sup>128</sup> The authority of the common law, by contrast, gained legitimacy from its antiquity, its "immemoriality." Its origins were unclear—indeed, mystical. It was not democratic per se (with all the "instability, unpredictability, violence, and dangerousness" that, especially to many of the Founding generation, democracy entailed), but nevertheless its rules were held to be rooted in the customs and traditions of the people. It was held to embody "the order of things itself." As Kunal Parker explains, it embodied a "sense that the world was, in crucial ways, beyond the power of the democratic subject to remake, that it was subject to laws not of its making." It was timeless, and suggested eternal constraints, but it was not abstractly universalistic. The common law, rather, was both eternal and rooted.<sup>129</sup>

Many modern conservatives—like many Americans before them—sought to integrate American common law thinking with American constitutional thinking.<sup>130</sup> This allowed them to claim both *lex scripta* and *lex non scripta* as law, to permit the exercise of democratic will while at the same time suggesting that there were deeper, real limits to that will, some of which were inherent in the nature of things, as had long been recognized in the (Christian) Anglo-American political and constitutional tradition. In this often ambiguously specified combination, "[n]ewer notions of contemporaneous consent mingle promiscuously with older notions of multigenerational and attributed consent." Whereas written law

held out the promise of clarity, of self-evident meaning, the common law allowed for appeals to unarticulated truths, to the long-recognized benefits of mystification.<sup>131</sup> In this, of course, the common law suggested many of the attributes of natural law. Indeed, the relationship between the (positive) law of the Constitution and legislation passed pursuant to it, the common law, and natural law was extensively debated in the United States during the slavery controversy.<sup>132</sup> As such, stories about the common law have served as significant adjuncts to stories about the nation's constitutional founding within the modern American conservative movement.

#### CONCLUSION

Commentators tethered to the usual concepts and categories of political, legal, and constitutional theory will typically miss the grounds of agreement shared by these supposedly diverse groups, which are often found in the realms of history, culture, and symbolism—conveyed in the narrative form, as constitutive stories—as opposed to the categorical abstractions of theory. Indeed, disagreements over principle are often managed—if not superseded—by stories.

In *Stories of Peoplehood*, Rogers M. Smith sets out a framework to help us understand the way in which individuals come to—and (crucially) are led to—develop a sense of being, of membership, of identity, and intra-group trust through the telling of "people-making," "ethically constitutive stories." These stories are typically historical and interpretive: they are rooted in interpretations of the group's (or nation's) past, and offer a shared understanding of the group's mores, understood in light of where they have been and where they are going.

Smith places particular emphasis on the role of elites (of the sort I have canvassed here) in constructing such stories, and championing them in the political process against competing, rivalrous stories of peoplehood. Intergenerational stories about the nature of the nation's legal/constitutional order are often critical components of the stories of peoplehood. In the United States, they are, arguably, the preeminent stories of peoplehood. These stories are constructed interactively, discursively, across time, lending

meaning to individuals' lives, associations, and identities.<sup>133</sup> Such stories rationalize, direct, motivate, and "provid[e] grounds or warrants" for political behavior.<sup>134</sup>

Despite their many disagreements and diverse preoccupations, all of the perspectives surveyed here understand themselves to be tribunes of the American Founding and the U.S. Constitution, and position themselves as locked in an epic battle with their faithless liberal/progressive antagonists who are committed to unmooring the American polity from its Founding commitments and traditions.<sup>135</sup> All are preoccupied with the unique virtues of the pre-New Deal/nineteenth-century American form of constitutional governance, which, in many respects, came close to achieving the benefits of *governance* without the oppressions and coercions of *government*. All are profoundly disturbed by the country's abandonment of this Edenic garden, and agree that it was the snake of willful (progressive/liberal) legal positivism that persuaded their countrymen to take the fateful bite of the apple. Each apprehends the dangers of a conception of law as made rather than found. While political, legal, and constitutional theorists may focus on differences in their attitudes toward individualism, the sources and nature of political authority, and rights and the role of courts and judges—points upon which these groups certainly differ—they implicitly downplay the fellow-feeling created by their sense of unity in their role in a common legal drama. In that, the conservative stories about the common law play an important part.

#### NOTES

1. In writing this chapter, the author benefited from discussions at the symposium on this volume at the University of Texas Law School (September 2012), the workshop at Yale Law School on the Processes of Legal and Constitutional Change sponsored by the New York Historical Society's Institute for Constitutional History (July 2010), and from discussions at the Schmooze on "Invisible Constitutions" hosted by Princeton University's Law and Public Affairs Program (December 2010). Thanks also to Clem Fatovic, Dan Geary, Lino Graglia, Sandy Levinson, and Joel Parker for helpful comments and criticism.

2. See Theodore J. Lowi, *The End of the Republican Era* (Norman: University of Oklahoma Press, 1995).

3. Most famous is Frank Meyer's "fusionism." See Frank S. Meyer, *In Defense of Freedom and Related Essays* (Indianapolis, IN: Liberty Fund, 1996).

4. Ken I. Kersch, "Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in *National Review*, 1955–1980," *Studies in American Political Development* 25 (April 2011): 86–116; Kersch, "Beyond Originalism: Conservative Declarationism and Constitutional Redemption," *Maryland Law Review* 71 (Issue 1, 2011): 229–282.

5. Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (New York: Cambridge University Press, 2003).

6. Kunal M. Parker, *Common Law, History, and Democracy in America, 1790–1900: Legal Thought before Modernism* (Cambridge: Cambridge University Press, 2011), 1.

7. See Martin M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981).

8. Parker, *Common Law, History, and Democracy in America*, 77–78; Ford W. Hall, "The Common Law: An Account of Its Reception in the United States," *Vanderbilt Law Review* 4 (June 1951): 791–825.

9. While private law governs the relationships between private parties in areas such as contracts, real property, and torts, public law governs those between individuals and the state, and within the state, such as criminal law, civil liberties, the separation of powers, and federalism.

10. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Constitution, Amendment VII.

11. William Blackstone, *Commentaries on the Laws of England, Vols. 1–4* (Chicago: University of Chicago Press, 1979); James Kent, *Commentaries on American Law, Vols. 1–4*, 7th ed. (New York: W. Kent, 1851); Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution* (Boston: C.C. Little and J. Brown, 1851).

12. See William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change in Massachusetts, 1760–1830* (Cambridge, MA: Harvard University Press, 1975); Mary Bilder, Maeva Marcus, R. Kent Newmyer, eds., *Blackstone in America: Selected Essays of Kathryn Preyer* (New York: Cambridge University Press, 2009). See also J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1956); Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw; The Evolution of American Law, 1830–1860* (New York: Harper and Row, 1957); Morton J. Horowitz, *The Transformation*

of American Law, 1780–1860 (Cambridge, MA: Harvard University Press, 1977); Howard Schweber, *The Creation of American Common Law, 1850–1880: Technology, Politics, and the Construction of Citizenship* (New York: Cambridge University Press, 2004).

13. See, as examples, Robert Rantoul, Jr., *An Oration Delivered Before Democrats and Antimasons, of the County of Plymouth: At Scituate on the Fourth of July, 1836* (Boston: Beals and Greene, 1836); David Dudley Field, *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field, Vols. 1 & 2* (New York: D. Appleton, 1884 and 1890).

14. See Victoria C. Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton, NJ: Princeton University Press, 1993); Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991). See also William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton, NJ: Princeton University Press, 1994).

15. Orren, *Belated Feudalism*; Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982); John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, MA: Harvard University Press, 2004); William J. Novak, "Making the Modern American Legislative State," in *Living Legislation: Durability, Change, and the Politics of American Lawmaking*, ed. Eric M. Patashnik and Jeffrey A. Jenkins (Chicago: University of Chicago Press, 2012), 20–45; William N. Eskridge, Jr. and John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven, CT: Yale University Press, 2010); Arthur F. Bentley, *The Process of Government: A Study of Social Pressures* (Chicago: University of Chicago Press, 1908); Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956); Theodore J. Lowi, *The End of Liberalism* (New York: W. W. Norton, 1979).

16. Originalists hold that, in interpreting the Constitution, judges are obligated to hew to its original meaning, as it was understood at the time of its ratification. See Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007).

17. There is a liberal wing of the law and economics movement, which includes scholars like Guido Calabresi and Ian Ayres. My focus here is on that movement's conservative wing.

18. Hurst, *Law and the Conditions of Freedom*. See W. W. Rostow, *Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge: Cambridge University Press, 1960). See Douglass C. North and Barry Weingast,

"Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England," *Journal of Economic History* 49 (December 1989): 803–832.

19. See North and Weingast, "Constitutions and Commitment," 823–824.

20. See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993). See also Theodore J. Lowi, "Four Systems of Politics, Policy, and Choice," *Public Administration Review* 32 (July/August 1972): 298–310.

21. See Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969); Friedrich von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).

22. See Skowronek, *Building a New American State*.

23. See, for example, Paul H. Rubin, "Common Law and Statute Law," *Journal of Legal Studies* 11 (June 1982): 205–224.

24. See, as examples, Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972); Paul H. Rubin, "Why Is the Common Law Efficient?" *Journal of Legal Studies* 6 (January 1977): 51–64.

24. For an overview of this "legal origins" scholarship, which used quantitative methods to demonstrate that societies with common law origins are more prosperous than those with civil law origins, see John Reitz, "Legal Origins, Comparative Law, and Political Economy," *American Journal of Comparative Law* 57 (Fall 2009): 847–862; Ralf Michaels, "Comparative Law by Numbers? Legal Origins Thesis, *Doing Business* Reports, and the Silence of Traditional Comparative Law," *American Journal of Comparative Law* 57 (Fall 2009): 765–796. See also Paul Mahoney, "The Common Law and Economic Growth: Hayek Might Be Right," *Journal of Legal Studies* 30 (June 2001): 503–526; Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, "The Economic Consequences of Legal Origins," *Journal of Economic Literature* 46 (June 2008): 285–332.

26. For overviews, see Todd J. Zywicki and Edward Peter Stringham, "Common Law and Economic Efficiency," in *Law and Economics*, 2nd ed., ed. Francesco Parisi and Richard A. Posner (forthcoming), accessed online January 20, 2015, at: [http://www.law.gmu.edu/assets/files/publications/working\\_papers/1043CommonLawandEconomicEfficiency.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/1043CommonLawandEconomicEfficiency.pdf); Peter H. Aranson, "Economic Efficiency and the Common Law: A Critical Survey," in *Law and Economics and the Economics of Legal Regulation*, ed. J.-Matthias Graf von der Schulenburg and Göran Skogh (Boston: Kluwer Academic, 1986); George L. Priest, "The Common Law Process and the Selection of Efficient Rules," *Journal of Legal Studies* 6 (January 1977): 65–82; Priest, "The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform," *Journal of Economic Perspectives* 5 (Summer 1991): 31–50.

27. Todd J. Zywicki, "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis," *Northwestern University Law Review* 97 (Summer 2003): 1551–1633.

28. *Ibid.*, 1552.

29. *Ibid.*, 1633. According to this view, the critical fact is that common law judges, if they are doing it right, are not willful. This is the theme of Philip Hamburger, *Law and Judicial Duty* (Cambridge, MA: Harvard University Press, 2008).

30. Zywicki, "The Rise and Fall of Efficiency in the Common Law," 1553.

31. James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962).

32. James M. Buchanan, "Socialism Is Dead but Leviathan Lives On," in James M. Buchanan, *Post-Socialist Political Economy* (Lyme, CT: Edward Elgar, 1997), 85, quoted in S. M. Amadae, *Rationalizing Capitalist Democracy: The Cold War Origins of Rational Choice Liberalism* (Chicago: University of Chicago Press, 2003). I draw extensively on Amadae's book in the overview that follows.

33. It is precisely this that Margaret Thatcher meant when she famously declared: "There is no such thing as society." "Margaret Thatcher in Quotes," *Spectator* (April 8, 2013).

34. Amadae, *Rationalizing Capitalist Democracy*, x, 143. On the role of the economic think tank in informing Thatcher's conservative thought and policy, see Kersch, "Ecumenicalism Through Constitutionalism."

35. Anthony Downs, *An Economic Theory of Democracy* (New York: Harper, 1957); Kenneth Arrow, *Social Choice and Individual Values* (New York: Wiley, 1951).

36. Amadae, *Rationalizing Capitalist Democracy*, 137–138.

37. *Ibid.*, 139.

38. See Peter Bachrach and Morton S. Baratz, *Power and Poverty: Theory and Practice* (New York: Oxford University Press, 1970); Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: W. W. Norton, 1969); Grant McConnell, *Private Power and American Democracy* (New York: Vintage Books, 1970). See generally Richard M. Merelman, *Pluralism at Yale: The Culture of Political Science in America* (Madison: University of Wisconsin Press, 2003); Ronald Kahn, *The Supreme Court and Democratic Theory: 1953–1993* (Lawrence: University Press of Kansas, 1994).

39. James M. Buchanan and Richard F. Wagner, *Democracy in Deficit: The Political Legacy of Lord Keynes* (San Diego, CA: Academic Press, 1977), 65, cited in Amadae, *Rationalizing Capitalist Democracy*, 144.

40. See Friedrich A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy, Volume 1—Rules and Order* (Chicago: University of Chicago Press, 1973), 88.

41. Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), for instance—which was influentially serialized in *Reader's Digest* when it first appeared—is frequently cited as one of the top ten most influential "conservative" books of the twentieth century. Hayek, famously, did not consider himself to be a conservative, and wrote a prominent essay on precisely that point. He was, however, certainly a vehement anti-socialist. See Friedrich A. Hayek, "Why I Am Not a Conservative," in Hayek, *Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 397–411.

42. Hayek, *Law, Legislation and Liberty*, 14.

43. *Ibid.*, 12.

44. *Ibid.*, 13, 22, 85. See also Hayek, *Constitution of Liberty*, 58, quoting "Sir Matthew Hale's Criticism on Hobbes's Dialogue on the Common Law," reprinted in W. S. Holdsworth, *A History of English Law, Vol. V: The Common Law and Its Rivals* (London: Methuen, 1924), 504–505. Kunal Parker underlines the degree to which nineteenth-century American "historical school" legal scholars like Christopher Tiedemann and Oliver Wendell Holmes emphasized the common law not as a backwards-anchored fixed restraint, but, like Hayek, as a form of dynamic, living law. For many of these historical school thinkers, it was legislation, with its rigidities, that was "anti-life." Parker, *Common Law, History, and Democracy in America*, 219–245, 291–292. See also Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge, MA: Harvard University Press, 1982).

45. Hayek, *Law, Legislation and Liberty*, 12.

46. *Ibid.*, 13.

47. *Ibid.*, 78, 84, 85.

48. Hayek, *Constitution of Liberty*, 236.

49. *Ibid.*, 163.

50. *Ibid.*, 236–237.

51. Hayek, *Law, Legislation and Liberty*, 115–116.

52. Hayek, *Constitution of Liberty*, 237. See also Noga Morag-Levine, *Chasing the Wind: Regulating Air Pollution in the Common Law State* (Princeton, NJ: Princeton University Press, 2003).

53. Hayek, *Constitution of Liberty*, 149, 151.

54. See, for example, Hayek, *Law, Legislation and Liberty*, 89–91.

55. *Ibid.*, 72; emphasis added. I have added the emphasis to highlight that Hayek here specifically equates the concept of "law" exclusively with common law. He puts legislation in a hermetically different category, where it is, by definition, not "law" at all. Similarly—but taking

the opposed position—Thomas Paine sharply distinguished the obscurantist “lawyer’s law” (the common law) from (legitimate) “legislative law.” Parker, *Common Law, History, and Democracy in America*, 71–73, 80–83, 99. See also Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971).

56. Hayek, *Law, Legislation and Liberty*, 73.

57. Hayek, *Constitution of Liberty*, 163.

58. *Ibid.*, 59. He added: “This demonstration that something greater than man’s individual mind may grow from men’s fumbling efforts represented in some ways an even greater challenge to all design theories than even the later theory of biological evolution. For the first time it was shown that an evident order which was not the product of a designing human intelligence need not therefore be ascribed to the design of a higher, supernatural intelligence, but that there was a third possibility—the emergence of order as the result of adaptive evolution.” Darwin borrowed from this, rather than the other way around: “It is unfortunate that at a later date the social sciences, instead of building on these beginnings in their own field, re-imported some of these ideas from biology and with them brought in such conceptions as ‘natural selection,’ ‘struggle for existence,’ and ‘survival of the fittest,’ which are not appropriate in their field.”

59. *Ibid.*, 242.

60. Hayek, *Law, Legislation and Liberty*, 118–119.

61. *Ibid.*, 65. See also Philip Hamburger, *Law and Judicial Duty* (Cambridge, MA: Harvard University Press, 2008).

62. Hayek, *Constitution of Liberty*, 160, citing Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (London: Routledge, 1951), 159.

63. Hayek, *Constitution of Liberty*, 59.

64. *Ibid.*, 60.

65. *Ibid.*, 60–61.

66. *Ibid.*, 69.

67. *Ibid.*, 70.

68. *Ibid.*, 236.

69. *Ibid.*, 181.

70. *Ibid.*, 244–245. In opposition to this trend was Roscoe Pound, a pioneer of the sociological jurisprudence who later became a critic of “administrative absolutism” and a champion of the common law. See John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, MA: Harvard University Press, 2007), 211–284.

71. Hayek, *Constitution of Liberty*, 247.

72. Hayek, *The Road to Serfdom*, 36. See also Juliet Williams, “The Road Less Traveled: Reconsidering the Political Writings of Friedrich

von Hayek,” in *American Capitalism: Social Thought and Political Economy in the Twentieth Century*, ed. Nelson Lichtenstein (Philadelphia: University of Pennsylvania Press, 2006), 213–227.

73. Hayek, *Constitution of Liberty*, 60–61, 67.

74. See also Angus Burgin, *The Great Persuasion: Reinventing Free Markets Since the Depression* (Cambridge, MA: Harvard University Press, 2012).

75. Hayek, *Constitution of Liberty*, 62.

76. *Ibid.*, 65.

77. *Ibid.*, 63.

78. *Ibid.*, 64–66.

79. See Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State* (New York: W. W. Norton, 2005). Some conservatives nevertheless cite the notation in Article VII that the document was “done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven . . .” as evidence that the Constitution patently presupposed Christianity. U.S. Constitution, Article VII [emphasis added]. See, for example, Felix Morley, *Freedom and Federalism* (Indianapolis, IN: Liberty Fund, [1959] 1981), 302. Others hold the Constitution’s godlessness—the result of which was the tolerance of the nation’s original sin of slavery—was corrected by the constitutional thought of Abraham Lincoln, whose reading of the Constitution incorporated the Declaration of Independence, which expressly mentioned both “the Laws of Nature and Nature’s God” and that “all Men are created equal” and “endowed by their Creator with certain unalienable Rights.” See Ken I. Kersch, “Beyond Originalism: Conservative Declarationism and Constitutional Redemption,” *Maryland Law Review* 71 (Issue 1, 2011): 229–282.

80. See Steven K. Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* (New York: Oxford University Press, 2010); Parker, *Common Law, History, and Democracy in America*.

81. Whitehead himself was co-counsel for Paula Jones in her sexual harassment lawsuit against President Bill Clinton. Francis A. Schaeffer, *A Christian Manifesto* (Westchester, IL: Crossway Books, 1982). See Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition* (Chicago: University of Chicago Press, 2008), 16, 26, 32, 34. See [www.rutherford.org/](http://www.rutherford.org/) (the site’s banner trumpets the group as being “dedicated to the defense of civil liberties and human rights”). Within the movement, Whitehead’s Rutherford model was soon followed by the Reverend Donald Wildman’s American Family Association Center for Law and Policy, available online at: [www.afa.net/](http://www.afa.net/); and Pat Robertson’s American Center for Law and Justice, headed by Jay Sekulow, available online at:

www.aclj.org/. Whitehead is a prolific author. See John W. Whitehead, *The Separation Illusion: A Lawyer Examines the First Amendment* (Milford, MI: Mott Media, 1977); Whitehead, *Slaying Dragons: The Truth behind the Man Who Defended Paula Jones* (Nashville, TN: Thomas Nelson, 1999); Whitehead, *The Freedom of Religious Expression in Public Universities and High Schools*, 2nd ed. (Westchester, IL: Crossway Books, [1985] 1986); Whitehead, *Stand and Fight: It's Time for a Second American Revolution* (Tyler, MN: Glass Onion/TRI Press, 2009). See also R. Jonathan Moore, *Suing for America's Soul: John Whitehead, The Rutherford Institute, and Conservative Christians in the Courts* (Grand Rapids, MI: William B. Eerdmans, 2007). Moore observes that, of all his writings, Whitehead was proudest of *The Second American Revolution* (Westchester, IL: Crossway Books, 1982). In recent years, the Rutherford Institute has taken some seemingly surprising turns, opposing, for example, the Iraq War and the USA Patriot Act and defending the due process rights of War on Terror detainees Jose Padilla and Yaser Hamdi. Whitehead has, in some respects, turned away from politics, at least in its more statist ambitions. See Whitehead, *God Is a Four-Letter Word* (Tyler, MN: Glass Onion/TRI Press, 2007). See Rob Boston, "Theocracy Rejected: Former Christian Right Leaders 'Fess up': Frank Schaeffer, John Whitehead and Cal Thomas Have Repudiated the Theocratic Movement They Once Led. Here's Why," *Altnet* (March 10, 2008), accessed online January 20, 2015, at: [http://www.altnet.org/story/78818/theocracy\\_rejected%3A\\_former\\_christian\\_right\\_leaders\\_%27fess\\_up/?page=2](http://www.altnet.org/story/78818/theocracy_rejected%3A_former_christian_right_leaders_%27fess_up/?page=2); Ted Olson, "The Dragon Slayer: He Fights for Religious Liberty, Defends the Civil Rights of Homosexuals, and Funded Paula Jones's Case against the President—the Enigmatic John Wayne Whitehead," *Christianity Today* 42 (December 7, 1998).

82. Whitehead, *The Second American Revolution*, 18. (Cover image: "The Spirit of '76," original painting in Selectmen's Room, Abbot Hall, Marblehead, Massachusetts.) At Franky Schaeffer's instigation, and in line with his conceptions, the book was also made into a film released by Franky Schaeffer V Productions (Acknowledgments, n.p.). In the Foreword to the book, the influential evangelical intellectual Francis Schaeffer explains that, "The government, the courts, the media, the law are all dominated to one degree or another by [the] elite. They have largely secularized our society by force, particularly using the courts. . . . If there is still an entity known as 'the Christian church' by the end of this century, operating with any semblance of liberty within our society here in the United States," he writes, "it will probably have John Whitehead and his book to thank," adding that this is "the most important book that I have read in a long, long time." See <http://www.rutherford.org/>.

83. See R. J. Rushdoony's *This Independent Republic: Studies in the Nature and Meaning of American History* (Nutley, NJ: Craig Press, 1964); *The Nature of the American System* (Nutley, NJ: Craig Press, 1965); *The Roots of Reconstruction, Law and Liberty* (Portland, OR: Ross House Books, 1971); and *Institutes of Biblical Law, Vols. 1-3* (Nutley, NJ: Craig Press, 1973). In 1965, Rushdoony founded the Chalcedon Institute, which is committed to the advancement of Reconstructionist Christianity. See <http://chalcedon.edu/>. "Post-Millennial" Reconstructionism calls for the rule here and now, on earth, by the literal word of God, as set out in the Bible—particularly in the Old Testament. See, generally, Walter Olson, "Invitation to a Stoning: Getting Cozy with Theocrats," *Reason* (November 1, 1998).

84. See Neal Devins, "Book Review: *The Second American Revolution* by John W. Whitehead," *Hastings Constitutional Law Quarterly* 11 (Spring 1984): 505-522, concluding that Whitehead's thinking as expressed in the book "is alien to the values underlying American jurisprudence," that his history is "inaccurate," and that *The Second American Revolution* in the end is little more than "normative advocacy of the virtues of and the necessity for Christian life in a Christian state."

85. Whitehead, *The Second American Revolution*, 86.

86. *Ibid.*, 113.

87. *Ibid.*, 96.

88. *Ibid.*, 101, 103. See also Robert T. Handy, *A Christian America: Protestant Hopes and Historical Realities* (New York: Oxford University Press, 1984); Green, *Second Disestablishment*.

89. Whitehead, *The Second American Revolution*, 95.

90. *Ibid.*, 96.

91. *Ibid.*, 76.

92. *Ibid.*, 21.

93. *Ibid.*

94. *Ibid.*, 28-30. Hayek alludes to Rutherford's *Lex Rex* in *The Constitution of Liberty* as "one of the polemical tracts of the period." Hayek, *Constitution of Liberty*, 169.

95. Whitehead, *The Second American Revolution*, 31.

96. *Ibid.*, 73.

97. *Ibid.*, 111.

98. *Ibid.*, 153.

99. *Ibid.*, 76.

100. *Ibid.*, 77, 194. This lends a special symbolic importance to the Supreme Court's recent decisions holding that the Establishment Clause limits the public display of the Ten Commandments. *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545

U.S. 677 (2005). From the ideological perspective set out here, this is evidence of major corruption on the Supreme Court. Such decisions are "the false dictum of the absolute separation of church and state." Whitehead, *The Second American Revolution*, 78.

101. Whitehead, *The Second American Revolution*, 195.

102. *Ibid.*, 195–196.

103. *Ibid.*, 193.

104. *Ibid.*, 197.

105. *Ibid.*, 75.

106. *Ibid.*, 116. For this reason, there can be no such thing as "gay rights" or a right to an abortion. Because they are inconsistent with God's law, they are not "rights." "Vice—homosexuality, prostitution—represents idolatry and can never be justified even if 'legalized' by the state. Attempts to do so repudiate the Second Commandment," at 79.

107. *Ibid.*, 75–76.

108. *Ibid.*, 47.

109. *Ibid.*

110. *Ibid.*

111. *Ibid.*, 193.

112. *Ibid.*, 196.

113. *Ibid.*, 200.

114. *Ibid.*, 193.

115. *Ibid.*, 170, 171.

116. *Ibid.*, 85–86.

117. *Ibid.* This theme is emphasized by Hamburger as well. Hamburger, *Law and Judicial Duty*.

118. Whitehead, *The Second American Revolution*, 40, 106. This is a major theme on the Right. See, for example, Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington, DE: ISI Books, 2001).

119. Whitehead, *The Second American Revolution*, 18, 74.

120. *Ibid.*, 36–37. Prominent conservative thinkers put their shoulders to the wheel to reconcile religious views of people like Whitehead with a robust commitment to free market capitalism. Perhaps most prominent in this regard was the work done by Michael Novak to bring conservative Catholics around to a robust commitment to free markets. See Michael Novak, *The Spirit of Democratic Capitalism* (New York: American Enterprise Institute/Simon & Schuster, 1982).

121. Whitehead, *The Second American Revolution*, 119–20. *Lochner v. New York*, 198 U.S. 45 (1905). See, as examples, David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011); Richard Epstein, *Principles for a Free*

*Society: Reconciling Individual Liberty with the Common Good* (New York: Perseus Books, 1998).

122. See Ken I. Kersch, "Constitutional Conservatives Remember the Progressive Era," in *The Progressives' Century: Democratic Reform and Constitutional Government in the United States*, ed. Stephen Skowronek, Stephen Engel, and Bruce Ackerman (New Haven, CT: Yale University Press, 2016); David E. Bernstein, "The Progressive Origins of Conservative Hostility to *Lochner v. New York*," in *Toward an American Conservatism: Constitutional Conservatism During the Progressive Era*, ed. Joseph Postell and Johnathan O'Neill (New York: Palgrave Macmillan, 2013).

123. See, as examples, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1991); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004); Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (Issue 3, 1989): 849–866. See Keith E. Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 2 (Summer 2004): 599–613; Robert C. Post and Reva B. Siegel, "Democratic Constitutionalism," in *The Constitution in 2020*, ed. Jack M. Balkin and Reva B. Siegel (New York: Oxford University Press, 2009), 25–34; Robert Post and Reva Siegel, "Roe Rage: Democratic Constitutionalism and Backlash," *Harvard Civil Rights—Civil Liberties Law Review* 42 (Summer 2007): 373–434.

124. Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).

125. In a statement made during a May 1866 parliamentary debate, John Stuart Mill famously said: "Although it is not true that all conservatives are stupid people, it is true that most stupid people are conservatives." See Lionel Trilling, *The Liberal Imagination: Essays on Literature and Society* (New York: Harcourt Brace Jovanovich, 1950). "But the conservative impulse and the reactionary impulse . . . do not, with some isolated and some ecclesiastical exceptions, express themselves in ideas but only in action or in irritable mental gestures which seek to resemble ideas." See also: Richard Hofstadter, *The Paranoid Style in American Politics and Other Essays* (New York: Knopf, 1965); Chris Mooney, *The Republican Brain: The Science of Why They Deny Science—and Reality* (New York: Wiley, 2012); Patricia Cohen, "'Epistemic Closure'? Those Are Fighting Words," *New York Times* (April 27, 2010).

126. Cass R. Sunstein, "Incompletely Theorized Agreements in Constitutional Law," *Social Research* 74 (Spring 2007): 1–24. See also John S. Dryzek and Simon Niemeyer, "Reconciling Pluralism and Consensus Political Ideals," *American Journal of Political Science* 50 (July 2006): 634–649.



127. See Novak, "Making the Modern American Legislative State," David R. Mayhew, "Lawmaking as a Cognitive Enterprise," in *Living Legislation: Durability, Change, and the Politics of American Lawmaking*, ed. Jeffrey A. Jenkins and Eric M. Patashnik (Chicago: University of Chicago Press, 2012), 255–264; Hamburger, *Law and Judicial Duty*.

128. See *Federalist* No. 1.

129. Parker, *Common Law, History, and Democracy in America*, 1–2, 7, 12–15, 29. Parker explains that early-seventeenth-century common law thinkers "reworked the medieval ideal that law could not be made, but only discovered and declared. Where medieval legal thinkers had argued on the basis of timeless, discoverable, universal, and rational principles, early seventeenth century common lawyers attributed a special non-historical temporality to the common law," at 29.

130. See James R. Stoner, Jr., *Common Law Liberty: Rethinking American Constitutionalism* (Lawrence: University Press of Kansas, 2003); Stoner, *Common Law and Liberal Theory: Coke, Hobbes and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992); Robert Lowy Clinton, *God and Man in the Law* (Lawrence: University Press of Kansas, 1997). See also John Philip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* (New York: New York University Press, 2005); Parker, *Common Law, History, and Democracy in America*, 2.

131. Parker, *Common Law, History, and Democracy in America*, 58, 68–69, 71–72, 77–79, 92–93, 107.

132. *Ibid.*, 176–193. See also Douglas Edlin, *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (Ann Arbor: University of Michigan Press, 2010).

133. Smith, *Stories of Peoplehood*. See also Rogers M. Smith, "Identities, Interests, and the Future of Political Science," *Perspectives on Politics* 2 (June 2004): 301–312; Peter A. Hall and Rosemary C. R. Taylor, "Political Science and the Three New Institutionalisms," *Political Studies* 44 (December 1996): 946–950; Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge, MA: Harvard University Press, 2011); Murray Edelman, *Politics as Symbolic Action: Mass Arousal and Quiescence* (Chicago: Markham Publishing, 1971); Edelman, *Constructing the Political Spectacle* (Chicago: University of Chicago Press, 1988); Kersch, "Ecumenicalism Through Constitutionalism."

134. See Willard A. Mullins, "On the Concept of Ideology in Political Science," *American Political Science Review* 66 (June 1972): 498–510, arguing that ideologies are inherently structured by an historical consciousness and lend moral significance to human experience; Harold D. Lasswell and Abraham Kaplan, *Power and Society: A Framework for Political Inquiry* (New Haven, CT: Yale University Press, 1950), 116, claiming

"the political myth is the pattern of political symbols current in a society" [emphasis in original]. See also Pamela Brandwein, "Law and American Political Development," *Annual Review of Law and Social Science* 7 (December 2011): 187–216.

135. This is, of course, a classical "origins" or "founding" myth. See Mullins, "On the Concept of Ideology," 505: "In politics, some of the most important myths concern the founding of the polity. The founding myth often refers to heroic figures, real or imaginary, who created the political order. When persons invoke the name or recount the exploits of the founders, past and present are merged; the past is reviewed in the present even as the present draws significance from the past. By such practices, political communities celebrate the essential identity between the original act of founding and the continuing actions that extend and preserve the polity. Hence in a society characterized by mythical consciousness, the social structure is not viewed as an arrangement that might be altered by each generation according to its perceptions of justice and convenience, but as a sacred and timeless order which is sanctified by the myths that explain its importance and its origin," citing Carl Friedrich, *Man and His Government: An Empirical Theory of Politics* (New York: McGraw Hill, 1963), 96, 393–396 and Bronislaw Malinowski, *Magic, Science, and Religion and Other Essays* (Garden City, NY: Doubleday/Anchor, 1954), 100–101. The call for a return to founding principles, from a place of corruption or decline, is, of course, a key theme of republican thought. See Niccolò Machiavelli, *Discourses*, in Niccolò Machiavelli, *The Prince and the Discourses* (New York: Modern Library, 1950); J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975).