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***(Re)Making the Case for Living Constitutionalism: The Necessary Revival of Third-Way, Mid-Twentieth Century Constitutional Liberalism***

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**Introduction**

It is generally agreed that since the time constitutional theory debates between conservative “originalists” and liberal “living constitutionalists” were launched in the mid-1980s in the Edwin Meese and William J. Brennan, Jr. exchange, the founding of The Federalist Society, and the Robert Bork Supreme Court confirmation hearing, the originalists have emerged victorious. Originalists remain proud and unbowed in trumpeting their understanding of the correct way for judges to go about interpreting and applying the Constitution’s text to concrete cases. If their understanding has many adherents amongst judges and legal academics, it seems to have even more in the world of politics, where the Republican Party has anchored much of its ascendency on the charge that the Democrats had betrayed the Founders’ Constitution. By contrast, one hears little from the Democrats about the theory of “living constitutionalism.” Indeed, some of the most contemporary prominent liberal constitutional theorists, such as Jack Balkin and Akhil Amar of Yale, have decided to work on their opponents’ turf as “liberal originalists” – adherents to originalist interpretive precepts who seek to demonstrate the ways in which those precepts, properly applied, yield liberal, not conservative, constitutional outcomes.

As I have recently noted elsewhere, however, the orgininalist triumph is curious in the sense that it the originalist method has been systemically dismantled under the cold light of academic criticism, which has raised serious hermeneutic questions about it, but also questions about the extreme difficulty of fixing an original meaning in the context of the pluralism of the founders with diverse outlooks and understandings, to say nothing of the pluralism of the polity at the time, and of the eighteenth century state ratifying conventions (and later textual authors and ratifiers, such as those of the Civil War Amendments), as well as the nature of constitutions as frequently embodying the ambiguities that were the deliberate result of political compromises (fudging, obfuscating, deferring). Add to this the fact that some of the leading originalists have not very good at applying it consistently when they tried to do apply it (see Justice Scalia’ s free speech jurisprudence, which, unlike the rejected Robert Bork’s, did not at all track the free speech understandings of the Founders or the Founding Era public, except at the very highest level of abstraction indistinguishable from living constitutionalism), or were sloppy and peremptory about it (See Scalia on the Second Amendment), or they shrugged their shoulders and gave up on the method, when it seemed to them politically impractical (See Justice Scalia on the incorporation of the Bill of Rights). Justice Scalia, saying that he is a textualist, “not a nut,” or, more academically, referring to himself as a “faint-hearted originalist,” thought the theory simply could not be applied consistently. To be sure, others like Clarence Thomas seem to have much more stomach for applying the theory consistently across the board. But even Judge Bork refused to defend its application in a way that would overturn *Brown v. Board of Education* (1954) Other leading contemporary originalists like Michael McConnell and Steven Calebresi (the latter, a Federalist Society founder) have similarly crafted quite venturesome ostensibly originalist theories that would support both *Brown* and contemporary approaches that would justify applying the equal protection clause to guarantee women’s equality. None of these failures necessarily means that originalism has fared any worse than its living constitutionalist rival. But it is fair to say that the, by now, originalism has been much more successful politically than intellectually.

The occasion for this paper is my sense that liberals have, for all practical purposes, and whatever the intellectual debilities of originalism, lost the constitutional theory wars. This is especially the case in the public sphere, where the battle now seems to be between originalism and avoiding an emphasis on the Constitution at all on the liberal side (with a preference for keeping the argument on the level of non-constitutional discussions of public policy).[[2]](#footnote-2) My argument here is that, in the American political culture, liberal would benefit considerably by appealing to the Constitution, and not just claims about what is good public policy, as part of their political program. Their previous appeals to the Constitution, under the guise of “living constitutionalism” is now all but defunct. Even if it weren’t defunct, it is irrelevant. This is because, in the originalist – living constitutionalist opposition and argument of the 1980s, the liberals were opposing what has recently come to be called the “Old” or “Reactive” originalism, a method forged in opposition to the Warren Court, which was advanced as a formula for ensuring, in most cases, majoritarian democracy and deference to legislatures, as, that is, a formula for restraining activist judges (in this, of course, it was a revival of early twentieth century Progressive constitutional theory of, e.g. James Bradley Thayer, Oliver Wendell Holmes, Jr., and Felix Frankfurter). It is obvious to many that current versions of originalism – what has been called “New” or “Proactive” originalism,[[3]](#footnote-3) is an altogether different animal: it has no particular commitment to majoritarianism as a superintending principle counseling deference to legislatures and “judicial restraint” – its animating principle is substantive Right and Wrong. This commitment to substantive Right and Wrong answers by the New Originalists, without any counsel in favor of deference to legislatures, does more than reject the earlier majoritarianism: it reads majoritarian democracy – which it reads as a believe in legal positivism – a major/existential threat to American/western civilization, as akin, as such to Communism and Naziism. This change in the political theory foundations of originalism on the contemporary Right has hardly been noticed by liberals, who are still advancing theories of living or even anti-Constitutionalist judicial review that are aimed at the moribund Old/Reactive originalism of an earlier time.

Liberals need a constitutional theory that effectively meets the challenge posed by the New Originalism, not the Old Originalism. I believe that in forging that theory, they would do well to go back to the constitutional theory forged by key Cold War liberals – chiefly Reinhold Niebuhr – who were writing in opposition to a the sort of substantive, natural law/natural rights based conservatism that is most closely analogous in both substance and tone to the conservatism that is underwriting the New Originalism.

**The New Conservatism and the New Originalism**

The Old Originalism of Bork, Meese, Scalia and Raoul Berger arose out longstanding legal academy debates centering around the role of the judge vis-à-vis the legislature – Progressive Era debates, extended forward, about the countervailing claims of democracy versus judicial review. The New Originalism, however, arises, out of different set of questions, out of more foundational questions about the role and nature of government and law themselves – substantive debates anchored in political theory. It is no accident, therefore that, although rarely noted, the key constitutional theorists on which this originalism is based are not judges or legal academics but, in significant part, political theorists – Straussians trained at the University of Chicago, like Walter Berns, Harry Jaffa (trained by Leo Strauss at the New School, before Strauss moved to Chicago), Martin Diamond, Herbert Strong, or contemporaries like Charles Kesler, R.J. Pestritto, Hadley Arkes, etc. Their constitutional theory has fed the conservative (political/social) movement, not just academic theories instructing judges on the legitimate exercise of their judicial review powers. They are also conservative movement intellectuals, like the evangelical Francis Schaeffer, who have written books – Christian bookstore bestsellers – sold instructional film series, and taught workshops for members of Congress and church groups, explaining the long arc of constitutional betrayals that have led to what they believe are now the darkest evils of the current political scene: abortion, *Obergefell v. Hodges* (which Princeton Catholic natural law theorist Robert George called on people to reject and resist, and Abraham Lincoln rejected and resisted *Dred Scott*), the Affordable Care Act (which Ben Carson called “the worst thing to happen to the U.S. since slavery”), and the “lawless” presidency of Barack Obama. In the face of this conservatism, which is originalist in emphasizing constitutional themes, especially one attributing the long list of current evils to the betrayal of the Founders and the Founders’ constitution. Especially significantly, this New Originalist constitutional theory has not particular interest in judicial deference to legislatures as such: deference is due when the law in question is constitutionally legitimate; the aggressive assertion of judicial power is required when it isn’t.

What are the challenges posed by the New Originalism, as constitutional – and conservative movement – theory? The first thing to note about it is that it operates along several distinct dimensions. First, it identifies the chief threat as the threat of legal positivism – of the adherence (by liberals/Progressives/Democrats) to the laws of man, without regard to, and indeed, often in direct defiance, of the laws of God and the laws of nature (Natural Law). Far from coming down on the side of majoritarian democracy and whatever laws its legislatures, e.g. happen to produce (Thayer, Holmes, Bork, Scalia), it assesses them by the timeless/eternal yardstick of natural law/natural right. Second, its tone or tenor is one of existential alarm and resistance, in a register of full-bore Manicheanism: the matter is held to have world-historical or civilizational consequence; analogies to Nazism and slavery are common, found in frameworks of the movement’s political philosophers as much as in the rhetoric of Republican Party candidates for high office, like Sarah Palin, Ted Cruz, and Ben Carson. The New Originalism is framed in politics as implicating the momentous choice that overspills the constitutional question to get at the one at the heart of constitutionalism/the rule of law itself: God or Man?

In this, it marks a return to the tone/tenor and Manichean oppositions of Cold War conservatism, and imported those into constitutional theory. This is Constitutionalism as McCarthyism.[[4]](#footnote-4)

Liberals have seemed not to notice that conservatives are now operating by the lights of the New, not the Old, originalism. For this reason, they have been floundering in recent years in the realm of constitutional theory. Many of us – myself included – still teach our classes the “conservative” versus the “liberal” theories of judicial review, framed as an opposition between the (now defunct) Old Originalism and the (today, rarely mentioned in politics) “living constitutionalism.” Many prominent liberals have decided to attack the current U.S. Constitution as “undemocratic” (Sanford Levinson), calling for major revisions to it, if not renouncing the constitutional enterprise altogether (Michael Louis Seidman). Others, as mentioned above, have advanced new theories of “liberal originalism.” To be sure, there are other liberal theories out there – David Strauss’s common law constitutionalism, various aspirational or perfectionist models arising out the Rawls/Dworkin project. To my mind, however, these are inadequate to the challenge. What I am proposing here is a living constitutionalist theory that is forged specifically with the challenge posed by contemporary New Originalism in mind. For this, we need to go back to an earlier liberalism – a Cold War liberalism, forged in the crucible of opposition to conservatives emphasizing themes of natural law/natural right as against the claims of history, man, and mass mobilization with the aim of remaking this into a better, more advance/progressive world.

**Formulating a New Living Constitutionalism to Meet the New Originalism**

It is this context in which Reinhold Niebuhr, John Dewey, and others wrote, and this, I believe, their arguments on behalf of living constitutionalism are most relevant to the contemporary conservative challenge. They – and we – confront a conservative constitutional theory anchored in the opposition of Right and Wrong, posed an entailing an opposition between Foundationalism versus Anti-foundationalism, God versus Man, Conservative versus Progressive, Republican versus Democrat. Its central questions are “Do you believe?” “Which side are you on?” Its stated enemies are positivism, historicism, and “moral relativism.” The central argument is that unless one is anchored in/professes a faith in (bedrock) God and his foundations, anything is possible. Progressives may not necessarily be pro-slavery, racists, eugenicists, or communists – in their own minds at least, they understand themselves to be anti-racist, especially. But they do not hold to any principles that would preclude them from falling into these snares – they are unmoored. In recent years, they have, in the courts and out, advanced affirmative action, same-sex marriage, euthanasia, restricted the natural rights to religious liberty, free speech (campaign finance regulation, campus political correctness), self-defense (Second Amendment) and denied the principles of original sin upon which our Constitution was founded and structured (federalism, the separation of powers, limited government (“If men were angels….”)). As such, today’s living constitutionalists need to meet the challenges of the New Originalism, not the Old Originalism. They need to explain why living constitutionalism is either not positivist, historicist, and relativist, or why those positions – at least as applied to constitutional interpretation – are defensible, and good, and that it is the (crude) foundationalism advanced by today’s conservatives that amounts to a betrayal of the Founders and the desirable and legitimate constitutional and political values of contemporary Americans. Here, I will set out the living constitutionalism of the Cold War liberals that I argue is the most appropriate constitutional theory for liberals today by focusing on their understanding of a living constitutionalist theory of constitutional equality.

From a developmental perspective, the problem of constitutional equality involves, at base, a consideration of normative requirements in and across time. The central social-political problem facing morally aspirational societies like the U.S. is the problem of justice, which requires that each person be afforded his *due*.[[5]](#footnote-5) The reality of power, however, rooted in unappeasable human appetites and wants, poses a problem for justice.[[6]](#footnote-6) As a society moves forward in time, the many who act upon these desires get and leverage what they get to get more, seeking, winning, and accumulating power. In this way, political and economic development in free, liberal capitalist societies conduces to the uneven distribution – the concentration – of power. As such, development in these societies generates “structural” inequalities: it is a hothouse for the germination of new obstacles to justice not present at earlier stages of development.

If we assume that individuals act both selfishly and unselfishly, benevolent efforts, individual and collective, may be undertaken to advance justice. Benevolence notwithstanding, however, “envy, jealousy, pride, bigotry, and greed” remain commonplaces, ingrained in human nature in ways that have long been understood in the Judeo-Christian traditions and, in turn, by the American Founders. People on balance will privilege their own needs and those of the groups to which they belong to those of other individuals and groups.[[7]](#footnote-7) As such, development perpetually throws up new problems of the relationship of power to justice.[[8]](#footnote-8)

These problems are dealt with -- or ignored or disregarded -- in the unique guises in which they appear across time in a changing institutional and political context. This means that every moment in time inherently raises questions about the ways in which existing institutions meet the concrete problems that concentrated power poses for justice. The result is a collective determination, self-consciously or *de facto*, either that: 1) currently existing institutions are either functionally effective or adequate in meeting the requirements of justice, or sufficiently settled, if not sacrosanct, with justice best, albeit imperfectly, served by the institutional *status quo*; or, alternatively, 2) that reform, if not revolution, is imperative to advance equality in the service of justice.

Given the nature of contemporary constitutional debates in the U.S. which I have described elsewhere,[[9]](#footnote-9) it is worth underlining that while the developmental framework I have set out above for considering the problem of constitutional equality is “historicist” and “relativist,” it does not entail a denial of “timeless” moral principles (including justice and the natural equality of man) and foundational eternal truths (like “human nature”). Nor does it a downgrade of their status as fundamental or even, for those so inclined, “God given.” It simply recognizes and accounts for the fact that those principles live and are applied in the real world, to real human beings, alive in a certain place, time, and context – in the world, if you will, as God created it. So too with the problem of justice.

***Equality Claiming: Power, Groups, and Movements in Time***

In free, modern societies, problems of political (and constitutional) equality are commonly problems of groups.[[10]](#footnote-10) Partiality and selfishness are underwritten in pluralist polities because unselfishness and magnanimity are especially rare between groups – perhaps even more so than between individuals: human collectivities are (inherently) morally obtuse. To expect disinterestedness in inter-group relations is unrealistic. As such, social and political aggregations pose “a potential danger to higher and more inclusive loyalties” and entail inducements to “the expression of a sublimated [unacknowledged] egoism.”[[11]](#footnote-11)

Over time, the “moral attitudes” of powerful/privileged groups will diverge from that of disempowered groups, with the former “characterized by … self-deception and hypocrisy” and an “unconscious and conscious identification of their special interests with general interests and universal values….”[[12]](#footnote-12) “[T]he intelligence of privileged groups is usually applied to the task of inventing specious proofs for the theory that universal values spring from, and that general interests are served by, the special privileges which they hold.” Indeed, “[t]he most common form of hypocrisy among the privileged classes is to assume that their privileges are the just payments with which society rewards specially useful or meritorious functions.”[[13]](#footnote-13)

Equality, where it exists in a pluralistic, morally aspirational liberal capitalist polity, tends to be an in-group commitment, afforded only rarely as a matter of course to out-groups – even in relatively enlightened (large) communities.[[14]](#footnote-14) “With only rare exceptions, [an in-group member’s] highest moral attitude toward members of other groups is one of warlike sportsmanship toward those who equal his power and challenge it, and one of philanthropic generosity toward those who possess less power and privilege.”[[15]](#footnote-15)

***The Historical Trajectory: The Stages of Anglo-American Liberal Constitutional Development***

These dynamics concerning the development of real power and the normative justification of the institutions that underwrite and sustain that power have structured the staged development of equality across Anglo-American constitutional history.

***Bourgeois Liberalism***

In the Anglo-American constitutional tradition, individual liberty (freedom) in its modern sense was forged under particular historical conditions involving opposition by rising claimants to the cultural, social, economic, and political dominance and subordination instituted and sustained by medieval/feudal institutions. In the emergent “bourgeois” society, the demand for middle-class (economic, then political) liberty was made by a socially vital advancing class understanding the conditions of its own liberation as universal, where “[f]reedom presented itself as an end it itself, though it signified in fact liberation from oppression and tradition.” “Since it was necessary … to find justification for the movements of revolt, and since established authority was upon the side of institutional life, the natural recourse was appeal to some inalienable sacred authority resident in the protesting individuals” -- that is, to pre-political, “natural [individual] rights.” In this “[t]he revolt against old and limiting associations was converted, intellectually, into the doctrine of independence of any and all associations…. that the sole end of government was the protection of individuals in the rights which were theirs by nature.” In moving from claims on behalf of the natural rights of individuals to the establishment of new forms of government, bourgeois liberalism promised to reconcile the “two dimensions of human existence… man’s spiritual stature [inherent in his status as an individual] and his social character [his status as a member of the community]”; that is, “the uniqueness and variety of life, [and] … the common necessities of all men.” Henceforth, as such, the core political questions would be held to involve the relationship between liberty and order, that is, the claims of the individual and those of the community, into proper relation. [[16]](#footnote-16)

At this moment of inception, of course, the potential menace of individual rapacity and anarchy – alien concepts, other than theoretically -- were hardly considered. “[R]emove irrelevant political restraints from economic activity,” it was assumed, “and … the ‘natural system of liberty’ will become effective…. [with] the self-interest of each individual checked and balanced by that of every other individual, and, should that fail, an ‘enlightened’ self-interest which knows how to find the point of concurrence between the interests of self and those of the community will … supply the deficiency.” Bourgeois liberalism’s “serene confidence in the possibilities of social harmony” was derived both from the genuine achievements of a commercial culture -- that men could be brought most effectively into the vast system of mutual services in a complex society by engaging their ‘self-interest’ rather than their ‘benevolence’” -- and from the illusions natural to that culture. [[17]](#footnote-17)

This new liberalism, however, “assume[d] a natural equilibrium of economic power in the community which historic facts refute.”[[18]](#footnote-18) Over time, “social realities would develop which were not anticipated by the creed. The strong would and did take advantage of the weak.” Given the liberal order’s ideological underpinnings, they would “make demands upon the community which seemed reasonable to the claimant and inordinate from the standpoint of the community.”[[19]](#footnote-19)

***“Free Market” Industrial Capitalism in the Nineteenth Century U.S.***

Like feudalism before it, bourgeois liberalism lent itself to unique aggrandizements of power. In nineteenth century England and the U.S., the commercial classes converted the precepts of an anti-hierarchical (liberating) liberalism into a set of dogmas holding the emancipated to be imbued with special “intellectual and moral qualities” which uniquely qualified them to rule, a rule that neatly coincided with their interests.[[20]](#footnote-20) This involved both “destroy[ing] political restraint upon economic activity … by weaken[ing] the authority of the state,” and, where useful, rendering the state “pliant to their needs.” Under the conditions of industrial capitalism, this rendered unprecedentedly coercive concentrations of economic power with significant implications for social well-being largely outside of social control.[[21]](#footnote-21) Classical liberal theory – pioneered in its laissez faire version not by Adam Smith and John Locke but by the French Physiocrats – did not account for “how inordinate and disproportionate economic power may become.”[[22]](#footnote-22) At its most naïve and self-serving, it posited, as an afterthought, a superintending dogma “that that general welfare is advanced by placing the least possible political restraints upon economic activity,” that there is “an identity between the individual and the general interest.”[[23]](#footnote-23) These understandings were reflected in the jurisprudence of the late nineteenth and early twentieth century U.S. Supreme Court.[[24]](#footnote-24)

Over time, the accumulation of social power by those who initially won and succeeded was leveraged through relentlessly “expansive impulses” in the interest of new conquests and greater gains by the acquisition of even more property -- subject to no control aside from would-be state coercion in the interest of justice.[[25]](#footnote-25) One potential problem with such coercion, of course, is that it *can itself become inordinate* because public officials charged with looking after broader societal interests themselves harbor private interests and seek to aggrandize power. The task of establishing a level of equality conducive to a just social order will thus necessarily entail making pragmatic adjustments that account for the most characteristic and egregious imbalances of power at a particular historical juncture.[[26]](#footnote-26)

***Contentious Politics and the Countervailing Power of the Modern American State***

A cresting sense of many in the late nineteenth and early twentieth century U.S. that they were living by the dictates of inordinate economic (and, in turn, social and political) power paralleled in many respects the dynamics that had first occasioned the birth of liberal individualism: the new claimants lost confidence in their power to navigate the world as self-determining individual agents; they felt themselves to be “not … individual[s], as more privileged persons are….”[[27]](#footnote-27) Their grievance was accentuated by the cognitive dissonance inherent in their predicament involving “the complete submergence [of the individual] in fact at the very time in which he was being elevated high in theory.”[[28]](#footnote-28) It was precisely this predicament that was registered first by the Granger Movement, then by Populists, and, in turn, by the Labor Movement and the Progressives. Its understandings were ultimately incorporated into the constitutional reasoning of Supreme Court justices willing to rethink the entrenched dogmas of their wonted analytical frameworks, like John Marshall Harlan and Charles Evans Hughes.[[29]](#footnote-29)

These rising claimant movements appealed, commonly, if not exclusively, to the countervailing sensibilities of fraternity and solidarity.[[30]](#footnote-30) When legislatures targeted by Populist, Progressive, and Labor Movement reformists moved to mitigate power imbalances through group-oriented regulatory and social reform legislation (antitrust laws, rate regulation, legal support for unionization, the removal of sanctions for strikes and boycotts, workplace health and safety laws, minimum wage and maximum hours laws, mothers and old-age pensions, amongst others), their animating paradigm clashed with the then regnant liberal individualist substantive due process/liberty of contract jurisprudence predominating on the courts. Liberal individualists apprehended and anathematized this emphasis as not only aberrant but heretical in its purported hostility to “individual freedom.”[[31]](#footnote-31)

This clash was apprehended as existential, fueling considerable violence and resistance.[[32]](#footnote-32) Liberal individualists identified the (unjust) status quo with “the peace and order of society in general,” conceiving themselves as “apostles of law and order,” and adopting a “pious abhorrence of the use of violent methods” by the destroyers of harmony and fomenters of strife. [[33]](#footnote-33) This put “[t]hose who would eliminate the injustice … at the moral disadvantage of imperiling its peace.”[[34]](#footnote-34) “[O]nly partly conscious of the violence and coercion by which their privileges are preserved,” the “stand patters” called upon “the police power of the state, seemingly sanctified by the supposedly impartial objectives of the government which wields it, but nevertheless amenable to their interests.”[[35]](#footnote-35)

***Beyond Economics: The Case of Subsequent Subject Classes in U.S. Constitutional Development***

Although initially focused on questions of economic power, the doctrinal adjustments made to incorporate into constitutional law the historical realities of the relationship between power, justice, and the state came to foundationally structure the New Deal liberal state, and were thus, in turn, applied broadly both to questions of economic and other forms of unequal group power.[[36]](#footnote-36)

After noting women’s liberation’s deep indebtedness to the bourgeois liberal individualism that had undermined organicist understandings of the family, Reinhold Niebuhr, for one, drawing upon the insights of earlier feminists, inveighed against “male autocracy,” which at mid-century he worked to incorporate into the overarching framework of the nascent New Deal state. There was nothing about a professed “[d]evotion to the family” that precluded “an autocratic relationship toward it,” he argued. “The tyranny of the husband and the father in the family has yielded only very slowly to the principle of mutuality,” he noted. In countering and mitigating this oppression, women could do little until they gained the economic power (and the independence it entails), for which political power was a prerequisite. “In the long agitation which preceded suffrage reform, the men significantly used the same arguments against their own women, which privileged groups have always used in opposition to the extension of the privilege,” Niebuhr observed. “The male oligarchy used fixed principles of natural law to preserve its privileges and powers against a new emergent in history.”[[37]](#footnote-37) “They insisted that women were not capable of exercising the rights to which they aspired, just as dominant classes have always tried to without the opportunity for the exercise of rational function from the underprivileged classes and them accused them of lacking capacities, which can be developed only by exercise.”[[38]](#footnote-38)

Taking the simultaneous measure of both religious privilege and oppression, Niebuhr also now considered the possibility of a comprehensive solution. “There are three primary approaches to the problem of religious and cultural diversity in the western world….,” he observed. “The first is a religious approach (typified particularly by Catholicism) in which an effort is made to overcome religious diversity and restore the original unity of culture. The second is … secularism which attempts to achieve cultural unity through the disavowal of traditional historical religions. The third … seeks to maintain religious vitality within the conditions of religious diversity.”[[39]](#footnote-39) Religious fanaticism is common, and “religious humility” and “charity” rarer than “religious indifference.” For most people, toleration registered as a strategic retreat, and defeat.[[40]](#footnote-40) Toleration, after all, “requires that religious convictions be sincerely and devoutly held while yet the sinful and finite corruptions of these convictions be humbly acknowledged; and the actual fruits of other faiths be generously estimated.”[[41]](#footnote-41) Still, this was the task that he called upon modern civil liberties doctrine to take up, which it did.[[42]](#footnote-42)

Niebuhr did not share the hope that anthropological understandings of racism’s irrationality would solve “the problem of the color line” by vanquishing ignorance.[[43]](#footnote-43) “[P]ride and the will-to-power” are perpetual and constitutive of the broader systems of injustice.[[44]](#footnote-44) With American blacks, the white U.S. had created “a subject class, which happens … also to be a subject race.” It justified denials of equality “on any terms” – if not on the grounds of current incapacity, then those of congenital incapacity: in short, whatever it took.[[45]](#footnote-45) White southerners denied blacks the vote based on illiteracy, but had, at the same time, denied them the education that would have removed this disability. Many American blacks *were* educated and, when *that* situation presented itself, white Americans adduced new reasons for their subjection; ultimately, subjection itself was the only point. “The real crime of any minority group,” Niebuhr plainly insisted, “is that it diverges from the dominant type; most of the accusations leveled at these groups are rationalizations of the prejudice aroused by this divergence. “The particular crime of the Negroes is that they diverge too obviously from type,” thus presenting the problem of power and the group in its purest form.[[46]](#footnote-46) The same dynamics met immigrants from unwonted regions of the world, like southern and eastern Europe or Asia: the possibility of assimilation was perpetually bedeviled by belief, *tout court*, in north-European superiority.[[47]](#footnote-47) For this reason, Niebuhr contended that it will take “every stratagem of education and every resource of religion to generate appreciation of the virtues and good intentions of minority groups, which diverge from the type of the majority, and to prompt humility and charity in the life of the majority.” This is hard work, given the pride and prejudices inherent in man’s nature.[[48]](#footnote-48)

Given this predicament, “[t]he one requirement [in the modern liberal state] is that there be some equilibrium between class forces; and the other is that the equilibrium should not become static but be subject to the shifts of power which conform to the development of the economic and social situation….” On this, proponents of “free market” bourgeois liberalism and its Marxist Communists enemies were alike in error. “A conservative class which makes ‘free enterprise’ the final good of the community, and a radical class which mistakes some proximate solution of the economic problem for the ultimate solution of every issue of life, are equally perilous to the peace of the community and to the preservation of democracy,” Niebuhr insisted.[[49]](#footnote-49) A historical, developmental understanding of problems of equality was neither a logical extension of collectivism (as many on the Right charged) nor of individualism (as claimed by many on the Left). It was the third way that apprehended the world along its own, more realistic and conceptually tailored dimensions.

This third-way arising out the challenges that the historical development of liberal individualism posed for justice recognized both the horrors of communism and the perils of statism. It defended civil liberties. In language similar to that of Justice Robert Jackson’s in *West Virginia v. Barnette* (1943), Niebuhr warned that “coerced unity produces sadistic cruelties,” and taught that “a genuine universalism must seek to establish harmony without destroying the richness and variety of life. At the same time, it would take full measure of the problem of unequal group power and the need of democratic civilization to integrate the life of its various subordinate, ethnic, religious, and economic groups in the community in such a way that the richness and harmony of the whole community will be enhanced and not destroyed by them.”[[50]](#footnote-50)

**Meeting the (New) Conservative Argument About “Historicism” and “Moral Relativism”**

Niebuhr insisted that those who played natural law as trump in law and politics were fundamentally mistaken about the relationship between foundational truths and politics. Moral life was characterized by a “double focus,” one involving the individual’s inner life [where the moral ideal is the pursuit of unselfishness], and the other in the necessities of man’s social life [where the moral ideal is the pursuit of justice].” Traditions focused on individual moral ideals, like Christianity or Kantian ethics, place the highest value on good motives, impelled by Love (Christ) or Duty (Kant). Real societies comprised of ordinary people -- especially complex, pluralistic, modern societies -- however, cannot assume a populace primarily motivated in its public acts by either Love or moral Duty. There, the pursuit of interest will predominate, entailing conflict, even unto violence. For this reason, the reflexive privileging of the individual in politics is not conducive to justice.[[51]](#footnote-51)

While moral idealism in individuals is laudable, when transposed to the collective it inevitably “express[es] itself within the limits of the imagination by which men recognize the true character of their own motives and the validity of interests which compete with their own.” Few adequately discount their own selfishness or fully understand others’ interests. As such, moral or philosophical idealism tends to confuse political and social issues more frequently than it clarifies them.[[52]](#footnote-52) In fact, “[s]elf-evident truths” and “inalienable rights” were commonly enlisted in ordinary politics as “instruments of self-defense against the threat of a new vitality” (that is, e.g., to the recognition by the disempowered of the historically emerging dynamics of power). To be sure, “[b]ecause reason is something more than a weapon of self-interest it can be an instrument of justice.” “[B]ut since reason is never dissociated from the vitalities of life, individual and collective, it cannot be a pure instrument of justice.” “Every human decision about the character of a community or its government has always been taken in light of, and been limited by, the actuality of the community which existed before the decision was taken.” “Natural-law theories which derive absolutely valid principles of morals and politics from reason,” Niebuhr warned, “invariably introduce contingent practical applications into the definition of the principle. This is particularly true when the natural law defines not merely moral but also political principles.”[[53]](#footnote-53) “The principles of political morality [are thus] inherently more relative than those of pure morality [and] cannot be stated without the introduction of relative and contingent factors…. [E]very precise definition of the requirements and the perils of government is historically conditioned by the comparative dangers of either a too strict order or of potential chaos in given periods of history.”[[54]](#footnote-54)

Equality is certainly “a transcendent principle of justice and is therefore rightly regarded as one the principles of natural law.” At the same time, “functional inequalities” are a social necessity. If the principle is welded too securely to a particular historical understanding of its requirements, it can function as defense of unwarranted privilege. As such, moral principles in the abstract and moral principles in politics are not the same thing. Political principles, moreover, are not the same thing as any particular application of political principles. And specific applications mean different things in different contexts/periods characterized by different “impulses and ambition of the social hegemony.”

“[T]his descending scale of relativity,” however, “never inhibits the bearers of power in a given period from claiming the sanctity of the pure principle for their power.” So, for example, “[t]here was a great[er] degree of validity in the ethical content of medieval natural law than in the social and political hegemony of priests and landed aristocrats in the feudal society. And there [was] more truth in the natural law as Jefferson conceived it, than there is justice in the social hegemony of monopolistic capitalism … which maintains its prestige by appeals to Jefferson’s principles.” This should serve as a caution that “[a] society which exempts ultimate principles from criticism will find difficulty in dealing with the historical forces which have appropriated these truths as their special possession.”[[55]](#footnote-55)

This moral realism foists upon the polity the perpetual responsibility of reassessing the balance in public policy between the claims of the individual and the community. As such, Niebuhr’s approach stands opposed to both to the apodictic application of natural law and natural rights theory in politics by the Right as well as efforts on the liberal/Left to philosophically reconcile the principles of liberty and equality to yield a formulation of justice that would stand outside of considerations of time, history, and development.[[56]](#footnote-56) Neither adequately attends to “the indeterminate possibilities of historic vitalities, as they express themselves in both individual and collective terms.”[[57]](#footnote-57) Political responsibility, political morality, and political ethics require endless elaboration, elaboration requiring accommodation by law.[[58]](#footnote-58) Living constitutionalism provides the space for this elaboration. It does not, as is frequently alleged on the Right, banish morality and ethics from politics, but rather provides space for these ideals and commitments to be realized across the unfolding of political time. Good and effective governance requires an attentiveness to the conditions and problems a society actually faces in a constantly changing interconnected, complex modern social and economic order.[[59]](#footnote-59)

These dynamics implicate the dividing line between the public and private spheres. “There is no sharp and clear line which draws itself, pointing out beyond peradventure … just where a public comes into existence which has interests so significant that they must be looked after and administered by special agencies, or governmental officers. Hence there is often room for dispute.” “The line of demarcation between actions left to private initiative and management and those regulated by the state has to be discovered experimentally.”[[60]](#footnote-60) “The very fact that the public depends upon consequences of acts and the perception of consequences, while its organization into a state depends upon the ability to invent and employ special instrumentalities, shows how and why publics and political institutions differ widely from epoch to epoch and from place to place. To suppose that an *a priori* conception of the intrinsic nature and limits of the individual on one side and the state on the other will yield good results once for all,” John Dewey insisted, “is absurd.”[[61]](#footnote-61) “[C]onsequences vary with concrete conditions; hence at one time and place a large measure of state activity may be indicated and at another time a policy of quiescence and *laissez-faire*…. There is no antecedent universal proposition which can be laid down because of which the functions of a state should be limited or should be expanded.”[[62]](#footnote-62)

The American founding “took form when English political habits and legal institutions worked under pioneer conditions.”[[63]](#footnote-63) The modern regulatory and social welfare state addressed new developments in the distribution of economic, social, and political power. The potential tyranny of government, including those arising out of bureaucratization, was real. All the same, “we have … achieved such justice as we possess in the only way justice can be achieved in a technical society: we have equilibrated power. We have attained a certain equilibrium in economic society itself by setting organized power against organized power. When that did not suffice we used the more broadly based political power to redress disproportions and disbalances in economic society.”[[64]](#footnote-64)

As the nation’s constitutional institutions (the Presidency, the states and their governments, Congress, the Supreme Court) and its political institutions (political parties, administrative agencies, etc.) move forward through time, while social and economic institutions (the family, the business corporation) change around them, the environment become complex, dense, and inter-current. Institutions no longer fill, or fill in the same way, the functions those who created them intended or imagined. Constitutional scholars, to say nothing of constitutional and political actors, *must* confront these changes, since they constitute the setting for actual, lived constitutional and political life.[[65]](#footnote-65)

***Periodization/Time***

Contemporary historical institutionalist and American political and constitutional development scholars have sought to map this mutating landscape of stasis and change, of settlement and disturbance, using a social scientific nomenclature of regimes, path dependency, punctuated equilibrium, and so forth – an analytic taxonomy of “politics in time.” Independently of these social scientists, but, increasingly, in engagement with them, legal academics have been pioneering the modern study of “constitutional development,” or the Constitution in Time.

As a matter of empirical fact, all have found periodicity to be the rule: time and circumstance matter, crucially. There are periods of stability, in which society’s injustices, or specific injustices, are taken for granted, often understood as either inevitable, “natural,” or (legitimately and authoritatively) willed, such as by the polity’s law-giving Founders. By contrast, there are other periods in which they are not – when the society is “immersed in the social problem.” Modern technological [capitalist] societies, Niebuhr, for one, believed, are inherently unstable and thus *perpetually immersed* in the social problem – “the circumstances of life [change] too rapidly to incline any one to a reverent acceptance of an ancestral order.”[[66]](#footnote-66) “In the long run [that order’s] pretensions are revealed” and the disinherited grow restive.[[67]](#footnote-67) Far from (necessarily) amounting to a flight from (timeless) principle and rationality, the movements and arguments for “constitutional change” concerning equality involves the struggle for fidelity under conditions of development. It would be irrational, willful blindness, for a society to rule a consideration of “the pretensions made by [its] powerful and privileged groups” off the table. Questions of justice and injustice must be considered in the only way they can be: critically, as they present themselves.[[68]](#footnote-68) As such, “the equalitarian ideal …[at least in the liberal U.S.] does not [typically] spring from pure ethical imagination” – from abstracted utopianism or Leftist dogmas -- but from the particular circumstances of actual life.[[69]](#footnote-69)

In fronting the world politically and legally, the relative attentiveness to the claims of individuals and those of the community will vary. “Both individual and collective centers of human vitality may be endlessly elaborated. “ “Any premature definition of what the limits of these elaborations ought to be,” moreover, “inevitably destroys and suppresses legitimate forms of life and culture.” “Every definition of the restraints which must be placed upon these vitalities must be tentative; because all such definitions, which are themselves the products of specific historical insights, may prematurely arrest or suppress a legitimate vitality, if they are made absolute and fixed.” The community must consistently re-examine the presuppositions upon which it orders its life, because no age can fully anticipate or predict the legitimate and creative vitalities which may arise in subsequent ages.”[[70]](#footnote-70) This was one of the key grounds upon which Niebuhr defended democracy – with a full accounting of its perils – as the most effective means for people to live together in time morally, ethically, and politically.[[71]](#footnote-71) “[D]emocratic freedom is right …, Niebuhr affirmed, because “there is no historical reality, whether it be church or government, whether it be the reason of wise men or specialists, which is not involved in the flux and relativity of human existence; which is not subject to error and sin, and which is not tempted to exaggerate its errors and sins when they are made immune to criticism.”[[72]](#footnote-72) To be genuinely moral, “Democracy … requires something more than a religious devotion to moral ideals.” “It requires religious humility.”[[73]](#footnote-73) When it comes to equality, the eruption of dissent and the preoccupation at a particular time with the social problem is predictably and rightly provoked by the “disparity between nominal standards, which become ineffectual and hypocritical in exact ration to their theoretical exaltation, and actual habits which have to take note of existing conditions.”[[74]](#footnote-74)

**Conclusion**

One of the chief charges lodged by the new conservatives against their progressive/liberal opponents is that they are anti-foundationalist historicists – and that, without bedrock moral foundations, anything (Nazism, Communism, etc.) anything is possible. As I have shown above, however, the new living constitutionalist theory I build here, borrowing from Cold War liberals, does not deny timeless moral foundations: it only acknowledges history as a fact. The conservatives are objecting to history as a fact on principle – a project that is, on its face, absurd. It is falseness selling itself under the label of Truth.

But more can be said regarding the spirit in which the contemporary conservative objection to the (supposed) absence of foundations – legal positivism – in progressive/liberal constitutional theory is lodged: a spirit of existential threat to U.S., and western, civilization. To the extent that the living constitutionalism of the liberals was based on the democratic majoritarianism of the early twentieth century Progressives, we might answer, first, that democratic majoritarianism can itself be anchored in moral principle. This doesn’t fully answer the warnings against the inflamed majorities of twentieth century “mass” movement politics (Hitler, Communism)(to some extent, of course, a real concern of the constitutional Framers, who were concerned with the role of inflamed passion and interest in politics – faction, threats to rights (especially property rights), etc.). But the entire Reagan administration push for (Old/Reactive) Originalism, as noted in passing above, was itself anti-Foundationalist and positivist, since it simply took the old, early twentieth century progressive theories of judicial review and judicial role in a democracy and hurled them at later Warren Court liberals, charging hypocrisy (the charge against the Warren Court of “judicial activism” were a recycling of the Progressive theories hurled earlier at the “Lochner Court”). If liberal anti-foundationalism is a profound threat to American freedom and the American way of life, in ways that amount to a betrayal of all we value as a country, then the conviction must apply equally to the constitutional theories of Robert Bork, Edwin Meese, Antonin Scalia, and Ronald Reagan.

This paper is aimed at what I see as the irrelevance of much of constitutional theory that is currently being advanced on the progressive/liberal side, leaving the field, in law, probably, but certainly in constitutional politics, to the Right – making “Originalism” the only game in town, even amongst liberals. A large part of the problem as I see it is that liberals have not be listening to conservatives. They are still focused on the Old/Reactive originalism that predominated a generation ago. The charge they lodge is hypocrisy: ‘you say you believe in judicial restraint – but you are the judicial activists! (*Lopez*, *Morrison*, *Heller*, *McDonald*, *Snyder v. Phelps*, *Hobby-Lobby*, *Citizens United*, *Kelo* dissents, etc. – the whole new conservative rights revolution)).[[75]](#footnote-75) But “originalism” is not the same today as it once was, simply because it is using the same name. The originalism at the heart of the contemporary Right is new wine in an old bottle.

How can liberals today start meeting the challenge as it actually exists? How can they stop talking past the Right, and engage in a real debate with them – the only way to truly advance the case that their theories of constitutional interpretation are actually better? I believe the best way for them to do this is too look the lost tradition(s) of foundationalist liberalism. This foundationalist liberalism – forged during the Cold War to meet a mid-century conservatism that was lodging the same charged of natural law, natural right, historicism, and moral relativism employed by today’s conservative movement – accepts the reality, and even the primacy/moral indispensability of foundations, the distinction between Truth and Falsehood, between Right and Wrong. It is thus, directly on point. It holds living constitutionalism to be not a choice, or a repudiation, but an indispensability, a necessity. It, moreover, justifies living constitutionalism as better than the supposedly more grounded/anchored conservative alternative. It is thus a wholly defensible, grounded, and thoroughly American constitutionalism, one that is capable of, point-by-point, of meeting and vanquishing the conservative challenge, not, as liberals anachronistically remember it, but as, today, it actually exists.

1. \* Professor of Political Science, Boston College. [kersch@bc.edu](mailto:kersch@bc.edu). This paper draws in part from the Tallman Lecture I delivered at Bowdoin College (Fall 2015), from my forthcoming chapter “Constitutional Conservatives Remember the Progressive Era,” in Bruce Ackerman, Stephen Engel, and Stephen Skowronek, editors, *The Progressives’ Century: Democratic Reform and Constitutional Government in the U.S.* (Yale, 2016), and from an early draft of the my chapter on “Equality” to be included in the *Cambridge Companion to the U.S. Constitution* edited by John Compton and Karen Orren. [↑](#footnote-ref-1)
2. See Ken I. Kersch, “The Great Refusal: Liberals and Grand Constitutional Narrative,” *Wisconsin Law Review* *Online*(May 2015). [↑](#footnote-ref-2)
3. Ken I. Kersch, “Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in *National Review,* 1955-1980,” *Studies in American Political Development* 25 (Spring 2011): 86-116. [↑](#footnote-ref-3)
4. See, e.g., William F. Buckley, Jr., *God and Man at Yale (*1951)(“I believe that the duel between Christianity and atheism is the most important in the world. I further believe that the struggle between individuals and collectivism is the same struggle reproduced on another level”); Whittaker Chambers, *Witness* (1952)(“Much more than Alger Hiss or Whittaker Chambers was on trial in the trials of Alger Hiss. Two faiths were on trial. Human societies, like human beings, live by faith and die when faith dies.” What is taking place now is a “critical conflict of faiths.” Communism is man’s “second oldest faith.” As such, the Communist faith is not new. “Its promise was whispered in the first days of the Creation under the Tree of Knowledge of Good and Evil: ‘Ye shall be as gods’…. It is the vision of man’s mind displacing God as the creative intelligence of the world. It is the vision of man’s liberated mind, by the sole force of its rational intelligence, redirecting man’s destiny and reorganizing man’s life and the world.” The Hiss-Chambers affairs “has posed in practical form the most revolutionary question in history – God or Man?”). [↑](#footnote-ref-4)
5. See Aristotle, *The Nichomachean Ethics*, Book V (George Barker, trans.) (Oxford) This, importantly, is different from a requirement that each is entitled to *the same*. See U.S. Constitution, Preamble; Sotirios Barber, *Welfare and the Constitution* (Princeton, 2003). [↑](#footnote-ref-5)
6. See, e.g., Hobbes, *Leviathan* (Quentin Skinner, ed.)(Cambridge). [↑](#footnote-ref-6)
7. Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* (Louisville, KY: Westminster John Knox Press, 2013)[1932], 1-3, 16, 11 [“MMIS”]. See also Federalist # 51 [James Madison]. In the discussion that follows, I draw heavily on the political thought of Reinhold Niebuhr and, to a lesser extent, John Dewey. [↑](#footnote-ref-7)
8. MMIS, 1-3, 16, 11. [↑](#footnote-ref-8)
9. Ken I. Kersch, “Conservatives Remember The Progressive Era,” in Stephen Skowronek, Stephen Engel, and Bruce Ackerman, editors, *The Progressives’ Century: Democratic Reform and Constitutional Government in the United States* (Yale University, 2016); Ken I. Kersch, “Beyond Originalism: Conservative Declarationism and Constitutional Redemption,” *Maryland Law Review* 71 (2011): 229-282. [↑](#footnote-ref-9)
10. Reinhold Niebuhr, *The Children of Light and The Children of Darkness: A Vindication of Democracy and a Critique of Its Traditional Defense* (Charles Scribner’s Sons, 1944)[“CLCD”], 122. [↑](#footnote-ref-10)
11. MMIS, 47, 272, 267-268. See also Hobbes, *Leviathan*. [↑](#footnote-ref-11)
12. MMIS, 117. [↑](#footnote-ref-12)
13. MMIS, 117. Niebuhr – a vocal anti-communist --observes that this is the mirror image of the equally erroneous communist view that unequal rewards are always unjust. [↑](#footnote-ref-13)
14. MMIS, 13. [↑](#footnote-ref-14)
15. MMIS, 13. [↑](#footnote-ref-15)
16. John Dewey, *The Public and Its Problems* (Henry Holt, 1927)[“PP”], 86-87; CLCD, 2-4, 6-7, 42-43, 52-53. See also Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth Century England and America* (Cornell University, 1990); Hartz, *Liberal Tradition in America*. Recent work in analytic constitutional theory has brought us right back to this very same point. See, e.g., James Fleming and Linda McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* (Harvard, 2013). See Ken I. Kersch, “Bringing it All Back Home?” *Constitutional Commentary* 28 (Fall 2013): 407-419. [↑](#footnote-ref-16)
17. PP, 86-87; CLCD, 2-4, 6-7, 42-43, 52-53. [↑](#footnote-ref-17)
18. CLCD, 76, 114. [↑](#footnote-ref-18)
19. Reinhold Niebuhr, *The Irony of American History* (University of Chicago, 1952)[“IAH”], 92-95. See also CLCD, 23, n. 4., 26, [↑](#footnote-ref-19)
20. PP, 204. See, e.g., Herbert Spencer, *Social Statics, of the Conditions Essential to Happiness Specified, and the First of Them Developed* (John Chapman, 1851); William Graham Sumner, *What the Social Classes Owe to Each Other* (Harper and Bros., 1883) Andrew Carnegie, “Wealth,” *North American Review* 148 (June 1889): 653-665. [↑](#footnote-ref-20)
21. MMIS, 14-15. [↑](#footnote-ref-21)
22. CLCD, 108-109. [↑](#footnote-ref-22)
23. MMIS, 8-9, 33; CLCD, 29. [↑](#footnote-ref-23)
24. IAH, 99. See, e.g., *Slaughterhouse Cases*, 83 U.S. 36 (1873)(J. Field, dissenting); *Munn v. Illinois*, 94 U.S. 113 (1877)(J. Field, dissenting); *Lochner v. New York*, 198 U.S. 45 (1905)(J. Holmes, dissenting). See also Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Little, Brown, 1868); David J. Brewer, “The Nation’s Safeguard,” in *Proceedings of the New York State Bar Association, Sixteenth Annual Meeting* (New York State Bar Association, 1893). [↑](#footnote-ref-24)
25. While this diagnosis and prescription is largely synonymous with the “Madisonian” diagnosis of the political problem posed by faction, and the institutional solution of simultaneously empowering and limiting government, Niebuhr argued that Madison’s Federalist #10 attached “too great a significance … to inequality of faculty as the basis if inequality of privilege.” What Madison did not recognize was that “unequal [economic] power … is a social and historical accretion.” CLCD, 65-66. “Differences in faculty and function do indeed help to originate inequality of privilege.” But “they never justify the degree of inequality created, and they are frequently not even relevant to the type of inequality perpetuated in a social system.” MMIS, 114. The situation in the late nineteenth and early twentieth century U.S. was particularly egregious in this regard. CLCD, 98-100. [↑](#footnote-ref-25)
26. CLCD, 67; PP, 82-83. [↑](#footnote-ref-26)
27. MMIS, 176-177; CLCD, 57. [↑](#footnote-ref-27)
28. PP, 95-97. See also Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (Doubleday, 1913). [↑](#footnote-ref-28)
29. *Lochner v. New York* (1905)(J. Harlan, dissenting); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). See also PP, 62-63. [↑](#footnote-ref-29)
30. See Steve Fraser, *The Age of Acquiescence: The Life and Death of American Resistance to Organized Wealth and Power* (Little, Brown and Co., 2015). [↑](#footnote-ref-30)
31. MMIS, 176-177. See *Munn v. Illinois* (1873)(J. Field, dissenting); *U.S. v. E.C. Knight*, 156 U.S. 1 (1895); *Pollack v. Farmers’ Loan and Trust Co.*, 157 U.S. 429 (1894)(Argument of Joseph H. Choate, for appellant). See generally Joseph Postell and Johnathan O’Neill, editors, *Toward an American Conservatism: Constitutional Conservatism During the Progressive Era* (Palgrave Macmillan, 2013). [↑](#footnote-ref-31)
32. See Robert Justin Goldstein, *Political Repression in Modern America, 1870 to the Present* (Schenckman Publishing Co., 1978); Nick Salvatore, *Eugene v. Debs: Citizen and Socialist* (University of Illinois, 1982); Rabban, *Free Speech in its Forgotten Years*; Ross, *Muted Fury*. [↑](#footnote-ref-32)
33. MMIS, 129-131. See *In re Debs*, 158 U.S. 564 (1895). [↑](#footnote-ref-33)
34. They, of course, understood their own violence as provoked, defensive, and in the service of law and order, and, hence, justified. MMIS, 129-131. [↑](#footnote-ref-34)
35. [page cite needed]. [↑](#footnote-ref-35)
36. The typically cited harbinger in the Supreme Court’s jurisprudence is *U.S. v. Carolene Products*, 303 U.S. 144, fn. 4. See generally David Plotke, *Building a Democratic Political Order – Re-shaping American Liberalism in the 1930s and 1940s* (Cambridge, 1996); Anne Kornhauser, *Debating the American State: Liberal Anxieties and the New Leviathan, 1930-1970* (University of Pennsylvania, 2015); Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (University of Chicago, 2004). [↑](#footnote-ref-36)
37. CLCD, 76-77. See *Bradwell v. Illinois*, 83 U.S. 130 (1873); Jane Addams, “If Men Were Seeking the Franchise,” *Ladies Home Journal* 30 (June 1913), 21. [↑](#footnote-ref-37)
38. MMIS, 46-47. [↑](#footnote-ref-38)
39. CLCD, 126. Niebuhr was an outspoken critic of “the inflexible authoritarianism of the [pre-Vatican II] Catholic religion” CLCD, 128. [↑](#footnote-ref-39)
40. CLCD, 120. [↑](#footnote-ref-40)
41. CLCD, 130, 137. [↑](#footnote-ref-41)
42. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Ewing*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Engel v. Vitale*, 370 U.S. 421 (1962); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Employment Division v. Smith*, 494 U.S. 872 (1990); *Lee v. Weisman*, 505 U.S. 577 (1992); *Rosenberger v. University v. Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford*, 553 U.S. 98 (2001); *McCreary v. ACLU of Kentucky*, 545 U.S. 844 (2005). See Kersch, *Constructing Civil Liberties*. [↑](#footnote-ref-42)
43. See, e.g., Franz Boas, “The Instability of Human Types,” in Gustav Spiller, editor, *Papers on Interracial Problems Communicated to the First Universal Races Congress Held at the University of London, July 26-29* (1911)(Ginn and Co., 1912): 99-103; Franz Boas, “New Evidence in Regard to the Instability of Human Types,” *Proceedings of the National Academy of Sciences of the United States of America*, 2 (December 15, 1916): 713-718. W.E.B. DuBois, *The Souls of Black Folk: Essays and Sketches* (A.C. McClung and Co., 1903). [↑](#footnote-ref-43)
44. CLCD, 138-139; MMIS, 253. [↑](#footnote-ref-44)
45. MMIS, 119 – 120. [↑](#footnote-ref-45)
46. CLCD, 141. [↑](#footnote-ref-46)
47. CLCD, 140. See PP, 115. [↑](#footnote-ref-47)
48. CLCD, 143-144. [↑](#footnote-ref-48)
49. CLCD, 148-149; IAH 107-108. Although often assumed otherwise, Hayek would likely agree. See Friedrich Von Hayek, *The Road to Serfdom* (University of Chicago, 1944). [↑](#footnote-ref-49)
50. CLCD, 124. [↑](#footnote-ref-50)
51. MMIS, 257-259. See Federalist #51 [Madison] (“If men were angels, no government would be necessary.”). [↑](#footnote-ref-51)
52. MMIS, 117. [↑](#footnote-ref-52)
53. CLCD, 72. [↑](#footnote-ref-53)
54. CLCD, 54, 73. [↑](#footnote-ref-54)
55. CLCD, 74-75. [↑](#footnote-ref-55)
56. See CLCD, Ch. 2. [↑](#footnote-ref-56)
57. CLCD, 59. [↑](#footnote-ref-57)
58. See CLCD, 61. [↑](#footnote-ref-58)
59. PP, 46-47. See Graham Wallas, *The Great Society: A Psychological Analysis* (Macmillan Co., 1914). [↑](#footnote-ref-59)
60. PP, 64-65. [↑](#footnote-ref-60)
61. PP, 65. [↑](#footnote-ref-61)
62. PP, 74. [↑](#footnote-ref-62)
63. PP, 111-112, 131-134. [↑](#footnote-ref-63)
64. IAH, 97, 100-101. See also Wilson, *New Freedom*. [↑](#footnote-ref-64)
65. CLCD, 101. This was no heresy to an earlier generation of seminal Straussian constitutional theorists either. See, e.g., Martin Diamond, “What the Framers Meant by Federalism,” in Robert Goldwin, editor, *A Nation of States* (Rand McNally, 1963). [↑](#footnote-ref-65)
66. MMIS, 275. See Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (Harper and Brothers, 1942). [↑](#footnote-ref-66)
67. MMIS, 11. [↑](#footnote-ref-67)
68. MMIS, 31, 233. [↑](#footnote-ref-68)
69. MMIS, 160. See also Lawrence Lessig, “Fidelity in Translation,” *Texas Law Review* 71 (1993) 1165; Lawrence Lessig, “Understanding Changed Readings: Fidelity and Theory,” *Stanford Law Review* (Feb. 1995): 395; Lawrence Lessig, “Fidelity and Constraint,” *Fordham Law Review* 65 (1997): 1365. [↑](#footnote-ref-69)
70. CLCD, 63-64. [↑](#footnote-ref-70)
71. MMIS, 175. [↑](#footnote-ref-71)
72. CLCD, 70-71. [↑](#footnote-ref-72)
73. CLCD, 151. [↑](#footnote-ref-73)
74. John Dewey, *Human Nature and Conduct: An Introduction to Social Psychology* (Henry Holt and Co., 1922), 82; Vorenberg, “Bringing the Constitution Back In”; Huntington, *American Politics: The Promise of Disharmony*. [↑](#footnote-ref-74)
75. See, e.g., Tom Keck, *The Most Activist Supreme Court in History*. [↑](#footnote-ref-75)