

[The Rise of the Libertarian Legal Movement](#)

[Damon W. Root](#) Aug. 20, 2012 2:00 pm

SCOTUSBlog is currently hosting an [online symposium](#) devoted to this year's 50th anniversary of the publication of Yale law professor Alexander Bickel's influential book *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. The whole symposium is well worth reading, but I wanted to draw particular attention to the [fascinating contribution](#) of Roger Pilon, founder and director of the Cato Institute's Center for Constitutional Studies, who explains how the spread of Bickel's ideas helped to galvanize the founders of today's libertarian legal movement.



As Pilon notes, Bickel had a very significant influence on the thinking of his one-time Yale colleague Robert Bork, particularly when it came to the issue of judicial restraint. And it was on that very issue that the libertarians started challenging Bork and other legal conservatives. Pilon writes:

Bork, after he left Yale, and whatever his several differences with Bickel, drew nonetheless on Bickel's two main themes – the “countermajoritarian difficulty” and the “passive virtues” – to become the dominant figure in the rising conservative legal movement, with its call for “judicial restraint” – a direct response to the “judicial activism” and the “rights revolution” conservatives saw coming from the Warren and Burger Courts. Whether in the pages of *National Review* from the late 1950s, in the aftermath of the Goldwater takeover of the Republican Party in the late '60s and on through the '70s, the emergence of the Federalist Society in 1982, or through the Reagan administration's judicial appointments, Bickel's influence on the Bork brief for “judicial restraint” was at

the center of the increasingly influential conservative political debate concerning the courts.

But a funny thing happened along the way. During the mid-'70s a tiny band of libertarians, rooted for the most part in that emerging conservative political movement and, in academia, in philosophy and law, began to question the conservative thesis. After all, didn't the nation spring from the idea of natural rights? And weren't courts instituted to secure those rights by limiting government power? Indeed, what was it with this judicial "deference" to majoritarian democracy, the very process that had given us the Leviathan against which conservatives (and libertarians) were otherwise railing?

Thus the debate over the conservative movement's jurisprudential soul began. Long dominated by Borkian conservatives, it has slowly shifted over the years in the libertarian direction – not entirely, to be sure, but significantly.

Read the [whole thing here](#). I discuss Bork's influence on the conservative/libertarian legal division [here](#).