A SHEEP IN WOLF'S CLOTHING: THE STORY OF WHY CONSERVATIVES BEGAN TO LOOK BEYOND ORIGINALISM

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This is a story about how and why social conservatives began to look beyond originalism. The focus of the story is how this transition within legal conservatism relates to the topic of this Faulkner Law Symposium, "Substantive Due Process: Critical Safeguard of Fundamental Rights, Flawed Doctrine, or Illegitimate Fiction." But the implications are much broader, extending beyond substantive due process, and indeed, constitutional law. The broader story is about legal change and shifting political coalitions.

Before we begin, a caveat is in order: In tracing the development of how social conservatives began to look beyond originalism, I will not argue whether "substantive due process" should be understood in accord with any of these three positions. I will instead describe how legal conservatism as a movement has shifted on these positions in concert with broader changes in conservative and originalist thought. I will argue that these shifts have had a significant impact on legal discourse, producing an implosion of legal conservatism as an organized social movement. This is not an argument for a version of substantive due process as much as it is a story of how shifting views on substantive due process have contributed to a larger crisis within legal conservatism.

This crisis was on full display on March 31, 2020, when Harvard Law School Professor Adrian Vermeule startled the legal world by writing an essay for *The Atlantic* on how legal

conservatives must start to think "beyond originalism."[2] Vermeule, a highly influential constitutional theorist and Catholic "integralist,"[3] explained in the *Atlantic* article that originalism "has become an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation."[4] Vermeule therefore proposed that conservatives adopt a new form of constitutional interpretation, a form that Vermeule dubbed "common-good constitutionalism"[5]— *i.e.*, a constitutionalism "based on the principles that government helps direct persons, associations, and society generally toward the common good."[6]

Just a few days later, Georgetown Law Professor Randy Barnett issued an extensive and vituperative reply, also published in *The Atlantic*.[7] Barnett, a leading originalist and libertarian thinker, warned that Vermeule's "common-good constitutionalism" is merely "conservative living constitutionalism."[8] And "this wolf" comes not as a sheep, but openly "as a wolf."[9]

Barnett's phrasing, derived from an influential Justice Scalia dissent,[10] refers to how liberals have often viewed

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[2] Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

[3] A helpful discussion of Vermeule's integralism can be found in Edmund Walstein's primer on integralist thought. Waldstein writes that "Vermeule … is an integralist in the sense that he sees political authority as ordered to the common good of human life, that rendering God true worship is essential to that common good, and that political authority therefore has the duty of recognizing and promoting the true religion." Edmund Waldstein, *What Is Integralism Today?*, CHURCH LIFE JOURNAL, https://churchlifejournal.nd.edu/articles/what-is-integralism-today/.

[4] Vermeule, *supra* note 2.

[5] *Id.*

[6] *Id.*

[7] Randy Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, THE ATLANTIC (Apr. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/.

[8] *Id.*

[9] *Id.*

[10] In his *Morrison v. Olson*, 487 U.S. 654 (1988) dissent, Justice Scalia claimed that the majority's decision to uphold the Ethics in Government Act, which created an independent counsel that could not be removed by the President, would result in politically opportunistic investigations of the executive and a blurring of the separation of powers. *Id.* at 697-734. Justice Scalia therefore claimed that, while some intrusions on executive authority may come as a sheep

originalism as a "judicial cover"—*i.e.,* as a way of dressing up "the wolf" of conservative judicial politics in "the sheep's clothing" of judicial neutrality.[11] Barnett thus invoked this phrasing to contrast his own originalism with Vermeule's "conservative living constitutionalism," which makes no attempt at judicial neutrality. In Barnett's view, Vermeule's "common-good constitutionalism" comes as a "wolf"—an open and flagrant danger to liberal values and goals.[12] The implication of Barnett's argument, of course, is that liberals should reconsider their support for "living constitutionalism," given that it justifies Vermeule's "conservative living constitutionalism." And liberals should likewise reconsider their indictments against originalism and originalists.[13]

For anyone who does not closely follow trends in American legal conservatism, the Vermeule-Barnett squabble must have been confusing, perhaps even bewildering. Given that an originalist interpretation of the Constitution would seem to justify things like established state churches[14] and state promotion of public morality

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but function as a wolf, this intrusion is so transparently dangerous to the separation of powers that it comes openly as a wolf. *Id*. at 699.

[11] The claim that originalism is simply conservative judicial politics is a commonly held proposition among thinkers on the legal left. A leading book expressing this view is ERIC J. SEGALL, ORIGINALISM AS FAITH (2018). Some leading articles are Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006), and Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller," 122 HARV. L. REV. 19 (2008).

[12] Barnett, *Common-Good Constitutionalism*, *supra* note 7.

[13] Notably, Barnett's gesture toward the legal left is made all the more appealing by Barnett's oft-repeated assurances that originalism (or at least his version of the theory) does not present a significant threat to cherished liberal victories. For example, in seeking to frame originalism as appealing to liberals, Barnett wrote in the Washington Post that "[i]t is almost perverse 'how critics of originalism refuse to accept that originalism bolsters the correctness of their *own* positions.'" Randy Barnett, *Not An April Fool's Day Post: Another Contradictory Attack on Originalism*, WASHINGTON POST, April 1, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/01/not-an-april-fools-day-post-another-contradictory-attack-on-originalism/ (emphasis added). Barnett lamented that, while originalists have been seeking for years to show that originalism can justify progressive judicial decisions, the liberal "critics of originalism simply won't take 'Yes' for an answer." *Id*.

[14] *See, e.g.*, *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 51 (2004) (Thomas, J., concurring) (declaring that incorporation of the Establishment Clause under the Fourteenth Amendment is misguided, because applying the

(including the regulation of marriage, abortion, pornography, and homosexuality),[15] why would a "social conservative"[16] like Vermeule be so eager to look "beyond originalism"? This question can be adequately answered only if one appreciates multigenerational trends within legal conservatism as a movement, the Federalist Society as an organization, and originalism as a mode of constitutional interpretation.

Over the last year, this intramural feud has intensified. Several prominent scholars and pundits within the legal conservative movement have recently called for a reconsideration of originalism.[17] This has prompted Josh Blackman to offer a dire

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Establishment Clause to the states "prohibit[s] precisely what the Establishment Clause was intended to protect—state establishments of religion").

[15] The best treatment of the Founders and their view that states not only *may* but *should* promote a public morality (including the regulation of marriage, abortion, pornography, and homosexuality) is found in THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING (2017). It is arguable that the Fourteenth Amendment, with its broad guarantees of due process, privileges and immunities of U.S. citizenship, and equal protection of the laws, changed the relationship between the states and the promotion of public morality. That is precisely the question at issue in this Article—how changes with regard to originalist views on the Fourteenth Amendment, particularly its Due Process Clause, have rendered the Founding view of public morality obsolete, thereby inducing social conservatives to begin looking "beyond originalism."

[16] "Social conservatism" is a problematic term, in that it suggests one can be a conservative without regard to adhering to traditional norms on social relations. The term is often used to distinguish between "economic conservatives" (whose commitment to conservative "limited government" principles is based on a view of how governments should regulate economic affairs) and those who place greater emphasis on the role of faith, family, and community in preserving a social order. Vermeule obviously has more in common with this latter camp, but Vermeule would likely not describe himself as a "social conservative," given that he is highly critical of American conservatism and its emphasis on limited government. Nevertheless, Barnett describes Vermeule as a "social conservative," and there is certainly good reason to do so, at least insofar as Veremeule's positions on the social issues underlying constitutional controversies are concerned. I will therefore refer to Vermeule as a "social conservative," despite reservations about the term and its applicability to Vermeule.

[17] *See, e.g.*, Josh Hammer, *Common Good Originalism*, THE AMERICAN MIND (May 6, 2020), https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism/; Hadley Arkes et al, *A Better Originalism*, THE AMERICAN MIND (March 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/.

prognosis for the legal conservative movement: Blackman warns that, if in its upcoming abortion case, *Dobbs v. Jackson Women's Health Organization*,[18] the Supreme Court does not reject the substantive due process doctrine developed in *Roe v. Wade*, originalism and the Federalist Society will lose their credibility within the larger conservative movement. In Blackman's words, "*Dobbs* is the fulcrum on which our movement pivots," and a *Dobbs* decision that affirms *Roe* "could be the end of FedSoc as we know it."[19]

This Faulkner Law Symposium, in other words, is coming at an auspicious time. The aim of this Article, within the context of the Symposium, is to shed light on why Professor Blackman has identified *Dobbs* (and by extension, substantive due process) as the fulcrum of legal conservatism. But my more general aim is to show how, over the last 75 years, legal conservatives have shifted from viewing the Fourteenth Amendment as a foe to viewing it as a friend. And in the process, legal conservatives have shifted among the three constitutional positions identified in this Symposium. Indeed, the first two generations of legal conservatives took Position A (viewing the federal judiciary's substantive protection of unenumerated liberties against state and local governments through the Fourteenth Amendment as an "illegitimate fiction" that has no basis in *any* of the provisions in the Fourteenth Amendment). But beginning in the early 2000s, the legal Right began shifting toward Position B (viewing "substantive due process" as a "flawed doctrine," in that the federal judiciary's substantive protection of unenumerated liberties against state and local governments has a basis in the Fourteenth Amendment but in the Privileges or Immunities Clause rather than the Due Process Clause). After Position A became an "off the wall" position,[20] the

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[18] At the time of my writing, the case is pending before the Supreme Court.

[19] Josh Blackman, #FedSoc2021 and Dobbs, THE VOLOKH CONSPIRACY (Nov. 13, 2021), https://reason.com/volokh/2021/11/13/fedsoc2021-and-dobbs/.

[20] Legal scholars often note how positions can shift from "on the wall" to "off the wall" (and vice versa), depending on who exercises power over significant legal institutions. As Jack Balkin describes the phenomenon, "[t]he question of what is 'off the wall' and what is 'on the wall' in law is tied to a series of social conventions that include which persons in the legal profession are willing to stand up for a particular legal argument," and as a result, "[t]he more powerful and influential the people who are willing to make a legal argument, the more quickly it moves from the positively loony to the positively thinkable." Jack

debate over substantive due process shifted—both among legal conservatives, and within the legal academy as a whole—so that the debate is now between Position B (accepting much of the doctrine in its effect but tracing its proper origin to the Privileges or Immunities Clause) and Position C (viewing substantive due process as a "critical safeguard of fundamental rights," one that operates independently of the additional protection provided in the Privileges or Immunities Clause).

The result is that, insofar as substantive due process is concerned, the Left-Right division in American law has become largely a matter of *form*: Whereas those on the legal Right provide originalist reasons for supporting the rights that the Court has generated through substantive due process (e.g., the incorporation of the Bill of Rights, privacy rights), those on the legal Left openly admit that they support a broad and evolving view of substantive due process to make the Constitution fit changing political values and circumstances. In short, at least when it comes to the liberties the Court has derived through the Due Process Clause, there are no more "wolves" in the legal academy, because the nonoriginalist Left and the originalist Right largely agree on the substance of Fourteenth Amendment liberties. But while they are both "sheep" in terms of their relationship to the established legal order, one "sheep" comes openly as a "sheep," and the other "sheep" comes deceptively dressed as a "wolf." The goal of this Article is to trace shifting conservative positions on the doctrine of substantive due process, as part of a broader exploration of how and why some of the "sheep" of legal liberalism came to be dressed as the "wolves" of legal conservatism.

In the course of this exploration on substantive due process, the Article will engage three broader themes relating to scholarship in judicial politics and constitutional theory. One, by showing how originalism and conservatism both have contestable meanings and applications, the Article will challenge normative efforts to root out the "true conservatism" or the "true originalism." Understanding how these concepts operate in our political and legal discourse requires studying how they have changed over an

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Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L. J. 1407, 1444 (2001).

extended period of time, rather than based on a snapshot of how they work in a particular political landscape.

A related theme is that contestations over conservatism and originalism have operated in conjunction with rather than independently from one another. While scholars have observed how originalism grew out of political conservatism, these scholars have neglected the extent to which changes within political conservatism have operated in concert with changes in how originalism has worked as a theory of constitutional law. Studying constitutional originalism as a movement therefore requires understanding more broadly how political conservatism has functioned as a movement.

A third theme is how legal interpretation can provide platforms for building coalitions, forming political movements, and creating social change. Scholars have noted this to some extent in terms of how originalism has galvanized political conservatism, particularly in terms of Second Amendment activism.[21] But scholars have largely ignored how originalism, after being filtered through elite sectors of the legal conservative movement, can dampen political conservatism on pressing social issues, particularly issues relating to race, gender, and sexuality. While political scientists like Reva Segal are no doubt correct that originalism may have contributed to our political polarization, it also may be the case that originalism has conversely created a more robust consensus between the political parties on hot-button issues relating to the Fourteenth Amendment, a point of significance for scholars studying social movements and judicial politics.

To explore how these complicated trends within conservatism and originalism have developed, particularly in the context of the Fourteenth Amendment and substantive due process, the Article will branch into two Parts, with the first covering the rise of legal conservatism as a movement (*i.e.*, how it became a "wolf" to legal liberalism) and the second covering its fall (*i.e.*, how this "wolf" became a "sheep").

Part I.A will provide a brief introduction to the post-war conservative movement and how some of its leading thinkers approached the Warren Court's Fourteenth Amendment

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[21] *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 19 (2008).

jurisprudence. Part I.A.1 will begin in the 1950s, when there was a fight for the meaning of conservatism and the future of the Republican Party. Part I.A.2 will explain how William F. Buckley created *National Review* to challenge the centrist alternatives that were on the table at the time. By the late 1950s, Buckley's robust and vigorous form of anti-liberalism had come to prevail as the new conservatism, and by the mid-1960s, Buckley's conservatism had become the platform for the Republican Party. Parts I.A.3 and I.A.4 will discuss, respectively, two of the most important *National Review* critics of the Warren Court (Willmoore Kendall and L. Brent Bozell).

On the basis of this survey, Part I.A will conclude that the general position of the early post-war conservative movement was that the conservative movement had to do two things to counter legal liberalism. One, the movement had to develop its own substantive agenda, one that explicitly opposed the Warren Court's view of judicial power and the Fourteenth Amendment. Two, the movement had to develop legal mechanisms that could stop the federal judiciary's use of the Fourteenth Amendment to transform the original constitutional design. In short, this was a period when conservatism was truly a "wolf"—menacing, aggressive, and threatening to the constitutional order being created through the Warren Court's Fourteenth Amendment jurisprudence.

Part I.B will explain how this "wolf" came to the legal academy, largely through the work of two law professors, Robert Bork at Yale Law and Raoul Berger at Harvard Law, both of whom added substantial legal weight to conservative arguments about the Warren Court's treatment of the Fourteenth Amendment. But there was an important difference between how conservatives outside the legal academy (like Bozell and Kendall) criticized the Warren Court and how Bork and Berger approached the issue. Whereas conservatives outside the academy critiqued the Warren Court on the ground that its decisions were *substantively bad* due to their transformation of local customs and conventions, Bork's and Berger's critiques focused only on the *formal processes* by which the Warren Court reached its decisions. In this sense, the Bork and Berger critiques were framed within, and constrained by, the prevailing debate at the time within the legal academy – the debate between the Legal Realists and Legal Process School.

To provide the context for Bork's and Berger's procedural critiques of the Warren Court, Part I.B.1 and Part I.B.2 will explain

how Herbert Wechsler's "neutral principles" theory played a critical role in the demise of the Legal Process School, creating an opening for a new critique of Legal Realism. Part I.B.3 and Part I.B.4 will show how Bork and Berger filled this gap, providing a procedural critique of the Warren Court's Fourteenth Amendment jurisprudence on the ground that it deviated from "the original intent" of the 39th Congress. This procedural critique, in turn, gave rise to a distinctly legal dimension to the general conservative movement, what scholars have referred to as the "conservative legal movement" or the "legal conservative movement."[22]

Part I will conclude with a snapshot of what this movement looked like with the election of Ronald Reagan in 1980. Legal conservatism at this point seemed to be an unstoppable force, now armed with: (a) the newly created Federalist Society as a "support structure"[23] to aid the development of a conservative legal agenda within the academy, the Bar, and the judiciary; (b) the Bork/Berger theory of "original intent"—a new legal vocabulary that courts, politicians, lawyers, and academics could use to effectuate and legitimize this agenda; and (c) the possibility of several Supreme Court appointments (Reagan ended up appointing a new Chief Justice and three associate Justices). After a generation of mobilizing against the Warren Court's Fourteenth Amendment jurisprudence, conservatives were finally in a position to attack. The "wolf" seemed ready to strike.

Part II will discuss how just as legal conservatism seemed to be ascending, it began its decline. To explain how this decline happened, Part II.A will break down into four subsections, each

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[22] The most important work in this field is STEVEN TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008). Whereas scholars generally refer to this movement as the "conservative legal movement," which suggests that it is the conservative variant of a "legal movement," I have referred to it as the "legal conservative movement," to place the emphasis on how it is a legal form of the general conservative movement. *See* Jesse Merriam, *Is Legal Conservatism As Accomplished As It Thinks*?, LAW & LIBERTY (July 1, 2019), https://lawliberty.org/forum/is-legal-conservatism-as-accomplished-as-it-thinks-it-is/.

[23] Judicial politics scholars use the term "support structure" to refer to organizations that facilitate social change through courts. The leading work on how "support structures" can influence socio-legal movements is CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

focusing on four critical events in the 1980s that stymied the bourgeoning Reagan Revolution against the Warren Court.

Part II.A.1 will discuss the so-called "Horowitz Memorandum," the 1980 memorandum that Michael Horowitz wrote to help craft the agenda and strategy for the emerging legal conservative movement. The overriding theme of Horowitz's strategy was that conservatives could prevail if and only if they appealed to the moral values held by cultural elites. This required a legal agenda that made conservatives out to be in favor of civil rights – even more in favor, in fact, than the liberals who had initiated the movement in the 1950s and 60s.

Part II.A.2 will explain how the Horowitz Memorandum directly led to the creation of the Federalist Society. From the start, the Federalist Society distanced itself from political conservatism, instead framing itself as an inclusive debating forum dedicated only to the rule of law. With the rise of originalism in the 1980s, the organization's commitment shifted from the rule of law in general to originalism in particular. The result was that, whatever originalism required as a matter of constitutional law, that would become the organization's legal agenda.

Part II.A.3 will discuss how originalism began to operate differently after then-Judge Scalia proposed a new version of originalism, one that focused on "original public meaning" instead of "original intent." This move had profound implications for the trajectory of the Federalist Society, as it made originalism a less historically anchored methodology, thus rendering it more adaptable to modification based on changing political circumstances. This adaptability became a useful political tool, as it gave legal conservatives a "Janus-like flexibility"[24]— permitting legal conservatives to adapt to changing political circumstances, while empowering legal conservatives to distinguish themselves as uniquely constrained by the fixed principles of the text.

Finally, Part II.A.4 will explain the role of Judge Bork's failed confirmation in making this "Janus-like flexibility" a political tool. After the Senate voted not to confirm Judge Bork,

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[24] I have used this phrase before to describe how originalism has developed over time. *See* Jesse Merriam, *Justice Scalia and the Legal Conservative Movement: An Exploration of Nino's Neoconservatism*, *in* THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA 155, 170 (David A. Schultz and Howard Schweber, eds., 2018).

largely on the basis of what Judge Bork had said and written about the original intent of the 39th Congress in adopting the Fourteenth Amendment, it was clear that no federal judge adhering to "original intentions" originalism could be confirmed.

Part II.B and Part II.C will discuss how the legal conservative movement grew after the Reagan Revolution by abandoning "original intentions" originalism—more specifically, by embracing the Warren Court's Fourteenth Amendment jurisprudence, including on such controversial matters as the incorporation of the Bill of Rights, judicial power, and substantive due process. A critical figure in this respect is Clint Bolick, who sought in the late 1980s and early 1990s to frame legal conservatism as a new civil rights movement. Part II.B will discuss how Bolick took Horowitz's strategy a step further by identifying which constitutional provisions the movement should use (the Privileges or Immunities Clause), which precedents the movement should attack (the *Slaughter-House Cases*), and which plaintiffs the movement should use (African Americans). Part II.C will show how a new breed of legal scholars entered the picture in the 1990s, providing the theoretical framework that Bolick's strategy needed to develop in the courts and legal academy. These scholars developed what has been aptly dubbed "New Originalism. This approach, which is in many ways a more sophisticated formalization of Justice Scalia's "public meaning" originalism, facilitated the rise of Bolick's views on the Fourteenth Amendment and judicial power. The effect is that, insofar as the Fourteenth Amendment is concerned, the "wolf" of legal conservatism lost its bite. This transformation, the Article will conclude, is what has prompted some legal conservatives to start looking beyond originalism.

I. THE RISE OF LEGAL CONSERVATISM: FORMALLY CONSERVATIVE, SUBSTANTIVELY CONSERVATIVE

A. Background on the Post-War Conservative Movement

In the beginning, there was *National Review*—or at least that is the conventional account of the conservative movement.[25] But this is not the whole story. There was a long-standing American right-wing tradition—what is now generally known as the Old Right—that preceded the conservatism created in National Review. The creation of National Review thus represented a fight on two fronts – one fight to remove the remnants of the Old Right and another to become the voice that would end up replacing it. For this reason, political scientists who study conservatism often focus on the early days of *National Review* to understand three things about the conservative movement – how it originated, how it shaped a new Republican Party platform and coalition, and how conservative arguments have developed over time.[26] Below, I will provide some background on what conservatism looked like before the creation of *National Review* and then proceed to discuss how *National Review*'s central intellectual framework—fusionism—relates to conservative thinking on the Fourteenth Amendment during this period.

1. *Before* National Review*: The Battle Over the Meaning of Conservatism*

Before World War II, the Old Right had dominated the conservative landscape. The Old Right held three central positions: an isolationist stance in foreign affairs, a skeptical view

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[25] As one Buckley biographer writes, "[t]he conservative movement was born on November 19, 1955, the publication date of the first issue of National Review." CARL T. BOGUS, WILLIAM F. BUCKLEY JR. AND THE RISE OF AMERICAN CONSERVATISM 141 (2011). The best history of the conservative movement is GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 (1976). For a fascinating account of the creation of *National Review*, from the perspective of Jeffrey Hart, a Dartmouth College professor and early National Review contributor, see JEFFREY HART, THE MAKING OF THE AMERICAN CONSERVATIVE MIND: NATIONAL REVIEW AND ITS TIMES (2005).

[26] *See* NASH, *supra* note 23.

of popular democracy, and a *laissez-faire* economic policy.[27] The Old Right had opposed the New Deal in its entirety, and even more controversially, American involvement in World War II. These positions ultimately led to the Old Right's demise, and as a result, it became common after the war to say that there was no longer a right-wing in America.[28] This void on the American Right was brought to the surface with the 1953 death of Ohio Senator Robert Taft, who had long stood for the isolationism in foreign affairs that had characterized the Old Right. With Taft's death, the Republican Party seemed open for the taking, particularly with the centrist President Dwight D. Eisenhower at the helm. The meaning of conservatism and "the soul of the Republican Party" were up for grabs.[29]

At one point in the 1950s, the centrist politics of the historian and poet Peter Viereck seemed most likely to fill the void left by the demise of the Old Right. Viereck had achieved some fame shortly before the war. In 1940, as a recent Harvard graduate who had won the university's top essay and poetry prizes, Viereck had received an invitation from *Atlantic Monthly* to write an essay about "the meaning of young liberalism for the present age."[30] Viereck proceeded to write a 5,000 word response, rejecting the trajectory of American liberalism, with the apt title "But – I'm a Conservative!"[31]

In that essay, Viereck chartered a middle-ground between what he took to be the most pressing dangers of the time – the egalitarian universalism of communism and the inegalitarian

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[27] Raymond Wolters, *Old Right*, *in* AMERICAN CONSERVATISM: AN ENCYCLOPEDIA 645 (Bruce Frohnen et al. eds., 2006). Some of the leading Old Right thinkers were H.L. Mencken, Ralph Adams Cram, and Albert Jay Nock.
[28] *See* LIONEL TRILLING, THE LIBERAL IMAGINATION: ESSAYS ON LITERATURE AND SOCIETY (1950); Richard Hoftstadter, *Paranoid Style of American Politics*, HARPER'S MAGAZINE, Nov. 1964, https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics/.
[29] *See* MICHAEL D. BOWEN, THE ROOTS OF MODERN CONSERVATISM: DEWEY, TAFT, AND THE BATTLE FOR THE SOUL OF THE REPUBLICAN PARTY (2011).
[30] ROBERT J. LACEY, PRAGMATIC CONSERVATISM: EDMUND BURKE AND HIS AMERICAN HEIRS 166 (2016).
[31] Peter Viereck, *But—I'm a Conservative!*, THE ATLANTIC (Apr., 1940), https://www.theatlantic.com/magazine/archive/1940/04/but-im-a-conservative/304434/.

particularism of fascism.[32] In between these extremes, Viereck wrote, a conservative "believes in the absolute constitutional and human rights of minorities, whether share-croppers or millionaires, whether economic, religious, or racial."[33] The protection of universal and constitutionally grounded human rights, Viereck concluded, was the future of American conservatism.

Viereck's most significant contribution to the meaning of American conservatism appeared several years later, in 1949, when Viereck, at that point a professor at Mount Holyoke, wrote *Conservatism Revisited: The Revolt Against Revolt* (1949). In that book, Viereck argued that American conservatism and liberalism are not contradictory but rather complementary; indeed, Viereck explained, liberalism and conservatism are mutually supportive allies in the resistance against moral relativism and totalitarianism, both from the left in the form of communism and from the right in the form of fascism.[34] That book denounced the Old Right as part of the radical right for its opposition to the New Deal and World War II. For Viereck, the ideal conservative was a centrist, displaying "humanist reverence for the dignity of the individual soul"[35] grounded in "the four ancestries of Western man,"[36] and

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[32] It should be noted that, in his indictment of fascism, Viereck was responding to his father's German nationalism and support of Nazism. LACEY, *supra* note 30, at 166. During his father's 1941 trial, where he was convicted of supporting the Nazis, Viereck wrote his first book, *Metapolitics*, which traced Nazism to German nationalism. He did not talk to his father for 16 years after that point. *Id*.

[33] Viereck, *But—I'm a Conservative!*, *supra* note 31.

[34] PETER VIERECK, CONSERVATISM REVISITED (2d. ed., 1962); see also NASH, *supra* note 23, at 227 (explaining how "Viereck in particular had sought a kind of alliance between liberal and conservatives to beat back 'Communazi' extremists"). In *Conservatism Revisited*, Viereck looked to the 19th century German diplomat Klemens Metternich as a model of conservatism, in seeking compromise between reform and stability. For an interesting but critical review of the book, see Dwight McDonald, *Conservatism Revisited*, NEW REPUBLIC (Nov. 13, 1949) (book review), https://newrepublic.com/article/94476/conservatism-revisited.

[35] VIERECK, CONSERVATISM REVISITED, *supra* note 34, at 71.

[36] *Id*. at 80. These four ancestries, according to Viereck, are: "the stern moral commandments and social justice of Judaism, the love for beauty and for untrammeled intellectual speculation of the free Hellenic mind; the Roman Empire's universalism and its exaltation of law; and the Aristotelianism, Thomism, and antinominalism included in the Middle Ages." *Id.*

expressed with a temperament based on "self-restraint"[37] and "classical balance."[38] His model conservative statesman was therefore Adlai Stevenson, a globally oriented and moderate Democrat.

Around this time, Clinton Rossiter developed a similar brand of centrist-conservatism in his influential *Conservatism in America* (1955), which he updated with a second edition in 1962, largely as a response to what he perceived as the "pseudo-conservatism" of *National Review*. Like Viereck, Rossiter viewed America as "a progressive country with a Liberal tradition."[39] And in such a polity, Rossiter argued, the role of conservatism is not to resist liberalism but to provide a moderate temperament and stable political order that can charter the course for the advancement of American liberalism. Because Rossiter viewed economic elites as the natural embodiment of this prudent but accommodating approach, Rossiter concluded that "the conservative movement must find its center of gravity, if by no means all its spokesmen and leaders, in the business community."[40] Rossiter therefore hoped that "leaders of business and industry" would charter a conservative path toward the promotion of equality and liberty "for all Americans."[41]

Were it not for William F. Buckley entering the picture in the 1950s, the Viereck/Rossiter centrist-conservatism might have been the American conservatism that emerged out of the war and took control of the Republican Party. Indeed, Viereck's *Conservatism Revisited* was the first post-war book to use the word "conservatism" in its title,[42] leading some to call Viereck the "first conservative."[43] As Viereck explained, his book had "opened people's minds to the idea that to be conservative is not to be satanic."[44] But, Viereck lamented, "once their minds were opened,

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[37] *Id*. at 70.
[38] *Id*. at 70.
[39] CLINTON ROSSITER, CONSERVATISM IN AMERICA 262 (2d ed., 1962).
[40] *Id*. at 249.
[41] *Id*. at 291.
[42] NASH, *supra* note 23, at 102.
[43] *See, e.g.*, Tom Ross, *The First Conservative: How Peter Viereck Inspired – and Lost – a Movement,* THE NEW YORKER (Oct. 24, 2005), http://www.newyorker.com/magazine/2005/10/24/the-first-conservative.
[44] *Id*.

Buckley came in."[45] And the young, charismatic Buckley quickly stole the show.

2. Fusionism and the Triumph of National Review Conservatism

William F. Buckley entered the scene in 1951, when just a year after graduating from Yale College, he published *God and Man at Yale*: *The Superstitions of Academic Freedom* (1951), a fiery book accusing elite colleges of imposing an anti-traditional and secular collectivism on the student body. The book infuriated liberals, but it may have antagonized conservatives like Viereck and Rossiter even more, as evidenced in Viereck's scathing *New York Times* review, accusing the young Buckley of providing in the book "[n]othing more inspiring than the most sterile Old Guard brand of Republicanism, far to the right of Taft."[46]

Four years after publishing *God and Man at Yale*, Buckley formed *National Review*, which differed from the Old Right and Viereck's centrist-conservatism in three fundamental ways. One, in contrast to the Old Right's isolationism, *National Review* positioned itself as much more aggressive and interventionist in the fight against communism. This would become one of the defining features of the publication – its unforgiving push to stamp out communism wherever it arose, whether within or outside American borders. Two, whereas many Old Right thinkers had been secular, *National Review* endorsed a much more religious (specifically, Christian, and even more specifically, Catholic) belief system on the ground that Christianity was essential not only to the Western tradition, but also to the American constitutional order. And three, *National Review* was confrontational in taking on liberalism, as opposed to the more accommodating centrism of Viereck and Rossiter. Indeed, the *National Review* Mission Statement, announced by Buckley in the first issue, was that the publication will "stand[] athwart history, yelling Stop, at a time when no one is inclined to do so, or to have much patience with those who so urge it."[47] Buckley sought to collect a group of

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[45] *Id*.
[46] Peter Viereck, *Conservatism Under the Elms*, N.Y. TIMES (Nov. 4, 1951), http://www.nytimes.com/books/00/07/16/specials/buckley-yale.html.
[47] William J. Buckley, Jr., *Our Mission Statement*, NATIONAL REVIEW (Nov. 19, 1955), https://www.nationalreview.com/1955/11/our-mission-statement-william-f-buckley-jr/.

intellectuals who embodied this vigorous, anti-communist, pro-Christian conservatism—thinkers who had published works departing from the Viereck/Rossiter understanding by defining conservatism as something altogether distinct from liberalism, rather than as a mere adjunct to it.

A battle quickly arose over the meaning of conservatism and the future of the Republican Party. Shortly after the creation of *National Review*, both Viereck and Rossiter attacked Buckley, with Rossiter dubbing Buckley an "ultra-conservative"[48] and Viereck accusing Buckley of aiding Senator McCarthy and the "New Right," what Viereck referred to as an "isolationist, Anglophobe, Germanophile revolt of radical Populist lunatic-fringers against the eastern, educated Anglicized elite."[49] The *National Review* writers responded by accusing Viereck and Rossiter of being liberals who merely dressed up their arguments in conservative premises about Western Civilization and free markets. Willmoore Kendall, for example, questioned Viereck's authority on conservatism, given that Viereck "agree[s] with the liberals about Everything."[50] Likewise, Kendall accused Rossiter of merging conservatism and liberalism, so as to "make you feel ashamed of yourself if you were not both conservative and liberal."[51] Frank Meyer even intimated some deception on the part of Rossiter and Viereck, arguing that their conservatism, with its "emphasis on tone and mood" was framed to be non-threatening to the elite liberal ruling class, thereby earning Rossiter and Viereck acceptance "into polite society" while in the process justifying that true conservatives be "expell[ed] into outer darkness."[52]

Buckley's *National Review* conservatism quickly prevailed over Rossiter-Viereck centrism, and part of this victory was due to the movement's theoretical framework creating a coalition between traditionalists and libertarians. This framework came to be known as "fusionism," a term often associated with Frank Meyer,[53] one of *National Review*'s founding editors. The central

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[48] *See* ROSSITER, *supra* note 39, at 287.
[49] NASH, *supra* note 23, at 170.
[50] *Id*. at 205.
[51] *Id*.
[52] *Id*. at 206.
[53] It should be noted that it was Brent Bozell, not Meyer, who would later dub Meyer's theory "fusionism"—and this was meant in a derogatory way, to imply that Meyer's libertarian orientation was a derogation from true conservatism.

idea behind fusionism is that American conservatism requires both the protection of individual liberty and a fidelity to a traditional social and religious order, because (or so Meyer held) liberty and tradition are mutually dependent.[54]

This was not merely a theoretical construct; it also had practical appeal in addressing a problem at the heart of the early conservative movement. Traditionalists and libertarians were both essential parts of the coalition that National Review was creating, what Meyer described as the new "conservative consensus." But on many economic and social issues, little held the coalition together. [55] There were two things, however, traditionalists and libertarians alike were committed to—free markets and the Founding. Traditionalists and libertarians therefore had two common enemies—communism and the Warren Court. Accordingly, communism and the Warren Court were common themes covered in the early years of National Review.[56] At times,

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See Donald Devine, *The Enduring Tension That Is Modern Conservatism*, LAW & LIBERTY (May 20, 2015), https://lawliberty.org/the-enduring-tension-that-is-modern-conservatism/.

[54] Meyer argued that a purely libertarian society, without any fidelity to tradition, will quickly devolve into an unruly polity, incapable of protecting property and contractual rights; for this reason, libertarians, Meyer concluded, should favor some deference to tradition and convention. Likewise, a purely traditional society, one that does not protect individual liberty, will threaten free will and devolve into authoritarianism, which could easily uproot social norms and traditional values; traditionalists, Meyer also concluded, should favor protecting individual liberty. *See* Frank Meyer, *Freedom Tradition, Conservatism*, MODERN AGE, Fall 1960, at 355.

[55] Many traditionalists (such as Russell Kirk) resisted fusionism for placing too much emphasis on markets and not enough on the conservative commitment "to religious belief, to national loyalty, to established rights in society, and to the wisdom of our ancestors." RUSSEL KIRK, RUSSELL KIRK'S CONCISE GUIDE TO CONSERVATISM 26 (2019). And many libertarians (such as Friedrich Hayek) explicitly rejected conservatism for being too nationalistic and hostile toward open systems. Nevertheless, despite resistance from both sides, fusionism became a lasting legacy of the conservative movement, quickly becoming absorbed into the Republican Party platform in the 1960s. See LEE EDWARDS, THE CONSERVATIVE CONSENSUS: FRANK MEYER, BARRY GOLDWATER, AND THE POLITICS OF FUSIONISM (Heritage Foundation, 2007), https://www.heritage.org/political-process/report/the-conservative-consensus-frank-meyer-barry-goldwater-and-the-politics.

[56] For representative examples of early *National Review* critiques of the Warren Court, see Editorial, *Segregation and Democracy*, NATIONAL REVIEW, January 25, 1956, at 5; Forrest Davis, *The Right to Nullify*, NATIONAL REVIEW, April 25,

these two common enemies were even featured together, with *National Review* writers arguing that the Warren Court's expansive use of the Fourteenth Amendment for egalitarian ends trampled on property and associational rights, thus paving the way for a centralized, communist-style, national bureaucracy.[57]

During these early years of post-war conservatism, the most influential conservative essay on the Warren Court and the Fourteenth Amendment did not appear in *National Review*. That essay (Willmoore Kendall's "American Conservatism and the 'Prayer' Decisions") appeared in the 1964 Summer issue of Modern Age, the more traditionalist-oriented publication that Russell Kirk created shortly after Buckley created *National Review*.[58] Although Kendall's essay focused on the Supreme Court's recent "school prayer" decisions, the larger purpose of the essay was to develop a strategy for how conservatives should think about judicial power and the Fourteenth Amendment. Kendall's essay is therefore quite instructive for how scholars can understand the trajectory of the legal conservative movement with regard to substantive due process, making his essay particularly significant for the purpose of this Article.

3. Willmoore Kendall's Strategy for Conservatives and Law

A senior editor at *National Review* and Buckley's mentor at Yale, Kendall was an eccentric and brilliant political theorist. In fact, Kendall was the man most responsible for Buckley's political

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1956, at 9–11; Henry Hazlitt, *Court or Constitution?*, NATIONAL REVIEW, September 1, 1956, at 14; Editorial, *Toward a Total State*, NATIONAL REVIEW, April 10, 1962, at 234-34; Editorial, *God Save This Honorable Court*, NATIONAL REVIEW, July 17, 1962, at 10–12; Editorial, *The Brown Decade*, NATIONAL REVIEW, June 2, 1964, at 433–34; James J. Kilpatrick, *A Very Different Constitution*, NATIONAL REVIEW, August 12, 1969, at 794–800.

[57] *See, e.g.*, Richard Weaver, *Integration Is Communization*, NATIONAL REVIEW, July 13, 1957 ("'Integration' and 'Communization' are, after all, pretty closely synonymous. In light of what is happening today, the first may be little more than a euphemism for the second. It does not take many steps to get from the 'integrating' of facilities to the 'communizing' of facilities, if the impulse is there."); see generally MAURICE ISSERMAN, AMERICA DIVIDED: THE CIVIL WAR OF THE 1960S 210 (2000).

[58] Willmoore Kendall, *American Conservatism and the "Prayer" Decisions*, 28 MODERN AGE 245-259 (Summer 1964).

philosophy, even influencing Buckley's mode of speech.[59] Kendall's "American Conservatism and the 'Prayer' Decisions" was a long essay, amounting to 15 pages of *Modern Age*'s fine print, and it was an incendiary essay, provocative in style and content. Kendall's essay was so influential at the time that it was even cited extensively by Representative James B. Utt in the Appendix to the August 11, 1964 Congressional Record.[60] As George Carey would later write of the Kendall essay, more than 60 years after its publication,

> I know of no writings (and we have been flooded with them over the years) that simultaneously bring us to the issues at stake, state the conservative alternatives on these questions, and reflect the depths of conservative outrage concerning the course of events, a course dictated, no less, by the imperious masters of the American liberal establishment.[61]

The influence of Kendall's essay is due to the fact that Kendall focused more on strategy than substance. Indeed, Kendall simply took it as obvious that things like incorporation of the Bill of Rights, school desegregation, and school prayer were not resolved by the Fourteenth Amendment. But Kendall also took it as obvious that the Supreme Court had found these requirements in the Fourteenth Amendment meant that it was futile, as a practical matter, to argue with the Supreme Court to narrow its

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[59] For more on Kendall, *see* GEORGE H. NASH, *The Place of Willmoore Kendall In American Conservatism*, *in* REAPPRAISING THE RIGHT, 60–71. For more on how Kendall influenced Buckley, see KEN I. KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 50 (2019).

[60] Indeed, after citing Kendall's explanation of how the Warren Court has used the Fourteenth Amendment to expand national power, Representative Utt concluded that "[e]xtremism in constitutional law began with the assertion by Earl Warren and leftist radicals that the Constitution is flexible, and that a simple majority of members of the Supreme Court can read new meanings into the document, or, in between the lines and change the law of the Constitution to meet changing needs, aspirations, and even the predilections of those currently members of the Court." *See* Extension of Remarks of Hon. James B. Utt of California in the House of Representatives, 110 Cong. Rec. A4246 (1964).

[61] George W. Carey, *How to Read Willmoore Kendall*, THE IMAGINATIVE CONSERVATIVE, March 28, 2015, https://theimaginativeconservative.org/2015/03/how-to-read-willmoore-kendall.html.

interpretations. Kendall believed that the Warren Court was simply not interpreting the Constitution in good faith, so a productive debate could not be had with the Court on these subjects. Kendall therefore focused on how the emerging conservative movement should mobilize *against* the Warren Court's Fourteenth Amendment jurisprudence, not within it.

Kendall began the essay by explaining the "analogy between the controversy over desegregation of the public schools and that over … their deorisonation,"[62] particularly in terms of how conservatives were not prepared as a movement to resist these two pillars of "the Liberal Revolution." Indeed, Kendall wrote, "the prayer decision has caught the Conservatives intellectually unprepared—just as, in 1954, the school desegregation decision caught them unprepared intellectually."[63] This lack of preparation, Kendall observed, seemed to be built into how the conservative movement operated: "American Conservatism seems to be in the *business* of being unprepared intellectually for the next thrust of the Liberal Revolution."[64] The point of Kendall's essay was to "take a step or two in the right direction," so that conservatives could move from "intellectual unpreparedness to intellectual preparedness."[65] After devoting several pages to analyzing the school prayer controversy, Kendall reached his principal concern, what Kendall took to be the ultimate cause of conservative unpreparedness: the Fourteenth Amendment.

The Fourteenth Amendment, Kendall explained, was "the cancer" in the American constitutional order, because it struck at the core of the original constitutional design – the preservation of self-governance.[66] Conservatives had been unprepared for each battle in the Warren Court "Liberal Revolution," because conservatives were trapped in a dilemma of thinking they must either attack judicial review in its entirety or accept each successive Warren Court transformation to the original constitutional order. Both options are self-defeating, Kendall

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[62] Kendall coined this term, "deorisonation," as part of his argument analogizing the Warren Court's desegregation efforts (*i.e.*, the removal of segregated facilities) with its "deorisonation" efforts (*i.e.*, the removal of *oris ratio*—spoken reason or prayer—from schools). Kendall, *supra* note 58, at 249.
[63] *Id*. at 250.
[64] *Id*.
[65] *Id*.
[66] *Id.* at 254.

claimed, because both turn conservatism against the original Madisonian design—with the first option threatening the separation of powers and the second threatening federalism.

The way out of this dilemma was to focus conservative energies away from the Warren Court and toward the Fourteenth Amendment itself: "We must recognize that the cancer that threatens not merely the good health but the very survival of the American political system is not judicial review (which unlike a cancer confers great goods upon the body politics)."[67] The cancer is not judicial review as such, but what the Fourteenth Amendment does to judicial review. In Kendall's words, the Fourteenth Amendment invites "the Supreme Court to tamper, in the teeth of the Tenth Amendment, with our traditional division of powers between the federal and state governments."[68] Indeed, without the Fourteenth Amendment, "the Court could not have catapulted itself into either the school-desegregation decision or the deorisonation decision."[69]

What conservatives must do, then, is strike at the Fourteenth Amendment itself. Conservatives, Kendall claimed, have four options here: (1) repeal the Fourteenth Amendment, (2) remove the due process and equal protections clauses from the Amendment, (3) get Congress to clarify the limited scope of the Fourteenth Amendment, or (4) get Congress to curb the Supreme Court's appellate jurisdiction over the due process and equal protection clauses. While Kendall proclaimed that "[i]t does not much matter … which of these alternative means we adopt for achieving the desired proximate end,"[70] Kendall at times implied that he favored the first two options, two things Kendall did not believe to "be particularly difficult to do if we set out to mobilize, behind repeal or amendment, the resentments engendered by the desegregation, deorisonation, and apportionment decisions."[71] Kendall further urged conservatives to "mak[e] the most we can … of the procedural irregularities that were involved in the adoption of the Fourteenth Amendment to begin with"[72]—referring here, of

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[67] *Id.*
[68] *Id*.
[69] Kendall, *supra* note 58, at 254.
[70] *Id*. at
[71] *Id*. at
[72] *Id*. at

course, to the constitutionally questionable ways in which the Fourteenth Amendment was ratified.[73]

Kendall thus argued that conservatives should bring these claims about the Fourteenth Amendment directly to the state and local governments, so that they can re-assert their role as self-governing entities. This idea—that the organic community is the proper forum for decision-making on matters of "keeping the peace"[74]—was a prominent theme throughout the essay. For Kendall, "[t]he real significance and danger of the 'prayer' decisions lies … in the attempt to lay down a general [national] rule on religious observances in the schools where formerly there was none."[75] And this new rule displaced the rule at the core of our constitutional order – the rule that allows "the local community [to] work the matter out, as part of their general problems of living together on their little portion of American real estate."[76]

But again, even though Kendall believed that the Fourteenth Amendment's history and language supported the conservative position on incorporation, desegregation, and school prayer – *i.e.,* even though be believed those clauses "were of course never intended for the purpose for which they are being used"[77]—that fact was of little relevance to Kendall, because Kendall believed that arguing within the Supreme Court's "broad" and "narrow" interpretations of the Fourteenth Amendment would only serve to legitimize, and thereby extend, the Court's role in arbitrating disputes in these realms of state and local policy. Instead of quibbling over the legal niceties of the Court's decisions, conservatives must seek to *transcend* the Court's authority in this domain. Indeed, Kendall believed that "the American conservative movement" would lose further battles—and not move toward preparedness—by "frittering away our energies in argument with the Supreme Court"[78] over "the so-

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[73] *See* Forrest McDonald, *Was the Fourteenth Amendment Constitutionally Adopted?*, THE ABBEVILLE REVIEW (Apr. 23, 2014), https://www.abbevilleinstitute.org/review/was-the-fourteenth-amendment-constitutionally-adopted/; *see also* Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627 (2013).
[74] Kendall, *supra* note 58, at 258.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 254.
[78] *Id*. at 250.

called 'broad' interpretation versus the so-called 'narrow' interpretation … of the words … 'equal protection of the laws,' and 'due process of law.'"[79] Kendall therefore closed the essay with the following admonition for the conservative movement: "let us get busy and amend the Fourteenth Amendment."[80]

This call to action was made all the more powerful by the momentum steadily building behind the conservative movement. Indeed, Kendall's essay emphasized two important facts that made a conservative counterrevolution against the Warren Court seem imminent. One, the conservative movement was supported by a swelling frustration among people all around the country. Two, the conservative movement had youthful and vigorous intellectual energy to mobilize and direct that frustration. On this latter point, Kendall alluded to how "we shall soon hold in our hands an important Conservative book – the first, I think – that will summon us, in the name of the good health of the American political system, to take any steps that may be required now in order to *curb* the Court."[81] That book would be published two years later. It was L. Brent Bozell's *The Warren Revolution*: *Reflections on the Consensus Society* (1966), the first book to use an originalist methodology in a sustained critique of the Warren Court's jurisprudence.[82]

4. Brent Bozell's Critique of the Warren Court Revolution

Buckley and Brent Bozell had become close friends as undergraduates at Yale, a relationship that would soon become familial when Bozell married Buckley's sister. Shortly after graduation, Buckley and Bozell co-authored a defense of McCarthyism, entitled *McCarthy and His Enemies* (1954), a book that proved to be a major boon for the emerging conservative movement. Bozell's next book, *The Conscience of a Conservative* (1960), which Bozell ghostwrote for Senator Barry Goldwater, proved to be even more significant, as it developed the Republican Party platform that Bozell and Buckley had been seeking to create

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[79] *Id*.
[80] Kendall, *supra* note 58, at 259.
[81] *Id.* at 254.
[82] L. BRENT BOZELL, JR., THE WARREN REVOLUTION: REFLECTIONS ON THE CONSENSUS SOCIETY (1966).

since their undergraduate days.[83] In 1964, when Goldwater challenged the Rockefeller Republican establishment and became the Republican presidential nominee, that represented the triumph of Bozell and Buckley's vision for the future of the Republican Party and American conservatism.[84] Next on Bozell's agenda, as alluded to in the Kendall essay,[85] was to develop the Republican Party's *legal* platform, the subject of Bozell's *The Warren Revolution* (1966).

The Warren Revolution was incendiary, condemning the Warren Court for creating a "new method of constitution-making [that] has affected our society's traditional way of doing business."[86] Bozell criticized the Warren Court's approach to constitutional interpretation by focusing on four Warren Court decisions, three of which directly involved the Warren Court's understanding of the Fourteenth Amendment.[87]

Bozell's critique of the Warren Court distinguished between a *fixed* constitution (the historical meaning itself) and a *fluid* constitution (the customs and social conventions that organize around that historical meaning). The *fixed* meaning of the Fourteenth Amendment, Bozell argued, meant only that African Americans "were to have the elemental juridical rights enjoyed by white persons."[88] Bozell based this conclusion on his analysis of the debate surrounding the adoption of the Fourteenth Amendment. Specifically, Bozell found that the Fourteenth Amendment was designed simply to uphold the constitutionality of the Civil Rights Act of 1866: "the consensus in Congress [was] that the Amendment covered the same ground as the Act."[89] This meant that the Fourteenth Amendment simply tracked the "civil rights" identified by Senator Trumbull, who had introduced the 1866 legislation. These rights were: "the right to make and enforce contracts, to sue and be sued, and give evidence, to inherit,

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[83] For more on the Bozell-Buckley intellectual and political relationship, see KERSCH, *supra* note 59, at 19.
[84] *See id*. at 106.
[85] Kendall, *supra* note 58, at 254.
[86] *Id*. at 30.
[87] *Id*. at 35. The four areas of Warren Court jurisprudence were: desegregation (pp. 41-57), preemption of state law (pp. 58-69), school prayer (pp. 70-79), and congressional districting (pp. 80-112).
[88] *Id.* at 31.
[89] *Id*. at 45.

purchase, sell, lease, hold and convey real and personal property."[90] According to Bozell, "that was all"[91] the Fourteenth Amendment guaranteed as a constitutional matter.

Bozell explained that there was consensus after the Civil War that two things in the Constitution had to change: (1) the document had to ban slavery,[92] and (2) the document had to ensure equality of "elemental juridical rights" without regard to race.[93] But on the question of constitutionally mandating political and social equality between the races, there was too much division between the moderate and radical Republicans, making it "impossible to mobilize hard constitutional consensus around any further role for governing race relations."[94]

That did not mean, however, that American race relations were frozen in time. While the *fixed* constitution created by the Fourteenth Amendment required only that states guarantee "elemental juridical rights" (such as equal access to courts, as well as an assortment of property and contractual rights), the Fourteenth Amendment permitted a *fluid* constitution to evolve in support of those rights. These supporting or subsidiary rights, Bozell argued, would develop differently in various parts of the country—"produc[ing] rules for governing the relations of the races that closely reflected, and promised to continue to reflect, the going beliefs, practices, capacities, and desires of the people."[95] Bozell conceded that the conventions organized under the "fluid constitution" would provide "imperfect solutions."[96] But they would have the advantage of being "viable"[97] as "organic law,"[98] meaning that they would be tailored for the particularities of the region in which they arose.

The Warren Court, Bozell alleged, threatened this "organic law," because the Warren Court, "moved by the ideology of equality, took matters into its own hands and sought to impose

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[90] *Id*.
[91] BOZELL, *supra* note 82, at 45.
[92] *See id*. at 31.
[93] *Id*.
[94] *Id*. at 31.
[95] *Id*. at 32.
[96] BOZELL, *supra* note 82, at 32.
[97] *Id*.
[98] *Id*.

upon the country a uniform solution to the problem."[99] In other words, judicial review, when combined with an expansive use of the Fourteenth Amendment, threatened to dissolve the states as governing units. This meant the dissolution of the fluid constitution. And that meant the dissolution of the norms that undergird our constitutional order.

Note the similarities in how Kendall and Bozell criticized the Warren Court. For both Kendall and Bozell, the threat was much larger than the form or process by which the Warren Court reached its decisions. The principal threat—what Kendall called "the real significance and danger"[100]—was in how the Warren Court had disturbed the original constitutional order, which had made the local community the locus of decision-making on matters of social relations. For this reason, the only Warren Court case outside the Fourteenth Amendment that both Kendall and Bozell treated extensively was *Pennsylvania v. Nelson*,[101] a preemption case involving the Smith Act, and one of the first uses of "field preemption" to nullify a state law.[102]

As we will see in Part II, these conservative concerns for local governance dwindled in the coming decades. And part of the reason for that shift has to do with how conservatism was expressed once it migrated to the legal academy.

B. The Wolf of Conservatism Comes to the Legal Academy

During the first generation of the conservative movement, from the mid-1950s to the mid-1970s, most of the conservative writing on constitutional law and judicial politics came from *outside* the legal academy. Indeed, during this period, the leading

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[99] *Id*.

[100] Kendall, *supra* note 58, at 258.

[101] 350 U.S. 497 (1956).

[102] *Id*. at 504. Kendall called the *Nelson* decision "a kind of judicial aggression of which, so far as I know, [the Supreme Court] had never before been guilty." Kendall, *supra* note 58, at 253. Likewise, Bozell chose the *Nelson* case as one of his four cases illustrative of the Warren Court Revolution, and devoted significant attention to how "field preemption" threatened to subordinate state authority without the existence of a direct conflict between federal and state law. BOZELL, *supra* note 82, at 58-69. For both Kendall and Bozell, an expansive use of the preemption power under the Supremacy Clause presented just as much of a threat as the use of the judicial power over the Fourteenth Amendment.

legal writer at *National Review* was James Kilpatrick, a journalist by trade, though one with a strong command of constitutional law and politics.[103] While Kendall and Hart were scholars at top colleges, they were not law professors. The legal academy was largely absent from this debate in the 1950s and 60s between how liberals and conservatives viewed the Warren Court, partly because the big debate at the time within the legal academy was not between conservatives and liberals, but between the two leading approaches to legal liberalism – Legal Realism and the Legal Process School. That this intramural debate within the American Left was the controlling legal debate at the time would end up having a significant effect on how legal conservatism developed as a movement in the 1970s, particularly with regard to the movement's treatment of the Fourteenth Amendment.

1. Legal Realism v. The Legal Process School

Although the Realists and Legal Process scholars were both New Deal liberals, the division was, in some sense, a political debate. The Realists and Legal Process scholars had radically different notions of how to justify the New Deal as a legal matter, and this had implications for how far the New Deal, as well as further progressive interventions, could push on the traditional constraints of the American legal system.

The Legal Realists held that legal norms are often times indeterminate in content, leading judges to interpret them in subjective ways. For this reason, Legal Realists contended that courts should become trained to make wise political judgments grounded in functional, pragmatic concerns.[104] For the Realists, then, the expansion of the federal bureaucracy under the New Deal was permissible, because restraints on federal power, such as those in the Commerce Clause and the Tenth Amendment, were outdated vestiges from a different economic era. The Constitution simply had to be re-conceptualized to fit a modern industrial economy. The Realists therefore had no problem defending FDR's expansion of the federal bureaucracy under the New Deal.

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[103] For more on Kilpatrick, see WILLIAM P. HUSTIT, JAMES J. KILPATRICK: SALESMAN FOR SEGREGATION (2013).

[104] For a more extensive treatment of legal realism, *see* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (2010).

Although the Legal Process scholars were also "liberal supporters of the New Deal, which they believed had instituted important changes in American government crucial for responsibly addressing modern conditions,"[105] they differed from the Legal Realists in that the Legal Process scholars did not believe that the New Deal expansion of federal power and the administrative state should operate based purely on *functional* concerns about what works as a political or economic matter. Rather, the Legal Process scholars held that the New Deal had to comply with the broad requirements of the rule of law. To this end, "the Legal Process scholars proposed a process-oriented functionalism that endeavored to re-commit modern liberals to institutional formalities and formal procedures that aimed to discipline the processes of government in service of traditional legal and constitutional ends."[106] Whereas the Realists accepted legal indeterminacy as an inevitable feature of law, requiring that judges use their discretion in many of the cases that reach courts, especially those at the appellate level, the Legal Process scholars were uneasy with this facile equation of law and politics. The Legal Process scholars demanded something higher from law, that it be generally applicable and logically consistent.[107] The Legal Process therefore sought to show how formal legal procedures could render the legal transformations wrought by the New Deal more legally legitimate.

In a sense, the New Deal birthed the Legal Process School by creating the demand to explain how a Constitution enumerating limited and disaggregated federal powers could accommodate the vast federal bureaucracy that the New Deal engendered. Just as the New Deal created the need for the Legal Process School, the Warren Court terminated this need, because it placed the Legal Process School in the following dilemma: How, on the one hand, could the Legal Process scholars defend the Warren Court's radical departures from legal process in pursuit of such a transparently

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[105] KERSCH, *supra* note 59, at 91.

[106] *Id*.

[107] A helpful way to understand the school is as a middle-ground between, on the one hand, the old-fashioned strictures of Legal Formalism (the 19th century view of law as more akin to science and logic than to politics) and the radical equation of law and politics held by the Legal Realists. The Legal Process School focused on the procedural nature of law to demonstrate how law is distinct from but still closely related to politics.

political agenda? But how, on the other hand, could the Legal Process School oppose the Warren Revolution, when it was engineered for the empowerment of various minority groups, a cause that legal elites (including the Legal Process scholars) overwhelmingly favored?

Due to these competing directives, the Warren Court Rights Revolution had the effect of pushing many of the Legal Process scholars into a position of "stunned silence."[108] There was, however, one notable exception: Columbia Law Professor, Herbert Wechsler.

2. Herbert Wechsler and the Shift Toward Neutral Principles

A good case can be made that the legal conservative movement and the conservative movement have different birth dates. Scholars of American conservatism uniformly agree, as discussed above, that American conservatism began in the mid-1950s, with the creation of *National Review*. But it is at least arguable that that the *legal* conservative movement (*i.e.*, the movement relating to how lawyers, judges, and legal scholars think about the relationship between law and conservatism) began a few years later – more specifically, on April 7, 1959, the day that Professor Wechsler delivered his famous "Neutral Principles" lecture at Harvard Law School.

Herbert Wechsler was a liberal New Deal Democrat who, before 1959, was known for his casebook, *The Federal Courts and the Federal System*, one of the most important casebooks of all time, particularly for its groundbreaking effort to enunciate the principles of the Legal Process School. But in 1959, he became known for his "Neutral Principles" lecture. This lecture ended up shaping his legacy because it did something almost no one in the legal academy dared to do: Wechsler's lecture attacked the *Brown*

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[108] KERSCH, *supra* note 59, at 92. As recounted by Ken Kersch, the *Brown* decision so nonplussed the Legal Process scholars that, as a result of the decision, "the pioneering Harvard Law School Legal Process scholars Henry Hart and Albert Sacks withheld the publication of their seminal text on the subject, *The Legal Process* (1958), and ultimately never published it." *Id*. For more on this saga, see William M. Eskridge, Jr., & Philip Frickey, *The Making of "The Legal Process"*, 107 HARV. L. REV. 107 2031 (1994); HENRY M. HART, JR. & ALBERT M. SACKS, BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William M. Eskridge, Jr., and Philip Frickey, eds., 1995) (1958).

decision for not complying with a bare requirement of the rule of law.

Wechsler's lecture was later turned into a Harvard Law Review article, "Toward Neutral Principles of Constitutional Law,"[109] eventually becoming the fifth most cited article ever.[110] And it may be the most controversial one of all time. This is *not* because the critique was unusual in the public sphere or in conservative publications. Indeed, as discussed in Part I.A, many conservatives at the time were critiquing the *Brown* decision for its expansion of judicial review and federal power. But Wechsler's critique of *Brown* stood out because he was one of the most well-respected law professors in the country, someone who, as his former Columbia Law student, Justice Ruth Bader Ginsburg, later proclaimed, "combined the power and beauty of the Greek gods Zeus and Apollo."[111] He also was a self-identified liberal who wholeheartedly supported the *Brown* outcome; as Wechsler later explained, "one of the elements of rhetorical effectiveness in the piece was precisely that I persuaded people that I liked the results and still felt it important to question the grounds."[112]

So what, then, concerned Wechsler about the *Brown* decision? The *method of reasoning* the Warren Court used to reach that result. But Wechsler (as a liberal) did not criticize the Court's reasoning in the way that conservatives at the time did. Indeed, Wechsler was not concerned that the decision enlarged judicial power, overruled precedent, or contravened the original intent of the Fourteenth Amendment.[113] Rather, Wechsler's concern was the narrowness of the decision, *i.e.*, its targeting a particular political crisis. For Wechsler, the *Brown* opinion was overly narrow in two fundamental ways: it failed to provide reasons "transcending the immediate result that [the decision]

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[109] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)

[110] Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

[111] Tamar Lewin, *Herbert Wechsler, Legal Giant, Dead at 90,* N.Y TIMES (Apr. 20, 2000), http://www.nytimes.com/2000/04/28/us/herbert-wechsler-legal-giant-is-dead-at-90.html.

[112] Norman Sibler & Geoffrey Miller, *Toward "Neutral Principals" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 925 (1993).

[113] Wechsler, *Toward Neutral Principles*, *supra* note 109, at 31-32.

achieved,"[114] and it failed to apply to all parties equally, whether "a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist."[115] According to Wechsler, this undermined the power of judicial review and thereby threatened the rule of law.

The divisions within the legal academy shifted as a result of the Wechsler lecture. The Legal Process School faded away, because if fidelity to legal process meant being against the Warren Court's Rights Revolution, then Legal Process scholars would have no place within the legal Left. Indeed, although Wechsler specified in the lecture how he was critiquing the Warren Court as a liberal, and he resolutely refused any association with conservative thought,[116] the lecture nonetheless infuriated liberal scholars and judges, leading to a flurry of furious responses over the next few years.[117] But while the Legal Process School faded away after the Wechsler lecture, the school's focus on procedures and the rule of law, particularly as requiring what Wechsler called "neutral principles" to justify judicial review, gave rise to a new movement, one that more explicitly embraced affiliation with political conservatism and a fidelity to the original constitutional constraints. [118]

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[114] *Id*. at 15.
[115] *Id*. at 12.
[116] As Geoffrey C. Hazard Jr. wrote in a powerful tribute to Wechsler, "Herb was exasperated both by radical 'crits,' in their hostility to the fundamentally conservative structure of a reasonably peaceful society, and also by conservative critics' disregard of the pervasive discontinuities and injustices in the law as it stands at any given time." Geoffrey C. Hazard, Jr., *Tribute in Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1363, 1367 (2000). For Wechsler's own account of his personal development, see Norman Sibler & Geoffrey Miller, *supra* note 112.
[117] *See, e.g.*, Louis H. Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Addison Mueller & Murray L. Schwartz, *The Principle of Neutral Principles*, 7 UCLA L. REV. 571 (1960), EUGENE V. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 24-39 (1962); Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587 (1963); Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660, 661, 663-64 (1963). For criticism tailored for a general audience, see C. Peter Magrath, Legal Neutralism, COMMENTARY (Sept.1961), https://www.commentarymagazine.com/articles/principles-politics-and-fundamental-law-by-herbert-wechsler/.
[118] *See* KERSCH, *supra* note 59, at 92.

Over the next decade there were many steps toward this new movement, with perhaps the biggest step being the 1968 election and Richard Nixon's pledge to nominate only "strict constructionists" to the federal judiciary.[119] At this point, the path toward originalism as a distinct movement was starting to look, as Ken Kersch writes, "like a trajectory."[120] An important data point in the formation of that trajectory appeared in 1971, when a Yale Law scholar, known principally for his writing on anti-trust law, took Wechsler's "neutral principles" argument and turned it into a movement.

3. Robert Bork and the Rise of Originalism

In 1971, Robert Bork published an Indiana Law Review article that resonated deeply with how conservatives were thinking about the Warren Court.[121] Although the article dealt with the First Amendment, and it did not announce a new theory of law, it nonetheless was transformative in using Wechsler's "neutral principle" framework to defend an originalist way of interpreting the Constitution. More specifically, Bork argued that, for judicial review to be legitimate within our system, Wechsler's "neutral principles" were a necessary but not a sufficient factor. Judicial interpretations of the Constitution must be not only broadly and neutrally derived so that they did not tilt the scales toward particular classes of litigants (as Wechsler had argued), but they must also be neutral in the sense that they are *beyond judicial derivation* in the first place. In Bork's words, "the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution."[122] That means that if the Court "does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own

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[119] *See* KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES (2011); MICHAEL J. GRAETZ AND LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016); EARL M. MALTZ, THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW (2016).
[120] KERSCH, *supra* note 59, at 93.
[121] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).
[122] *Id*. at 3.

predilections, the Court violates the postulates of the Madisonian model that alone justifies its power."[123] Without originalism, even Wechsler's neutral principles cannot separate constitutional law from bare politics.

Bork's article resonated deeply with conservative lawyers and law students. As recounted in Amanda Hollis-Brusky's research on the Federalist Society, many leading Federalist Society members have identified the Bork article as a critical influence in their earlier intellectual and political development.[124] Even though it was an article on free speech doctrine, the article is often represented, as Ken Kersch writes, "to be the first significant articulation of modern originalism (as an "ism")," because in the 1970s lawyers and law students read the article as sorting through the same problems with judicial legitimacy that *National Review* writers at the time were exploring, but that no one—at least no one of Bork's intellectual pedigree in the legal world—had tied so explicitly and forcefully to a particular mode of legal interpretation.[125]

Bork's article paved the way for a full book on the subject several years later, Raoul Berger's *Government By Judiciary: The Transformation of the Fourteenth Amendment* (1977), the first major work on originalism in the legal academy. While Bork may have been an unlikely exponent of originalism, as someone principally known for law-and-economics scholarship on anti-trust law, Berger was even more surprising, for he was a self-identified liberal and life-long Democrat. And he used originalism to go after the core of what Kendall had dubbed the "Liberal Revolution"—the Warren Court's use of the Fourteenth Amendment.

4. Raoul Berger and the Originalist Critique of the Warren Court's Fourteenth Amendment Jurisprudence

Just about everything in Raoul Berger's life pushed against him becoming the leader of the emerging originalist movement. Berger was a Ukrainian Jewish immigrant, having come with his

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[123] *Id*.
[124] AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 184 n.19 (2014).
[125] KERSCH, *supra* note 59, at 98.

family to the U.S. as a child.[126] He was trained as a violinist; in fact, Berger did not receive his bachelor's degree until his early 30s and his law degree until his mid-30s. Berger did not become a law professor until he was in his early 60s. And he did not publish his first book, *Congress v. The Supreme Court* (1969), until he was 68.[127] But in his early 70s, during the Watergate scandal, Berger became well-known for his constitutional scholarship, particularly because his writings on the historical bases for impeachment and executive privilege were used in the proceedings against President Nixon. Berger even testified before the Senate Committee concerning Nixon's invocation of executive privilege, and in his testimony Berger urged for the Senate to stop holding hearings and "kick them in the slats."[128]

One would not expect someone with that background to write in his mid-70s the most important constitutional law book, at least among legal conservatives, of the entre decade. But that is what Raoul Berger did in 1977, when he published *Government By Judiciary*, examining whether the Warren Court's landmark Fourteenth Amendment decisions were authorized under the 39th Congress "original intent" in adopting the constitutional amendment.

Berger's book was, indeed, as Ken Kersch writes, "a landmark manifesto."[129] And it was not only an intellectual

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[126] For a summary of his fascinating life and career, see Douglas Martin, *Raoul Berger, 99, an Expert On Constitution in 2nd Career*, N.Y. TIMES (Sept. 28, 2000), https://www.nytimes.com/2000/09/28/us/raoul-berger-99-an-expert-on-constitution-in-2nd-career.html.

[127] *Id*.

[128] Israel Shenker, *Expert on the Constitution Studies Executive Privilege*, N.Y. TIMES (July, 26, 1973), https://www.nytimes.com/1973/07/26/archives/expert-on-the-constitutionstudiesexecutive-privilege-became.html. Even though Berger had been a lawyer in the FDR Administration, and personally identified as a "moderate Democrat," Berger had long displayed a fidelity to legal history above politics. Indeed, even before becoming notorious among liberals for his originalist view of the Fourteenth Amendment, he had disavowed any political agenda in his role in challenging Nixon's claim of executive privilege. "I'm a fundamentalist," Berger explained in a 1973 New York Times interview. *Id*. "I believe with Jefferson: Bind them down with the chains of the Constitution. The alternative is a Constitution writ on water, a Constitution that allows a Johnson or a Nixon to embroil us in war. As between a Constitution framed by a group of men of the highest wisdom, and a White House camarilla, I'll stand with the Constitution." *Id*.

[129] KERSCH, *supra* note 59, at 93

manifesto; it created a platform for a social movement. As Robert Post and Reva Siegel write in their article conceptualizing originalism as a social movement, the Berger book was so significant because "for the first time claims about fidelity to originalist interpretive methodology became a vehicle for widespread and sustained mobilization of conservatives," thus creating a way for conservative activists to mobilize "aroused citizens, government officials, and judges into a dynamic and broad-based political movement."[130]

Put simply, Berger's argument was that Representative Bingham had proposed the Fourteenth Amendment for the limited purpose of upholding the constitutionality of the 1866 Civil Rights Act.[131] Berger acknowledged that there were some statements (most notably by Representative Bingham[132] and Senator Howard[133]) suggesting that the Fourteenth Amendment would apply the Bill of Rights to the states, and perhaps even create a broader set of rights beyond the Bill of Rights, such as the ones mentioned in Justice Washington's opinion in *Corfield v. Coryell*.[134] For three principal reasons, however, Berger concluded that these statements did not reflect the "original intent" behind the Fourteenth Amendment. One, such statements supporting a broad Fourteenth Amendment meaning appeared infrequently. Two, these statements were not only made infrequently but they were often contradicted by the very people who made the statements. Three, and most importantly, these statements did not reflect the

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[130] Robert Post and Reva Siegal*, Originalism as a Political Practice: The Right's Living* Constitution, 75 FORDHAM L. REV. 545, 548 (2006). To be sure, there had been previous efforts to create a conservative legal agenda that would mobilize the Republican electorate, such as the Bozell book discussed above. And it may therefore be more accurate to describe the Berger book as a part of this trajectory, as Kersch sees it, rather than as a sudden departure, marking an entirely distinct movement. Or perhaps as O'Niell writes, Berger represented a "restoration of originalism" rather than the creation of a new movement. See JONATHAN O'NEILL, *Raoul Berger and the Restoration of Originalism*, *in* ORIGINALISM IN AMERICAN LAW AND POLITICS (2005). But Post and Siegel are certainly right that the Berger book was distinct in connecting the legal academy, the judiciary, and the conservative electorate through the construction of a common vocabulary about the rule of law and the Founding.

[131] *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 22-36 (Liberty Fund 1997).

[132] *See id*. at 140-147.

[133] *See id*. at 147-151.

[134] *See id*. at 31-33.

congressional or popular consensus, in either the 39th Congress or state legislatures.

For these reasons, Berger concluded that the "original intent" behind the Amendment was to create a basic legal equality between black and white persons with regard to three categories: (1) access to judicial procedures and law enforcement, (2) property rights, including the right to buy, sell, and lease real and personal property, and (3) contractual liberties and enforcement.[135]

The individual clauses of the Fourteenth Amendment sought to create this basic legal equality. Specifically, the Due Process Clause dealt with the administration of judicial procedures and the enforcement of public law; the Privileges or Immunities Clause required states to ensure basic contractual and property rights; and the Equal Protection Clause dealt with how laws relating to those specific subjects would be enforced by the states. None of this, however, touched the application of the Bill of Rights to the states. Nor did it touch the substance of what state legislatures could adopt outside of these narrow subjects.

For purposes of this Article, of course, the most important part of Berger's originalist argument was Chapter 14, entitled "From Natural Law to Libertarian Due Process." That chapter argued that the Supreme Court had smuggled a natural rights conception of justice into constitutional law through the Due Process Clause. Berger alleged that the *Slaughter-House* decision got the Due Process Clause basically right, but the Court abandoned this approach in the late 19th century, when courts began to scrutinize restrictions on property and contractual rights. This economically libertarian approach later transformed into a civil libertarian view of due process, as the Court began to apply a more deferential standard to economic restrictions but a heightened standard to restrictions on so-called "fundamental liberties."[136] For Berger, there was no constitutional warrant for this transition from economic libertarianism to civil libertarianism; indeed, the change had everything to do with who was controlling the Supreme Court, and nothing to do with the Constitution itself. If anything, Berger explained, the economic model of substantive due process, the one that had prevailed from the late 19th century thru the early 20th century, was more defensible than the Warren Court's civil

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[135] *See id*. at 18-19.

[136] *See* BERGER, *supra* note 131, at 269-282.

libertarian model, because "[h]istory reveals that property actually was more highly prized by the Founders than 'civil liberties.'"[137]

So what, then, did the Due Process Clause mean as an original matter? Berger summarized his findings in these terms:

> [T]he record establishes that the framers [of the Fourteenth Amendment] had limited objectives; that they carefully avoided encroaching on the States beyond those limits; that they chose technical words apt for their purpose, which, in the case of due process, meant to them access to the courts according to the due course of law, not a roving commission to revise State institutions.[138]

Here, it is important to highlight the relationship between, on the one hand, the conservative arguments discussed in Part I.A against the Warren Court's use of the Fourteenth Amendment and, on the other hand, the originalist arguments Berger was providing in *Government By Judiciary*. Both viewed the federal government, including the federal judiciary, as having limited authority over intrastate affairs. Both saw the states as sovereign in regulating social relations. And both argued that the Fourteenth Amendment did not change the original Constitution's prioritization of property ownership over equality. For these reasons, both viewed the Warren Court's Fourteenth Amendment decisions as transformative of the original constitutional order.

But there was an important difference between how the early post-war conservatives criticized the Warren Court's use of the Fourteenth Amendment, and how Berger advanced this argument in *Government By Judiciary*. As discussed in Part I.A, the early post-war conservatives emphasized how the Warren Court's Fourteenth Amendment jurisprudence not only got the Fourteenth Amendment wrong as a matter of the 39th Congress's "original intent," but the Warren Court also got American constitutional law wrong as a whole. Indeed, conservative writers like Bozell and Kendall alleged that the Warren Court's Fourteenth

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[137] *Id*. at 279. Revealingly, Berger cited many contemporary liberals who at the time were saying the same thing about the Warren Court; indeed, Berger cited Archibald Cox's recently published 1976 book, proclaiming that the Warren Court had "behaved even more like a Council of Wise Men and less like a court than the *laissez faire* Justices." *Id*. at 298.

[138] *Id.* at 273.

Amendment decisions would upend our constitutional order and all the mediating institutions (such as family, church, and local community) that sustained American traditions. The early conservatives therefore argued that not only were the Warren Court's decisions procedurally wrong in the way they went about interpreting the Fourteenth Amendment, but the decisions were also substantively bad for the future of American constitutionalism. For this reason, the post-war conservatives did not think there was any way to mend these decisions through alterations to the legal reasoning supporting the outcomes. Any decisions reaching these outcomes were to be resisted, within and outside the judicial system.

Berger, however, departed from these early conservatives by remaining mostly indifferent toward the original constitutional order. His stated objection to the Warren Court was simply that it got the Fourteenth Amendment wrong as a matter of historical intent. But Berger had no problem with the Constitution being amended to achieve the results that the Warren Court derived through the Fourteenth Amendment. And at times Berger even proclaimed that, as a "moderate Democrat," he favored the results.[139]

In a sense, Berger's departure from earlier conservative critiques of the Warren Court can be understood in disciplinary terms. Berger was, of course, writing about the Fourteenth Amendment as a law professor, not as a political activist or ideologue. So it made sense to limit his inquiry to the legal events surrounding the adoption of the Fourteenth Amendment. But disciplinary differences do not account entirely for why Berger's critique was confined to the form of the Warren Court's decisions, given that much of the legal scholarship on the Warren Court at the time vigorously endorsed the Warren Court's jurisprudence in normative terms. Indeed, this was the prevailing mode of legal scholarship, with leading scholars like Ely and Dworkin writing significant works on how to frame American constitutional law in a way that could justify (and extend) the Warren Court's landmark

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[139] *See* Martin, *supra* note 126. In fact, Berger explicitly opposed in *Government By Judiciary* any effort "to undo the past in the face of the expectations that the segregation decisions … have aroused in our black citizenry – expectations confirmed by every decent instinct." BERGER, *supra* note 131, at 412-413.

decisions.[140] Berger did not confront this scholarship by questioning whether these decisions would be good for American constitutionalism. Berger's critique was much less oppositional than that. Rather, he limited himself to writing from a Wechslerian perspective—*i.e.*, as a liberal who agreed with the Warren Court's agenda, but who was simply uncomfortable with the legal process that the Warren Court used to achieve those results.

Nevertheless, despite Berger's attempts to assuage his fellow liberals and convince them that he was pained to find that his "conclusions are not infrequently at war with [his political] predilections,"[141] Berger's book still made many enemies, just as had been the case with Wechsler's "neutral principles" lecture. And just as had been the case with Wechsler, Berger's identification as a liberal did not change the fact that his argument was adopted principally by conservatives. *National Review* featured an extensive review of the book,[142] and one month later, Berger even wrote an essay for *National Review*, rebutting claims made by Paul Brest against the book.[143] By the time Paul Brest coined the term "originalism" in 1980 as a term of derision to describe how conservatives were increasingly viewing constitutional law,[144] Raoul Berger had become the principal target.[145] When Ronald Reagan came into the White House, as a part of a surging conservative renaissance, originalism had become

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[140] *See, e.g.*, ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[141] *See* Martin, *supra* note 126. Indeed, Berger would spend the rest of his career, extending well into his 90s, defending himself from liberal attacks on his view of the Fourteenth Amendment. *See* Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981).

[142] Joseph Sobran, *Taking the Fourteenth*, NATIONAL REVIEW, March 3, 1978, at 283-285.

[143] Raoul Berger, *Academe vs. the Founding Fathers*, NATIONAL REVIEW, April 14, 1978, at 468–71.

[144] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 204 (1980).

[145] Berger therefore responded to Brest's article with Raoul Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1 (1981). Berger began that article with this provocative sentence: "Professor Paul Brest's article 'The Misconceived Quest for the Original Understanding' might better have been entitled 'The Constitution is Dead.'" *Id.*

Raoul Berger, and legal conservatism was well on its way to becoming originalism.

But as we will see in Part II, originalism quickly changed thereafter. Those changes started to appear just as legal conservatism seemed to be at its height, finally holding the power to undo the Warren Court Revolution.

II. THE DECLINE OF LEGAL CONSERVATISM: FORMALLY CONSERVATIVE, SUBSTANTIVELY LIBERAL

When Ronald Reagan won the 1980 presidential election, there seemed to be a conservative renaissance on the horizon. Reagan came into office by galvanizing a new conservative coalition, one that rested on mobilizing the Religious Right and Rust Belt Democrats against the social engineering wrought by the 1960s and 1970s, including the Warren Court Rights Revolution. With the advent of a new vocabulary for talking about the Founding (originalism), a new Republican coalition mobilized around abortion, religion, and the family, and the possibility of several Supreme Court appointments, the 1980 election seemed to guarantee that Berger's critique in *Government By Judiciary* would soon be turned into a legal agenda for the Supreme Court. While it seemed unlikely that *Brown* itself would be overruled, given the political will that had accumulated around the decision, it seemed likely that the more aggressive interpretations of *Brown*, as well as the practice of affirmative action, would be abandoned. It seemed even more likely, almost certain, that *Roe v. Wade* would be overruled, and this might even include the constitutional warrant for the decision, the "substantive due process" doctrine. It was even plausible that the entire "incorporation" project would be dissolved as well, thus restoring state authority over controversial social matters. Conservatives had been steadily building a movement to overhaul the Warren Court, and now they finally had the opportunity to restore the American constitutional order.

But none of that happened, not during or even after the Reagan Revolution. Moreoever, the meaning of legal conservatism has also changed so drastically in the 40 years since the 1980 election that the Warren Court victories are no longer the targets of conservative criticism. In fact, they have recently become the cause for conservative celebration, with leading conservative thinkers arguing that the original meaning of the

Constitution requires, among other things, incorporation, desegregation, sex equality, bodily autonomy, and even same-sex marriage.

Part II of this Article will thus focus on how the Reagan Revolution turned out to be a counterrevolution, stymying the grassroots movement driving the 1980 election. By the end of Reagan's second term, less than a decade after the publication of Berger's book, four important events had materialized that would create a substantial shift in the direction of legal conservatism, a shift that would have profound consequences for "substantive due process" doctrine.

A. The Four Events That Turned the Reagan Revolution into a Counterrevolution

1. The Horowitz Report and the Conservative Embrace of Civil Rights

In 1979, on the eve of the Reagan Revolution, the conservative Scaife Foundation commissioned a former law professor and New York City lawyer, Michael Horowitz,[146] to develop a litigation strategy for the emerging legal conservative movement. This report, which in 1980 was "distributed informally to conservative donors and activists," is now known as the "Horowitz Report" among scholars who study legal conservatism.[147] Scholars have focused so much on the Horowitz Report because the report was not only influential in creating the agenda and organizational strategy for how conservatives viewed constitutional law and judicial power, but it was also critical to

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[146] Under the Reagan Administration, Horowitz was general counsel for the Office of Management and Budget. Horowitz was later nominated to the D.C. Circuit and was considered a likely Reagan nominee for the Supreme Court. *See* David Brooks, *The Young Pol's Guide to the Brave New World*, NATIONAL REVIEW, April 10, 1987, at 28. Horowitz is currently Senior Advisor at the Religion Action Center of Reform Judaism. *Michael Horowitz: Biography*, RELIGIOUS ACTION CENTER OF REFORM JUDAISM, *https*://rac.org/michael-horowitz-biography?id=23122#ixzz3OoR8YCCt (last visited Nov. 9, 2021).

[147] STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 67.

creating the Federalist Society, the legal conservative movement's principal "support structure."[148]

Just like Wechsler and Berger, Michael Horowitz was in many ways an unlikely candidate to frame a strategy for the legal conservative movement. Until just a few years earlier, Horowitz had been a civil rights activist and liberal law professor.[149] But in the late 1970s, Horowitz began to identity as a "neoconservative" and to veer toward the Republican Party.[150] After developing a relationship with critical figures at the American Enterprise Institute, which, Irving Kristol, the godfather of neoconservatism, was busy turning into a "neoconservative hotbed,"[151] Horowitz was selected to craft a new legal strategy for what conservatism would look like under the Reagan Revolution.

The strategy developed in the report reflected Michael Horowitz's background as a liberal law professor and civil rights activist. The report focused extensively on race relations and sought to show how conservative "limited government" policies, and not progressive "big government" policies, actually favor the most cherished causes of American liberalism. Horowitz's overarching strategy was, in Steven Teles's words, to take "the side of blacks in conflicts with liberal interests."[152] By doing this on various issues, conservatives could expose how liberals had, in Horowitiz's words, "essentially ignored the victims of ghetto

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[148] *Id*. at 179

[149] *See* DAVID G. SANSING, THE UNIVERSITY OF MISSISSIPPI: A SESQUICENTENNIAL HISTORY 311-312 (1999) (explaining how Michael Horowitz was "among a group of Yale-trained law professors Dean Joshua Morse brought to Ole Miss in the late 1960s" and how "their 'liberal leanings'. . . provoked the wrath of several legislators, who introduced several resolutions to move the law school to Jackson"). *See also* Jennifer Paul Anderson, *Rebel Yale: Yale Graduates and Progressive Ideals at the University of Mississippi Law School, 1946-1970*, UNIVERSITY OF SOUTHERN MISSISSIPPI: AQUILA DIGITAL COMMUNITY (May 1, 2015), https://aquila.usm.edu/cgi/viewcontent.cgi?article=1087&context=dissertations.

[150] *See* Samuel G. Freedman, *Horowitz's List*, NEW YORK MAGAZINE, March 31, 1997, at 46, 50.

[151] STEPHEN FELDMAN, NEOCONSERVATIVE POLITICS AND THE SUPREME COURT: LAW, POWER, AND DEMOCRACY 53 (2012).

[152] Steven Teles, *Compassionate Conservatism, Domestic Policy, and the Politics of Ideational Change*, *in* CRISIS OF CONSERVATISM? THE REPUBLICAN PARTY, THE CONSERVATIVE MOVEMENT, & AMERICAN POLITICS AFTER BUSH 193 (Joel D. Aberback & Gillian Peele eds, 2011).

disorder."[153] Conservatives could then claim that *they*—and not liberals—"were the true inheritors of the civil rights struggle."[154] Horowitz's idea was that conservatives would not only be able to appeal to an important electorate in doing this, but they would also gain the moral upper-hand within the progressive framework of "protected groups."

Horowitz urged conservative organizations to focus on recruiting elite lawyers from top law schools and cultivating relationships with academics, as opposed to relying on the "appallingly mediocre"[155] regional lawyers traditionally drawn to conservative causes. Horowitz acknowledged that elite lawyers and academics tend not to be drawn to conservative causes, but Horowitz had a simple solution to this problem—legal conservatives had to change their agenda to appeal to elites. In particular, conservative organizations had to "exhibit idealism and provide an opportunity for conservatives to be seen on the side of the 'good guys.'"[156]

But who are the good guys? By the standards of the early post-war conservative movement, the good guys might be characterized as small businesses and local communities. By the standards of the Religious Right, the good guys might be characterized as unborn children and traditional families. But Horowitz took a different approach. Instead of appealing to a conservative vision of the good guys, Horowitz argued that conservatives should appeal to a *progressive* one. The implication was that legal conservatives would have to frame their agenda in a way that moved away from criticizing the Warren Court, which could make conservatives seem like they were on the side of the "bad guys" (*i.e.*, Southern whites) instead of the "good guys" (*i.e.*, African Americans). Instead of attacking the Warren Court, conservatives should try to appeal to "protected groups" by emphasizing, for example, how conservative policies favor, in

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[153] TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT, *supra* note 147, at 79.
[154] Teles, *Compassionate Conservatism*, *supra* note 152, at 193.
[155] Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law"*, 52 UCLA L. REV. 1223, 1252 (2005).
[156] TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT, *supra* note 147, at 72.

Horowitz's words, "ghetto school children" and "ghetto public housing residents."[157]

The same year that the report was published, three elite law students (two at Chicago Law and one at Yale Law) began discussing the possibility of creating an organization for conservative law students, faculty members, and practicing lawyers. This became the Federalist Society.

2. The Federalist Society and the Legal Conservative Movement's Fusionism

Michael Horowitz provided much of the early organizational networking for the Federalist Society, even arranging, along with Irving Kristol, for the Federalist Society's initial funding and first office (in the AEI building).[158] As one of the Federalist Society founders later recalled, Horowitz was critical to setting up the Federalist Society agenda, in that the organization was doing exactly what Horowitz "had called for in his report."[159]

The Federalist Society held its first conference in 1982 and quickly grew to become the most powerful "support structure" for legal conservatism. As several political scientists have observed, the most important accomplishment of the Federalist Society was to systematize conservative critiques of the Warren Court in such a way that would (a) appeal to the electorate, (b) frame a legal agenda, and (c) sustain a political coalition. The Federalist Society did this largely through its promotion of originalism as a vocabulary for talking about judicial power, the rule of law, and the Founding.

Like *National Review*'s fusionism, originalism had the promise of bringing traditionalists and libertarians together, because originalism had much to promise each side of the *National Review* coalition. For traditionalists, originalism was appealing, because originalism, at least as it was conceived in the Bork/Berger model, would push against the Rights Revolution, thus restoring the state sovereignty and "mediating institutions" that are so critical for the operation of the original constitutional

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[157] Teles, *Compassionate Conservatism*, *supra* note 152, at 193.
[158] TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT, *supra* note 147, at 141.
[159] *Id.*

order. For libertarians, originalism held the promise of limiting the federal government and administrative bureaucracy; originalism thus meant opening up the path for free enterprise.[160]

By the mid-1980s—with the popularity of Berger's originalist attack on the Fourteenth Amendment, the creation of the Federalist Society, and Attorney General Meese's endorsement of originalism in a 1985 speech to the Federalist Society[161]—it was clear that originalism had become the defining feature of legal conservatism. Now that there was an organization heading the legal conservative movement, and a legal framework for how that organization would be pursuing its agenda, legal conservatism seemed to have all the necessary tools for advancing that agenda within the Reagan Administration.

3. Justice Scalia and the Rise of Public-Meaning Originalism

Until two days before his nomination to the Supreme Court in 1986, Antonin Scalia had not written or issued a single public statement about originalism. That is not to say Scalia had not written or said much about law and legal theory. In the 20 years before his appointment to the Supreme Court, Scalia had been a government lawyer in the Nixon and Ford administrations, a law school professor at two elite law schools (UVA and Chicago), an editor of Regulation (the AEI publication), and a D.C. Circuit judge.[162] But over these two decades, Scalia's academic and professional work was conspicuously devoid of historical analysis. Even when Scalia wrote as a law professor on controversial constitutional law topics (including federalism, affirmative action, and church-state relations), he never bothered to consider the

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[160] Notably, this similarity between *National Review*'s coalition through fusionism, and the Federalist Society's traditionalist-libertarian coalition through originalism, was made all the more striking by the fact that Frank Meyer had developed *National Review* fusionism, and Meyer's son, Eugene Meyer, has been the President and CEO of the Federalist Society since its earliest days. *See* ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 131-132 (2008).

[161] Edwin Meese, *The Great Debate: Attorney General Ed Meese III – November 15, 1985*, THE FEDERALIST SOCIETY (Nov. 1, 1986), https://fedsoc.org/commentary/publications/the-great-debate-attorney-general-ed-meese-iii-november-15-1985.

[162] For more on Scalia's professional and ideological development, *see* Merriam, *Justice Scalia and the Legal Conservative Movement*, *supra* note 24.

original meaning of the Constitution as it relates to these hot-button topics.[163] Likewise, in the years when Scalia was a D.C. Circuit judge, from 1982 to 1986, years when originalism was ascendant within legal conservatism, "his work … evidenced no single jurisprudential principle or philosophy."[164]

That changed on June 14, 1986, when, at the age of 50, Scalia gave a speech to the Attorney General's Conference on Economic Liberties. Scalia's speech explained why originalist interpretations should seek to discern what the constitutional text meant in general, as opposed to what a particular constitutional framer intended the text to mean. As Bruce Murphy writes in his excellent biography of Scalia, it was common knowledge at the time of that speech that both Scalia and Bork were being considered by President Reagan for the Supreme Court vacancy left by Chief Justice Burger's retirement. By giving that speech, Murphy writes, Scalia was seeking to persuade the Reagan administration that Scalia's "public meaning" approach was not only different from, but "even better[] than[,] Bork's 'original intent' theory."[165] Notably, two days after giving the speech, Scalia met with President Reagan and was informed that Reagan had chosen him to be the next Supreme Court nominee.

Scalia is now considered the critical figure in moving away from "original intent" originalism (the form that had been endorsed by Bork, Berger, and Meese). This shift was a significant step in making originalism less tethered to the modes of social relations that had shaped American life in the past. Once liberated from the actual intentions of the Framers, and the ways of life that surrounded those intentions, interpreters could consult new social understandings to fill in the gaps of broad linguistic guarantees. Originalism thus became more susceptible to adaptation, including on the doctrine of "substantive due process."

This theoretical vulnerability would become much more practically relevant once the political will behind Berger's positions on the original intent of the Fourteenth Amendment started to dwindle. A critical event in the loss of political will arose the year after Scalia's appointment, in 1987, when the Senate rejected Judge Robert Bork for Justice Powell's spot on the

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[163] *See id*. at 168.
[164] BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 116.
[165] *Id*. at 125.

Supreme Court. As discussed above, in Part I.B, Bork, while still a Yale Law Professor, had been one of the innovators in carving out a path for originalism. He was later appointed to the D.C. Circuit and was widely expected to be nominated to replace Justice Rehnquist's vacancy as Associate Justice on the Court (that vacancy arose after Rehnquist was appointed to be Chief Justice). As mentioned above, that Associate Justice position went to Justice Scalia (who was also on the D.C. Circuit at the time). But a year later, Justice Powell retired, opening up yet another position for President Reagan to fill. This time, President Reagan selected Judge Bork.

4. The Loss of Political Will and Judge Bork's 1987 Confirmation Hearings

Unlike Scalia, Bork had been quite outspoken about originalism, including on the controversial doctrine of "substantive due process." Bork, like just about all originalists at the time, thought "substantive due process" was a wholly illegitimate doctrine, one that had no place in the text or history of the Fourteenth Amendment. Bork's confirmation hearings therefore involved intense scrutiny on the subject of abortion, ultimately leading to the Senate's rejection of Bork's appointment. That Supreme Court seat, of course, ended up going to Justice Kennedy, who, ironically, would later become the Court's most outspoken proponent of "substantive due process."

After the Senate rejected his appointment, Bork resigned from the D.C. Circuit and became an AEI Fellow, where he wrote *The Tempting of America: The Political Seduction of the Law* (1990), explaining his constitutional outlook and sharing his personal experience in his failed Supreme Court appointment. In that book, Bork devoted significant attention to the Fourteenth Amendment, the provision that had doomed his Supreme Court appointment. Bork, as Berger had done more than a decade before, explained the limited scope of the Fourteenth Amendment, and defended the Supreme Court's decision in the *Slaughter-House Cases* as "a narrow victory for judicial moderation," albeit "only a temporary one"[166] because substantive due process would soon emerge in the

[166] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 39.

late 19th century with the rise of economic libertarianism. In Bork's view, the *Slaughter-House* Court got the Fourteenth Amendment essentially right in holding that the Fourteenth Amendment subjected the states only to a narrow set of constraints (relating to juridical, contractual, and property rights), and applying these rights to a narrow set of beneficiaries (the freedmen).[167] In Bork's view, he had been denied a spot on the Supreme Court simply because he was an outspoken supporter of originalism.

Although not nearly as scholarly and historically oriented as Berger's *Government By Judiciary*, Bork's *The Tempting of America* was even more popular in conservative circles, partly because it was more accessible and personal. Whereas Berger's book had the tone of an indifferent interpreter of constitutional history and observer of Supreme Court doctrine, Bork's book explicitly condemned trends in American politics and the blurring of law and politics wrought by judicial activism.[168] Nevertheless, despite its popularity among legal conservatives, the book evinced the tone of a losing culture. It was written from the perspective of someone who was denied a Supreme Court appointment not for being factually wrong about the law, but for being on the wrong side of the culture wars.

B. Turning the Reagan Movement into a Libertarian Movement

Bork's failed confirmation punctuated a deep failure of the Reagan Revolution. None of what had been promised—an empowerment of local communities, a restoration of the traditional family structure, and an undoing of the Warren Court and *Roe*—would be accomplished under Reagan. Just as legal conservatism seemed to be an ascendant movement, it showed signs of collapsing. Indeed, the movement had created a vocabulary for advancing its agenda, but now that very methodology had been the basis for the Senate's rejecting one of the movement's leaders. The movement had rallied around social issues like abortion, the family, and affirmative action, but conservatives were clearly losing ground on these fronts, including in the Supreme Court, despite Reagan's appointments. With the movement losing

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[167] *Id*. at 37-40.
[168] *Id*. at 17.

momentum, there was an opening for a replacement within the legal Right. The same year that Bork's nomination was rejected, a young libertarian in Reagan's Department of Justice began working to push legal conservatism in a different direction. That young lawyer, Clint Bolick, now a Justice on the Arizona Supreme Court, is largely responsible for the libertarian turn in the legal conservative movement, making originalism, 30 years later, a foe of social conservatives like Adrian Vermeule.

Before being appointed to the Arizona Supreme Court, Clint Bolick had been one of the most important figures in legal conservatism, largely due to his scholarly writing, the public-interest law firm he founded (Institute for Justice), and the constitutional cases he litigated. Through all of this work, Bolick has developed a reputation on one particular matter—the relationship between legal conservatism and race.[169]

Much of Bolick's work can be understood as following the dichotomy presented in the Horowitz report—as positioning legal conservatives as part of the "good guys" supporting the economic and social empowerment of African Americans. This required changing the way that conservatives thought about the Warren Court. Bolick's thinking on these issues is traceable to when Bolick was a young lawyer in Reagan's Equal Employment Opportunity Commission (EEOC), where he was influenced by the EEOC Chair at the time, Clarence Thomas. During that period, Thomas did not identify as an originalist but as a West-Coast Straussian—that is, as part of a vocal cohort of scholars who had separated themselves from the rest of the conservative movement by, among other things, condemning Bork and the originalist

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[169] Indeed, the New York Times has dubbed Bolick "the maestro of the political right on issues of race." Steven A. Holmes, *Political Right's Point Man on Race*, N.Y. TIMES (Nov. 16, 1997), https://www.nytimes.com/1997/11/16/us/political-right-s-point-man-on-race.html. W.B. Allen, an African-American conservative scholar, has likewise called Bolick "the new Jew of civil rights—that is, advancing the interest of his own people by means of a sincere attachment to the civil rights of a minority." William B. Allen, Book Note, 10 LINCOLN REV. 48, 48-50 (1991), http://williambarclayallen.com/book%20reviews/Book-review_Unfinished_Business.pdf. Nina Easton has gone so far as to call the Republican Party's minority outreach a result of the "Clint Bolick Revolution." Nina J. Easton, *Welcome to the Clint Bolick Revolution*, L.A. TIMES (April 20, 1997), https://www.latimes.com/archives/la-xpm-1997-04-20-tm-50490-story.html.

movement.[170] At the EEOC, Thomas had parted ways with the Reagan administration on civil rights and race issues,[171] even urging Republicans to frame their platform in a way that was more appealing to African Americans.[172] Thomas's vision for the Republican Party had an especially strong impact on his then-employee, Clint Bolick.[173]

Once Bolick moved to the DOJ, he started thinking about how to construct a legal agenda for this new version of conservatism, one that would be more appealing to traditional Democrat voters. Indeed, Bolick's notes as a DOJ attorney reflected that in the late 1980s he was beginning "to think about how to introduce more Americans to the [Reagan] administration's position in a 'positive way.'"[174] Bolick's focus

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[170] West Coast Straussians are generally defined as followers of Harry Jaffa, a Leo Strauss student who viewed the original Constitution as a flawed document that failed to secure the promise of equality referenced in the Declaration of Independence. For many of the so-called "Jaffaites," the Civil War, the Lincoln presidency, and the Fourteenth Amendment were vital elements of securing the natural rights at the core of the Declaration. For an exploration of Justice Thomas's West Coast Straussian affiliations, see MYRON MAGNET, CLARENCE THOMAS AND THE LOST CONSTITUTION (2019).

[171] For example, the EEOC under Thomas defended affirmative action policies that the Reagan Department of Justice condemned. See JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT 201 (2016).

[172] *See id.* at 200-202 (2016); *see also* Clarence Thomas, *No Room at the Inn: The Loneliness of the Black Conservative*, POLICY REVIEW, Fall 1991, at 72-78 (detailing how Thomas had pushed against the Reagan Administration on various civil rights issues).

[173] *See* DECKER, *supra* note 171, at 202. Indeed, in Nina Easton's profile of five leading conservatives, including Bolick, Easton explains how when Bolick first came to the EEOC in 1985, he "worshipped at the altar" of Clarence Pendleton, the conservative black chair of the U.S. Commission on Civil Rights. NINA J. EASTON, GANG OF FIVE: LEADERS AT THE CENTER OF THE CONSERVATIVE CRUSADE 193 (2001). But once Bolick started working at the EEOC, his worship shifted to "the other Clarence," who quickly became his mentor, eventually becoming the godfather to Bolick's second child. *Id*. at 193, 196. As Easton explains, Thomas and Bolick bonded over one particular issue: They both "saw themselves as lone warriors against the entrenched … civil rights community"—a community that, as Bolick would later write, had become "detached from the needs of its claimed constituency." *Id*. at 196. Thomas encouraged his mentee to serve this neglected constituency.

[174] DECKER, *supra* note 171, at 205.

was specifically on how Republicans could secure a larger percentage of the black vote.[175]

For this purpose, Bolick began thinking about how a movement against the *Slaughter-House Cases*—on the ground that the decision's narrow view of economic liberty is part of the that Court's ideological hostility toward Reconstruction— could provide a legal vehicle for constructing a new political coalition, one in which libertarians and civil rights advocates would be allies.[176] As opposed to the *National Review* fusion between traditionalists and libertarians, a fusion that turned on criticizing the Warren Court and its use of the federal judiciary to limit state sovereignty and voluntary associations, Bolick's fusionism would attack the *Slaughter-House Cases* for limiting the federal judiciary's power to guarantee individual rights. This fusion would have the electoral and cultural advantage of making libertarians, as Horowitz had prescribed, aligned with "the good guys."

This was a striking move because, at this time, liberal activists, judges, and scholars were the ones criticizing the *Slaughter-House* decision. And for good reason – *Slaughter-House* was one of the most important precedents in constraining the federal judiciary's power to limit state and local authority. Conservatives, as mentioned above, had been the ones who had supported the decision; indeed, both Berger and Bork cited the case as generally consistent with what the Fourteenth Amendment was intended to accomplish.[177] For conservatives,

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[175] *Id*.

[176] Indeed, Bolick has framed his books in terms of how economic liberty can empower the civil rights cause and African-American interests. *See* CLINT BOLICK, CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS (1988); CLINT BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY (1990); CLINT BOLICK, THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION? (1996); CLINT BOLICK, VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE (2003).

[177] I say "generally" in that both criticized the opinion to some extent and they differed in their criticisms. Of the two, Bork viewed the *Slaughter-House* majority decision more favorably. For Bork, Justice Miller's majority opinion "was following a sound judicial instinct: to reject a construction of the new amendment that would leave the Court at large in the field of public policy without any guidelines other than the view of its members." BORK, THE TEMPTING OF AMERICA, *supra* note 166, at 37. For Berger, however, Justice Miller's opinion erred by interpreting the Privileges or Immunities Clause too

the *Slaughter-House* decision affirmed that the Fourteenth Amendment was designed not to transform the original constitutional order, but rather to provide a limited set of rights to a limited set of beneficiaries.

Jefferson Decker's review of DOJ documents has uncovered some of Bolick's early thinking on the *Slaughter-House* case. On one set of notes, featured alongside a printout of the *Slaughter-House* opinion, Bolick wrote that "cts. have used [the] 14th Am. to restrict state auth. in other areas—but not economic liberty."[178] On a separate sheet of paper, Bolick expanded (albeit in short-hand form) on his thinking about the relationship between *Slaughter-House* and the civil rights movement: "What [the civil rights] estab. had forgotten is that the [civil rights movement] had always been about securing for indivs. the right to control their own destinies."[179] Bolick further asserted that, due to the civil rights movement's "preoccupation with employment quotas" since the 1970s, the movement "has ignored one of the greatest + most pervasive deprivations of civ. rts. today—state imposed barriers to entrepreneurial opportunities"[180]—such as the occupational restrictions upheld in the *Slaughter-House* case. Bolick concluded in his notes that, as a result of the movement neglecting economic liberty, "the [civil rights] movement had accomplished nothing in the past 25 years."[181]

The new civil rights movement—that is, the movement Bolick was seeking to create – had to focus on overruling *Slaughter-House* in its entirety, so that civil *and* economic liberty would be equally and aggressively enforced by the federal judiciary under the Fourteenth Amendment. Criticizing the *Slaughter-House* case in this way, Jefferson Decker observes,

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narrowly, just as Justice Bradley's dissent interpreted the Clause too broadly. Berger therefore favored Justice Field's dissenting opinion. According to Berger, Justice Field's opinion "staked out a position midway between the extremes of Miller and Bradley, one that honestly reflected the intentions of the framers." BERGER, GOVERNMENT BY JUDICIARY, *supra* note 131, at 49.

[178] DECKER, *supra* note 171, at 207. What Bolick meant here is that the Warren Court had used the Fourteenth Amendment to guarantee various civil rights, but not to advance economic liberties.

[179] *Id*. at 207-208.

[180] *Id.* at 208.

[181] *Id*.

"allowed Bolick to connect the libertarian goal of rolling back intrusive regulation of business with the broader story of civil rights."[182] This would become the defining feature of Bolick's writing and litigation, and it would eventually become a principal part of legal conservatism, just as Horowitz had urged in his report.

To advance this movement, however, Bolick first had to take on a major obstacle: the positive view of the *Slaughter-House* precedent that had prevailed among conservatives since the creation of the movement. More particularly, Bolick had to take on Judge Bork, one of the leading thinkers in the legal conservative movement and one of the most outspoken critics of substantive due process.

When President Reagan nominated Bork to the Supreme Court, Bolick was still at the DOJ and was therefore not in a position to oppose Bork outright. But when Bolick was called before the Allied Jewish Federation to defend the Reagan Administration's controversial nomination of Bork, Bolick took the opportunity to criticize Bork's view of substantive due process. "This Administration," Bolick explained, "strongly supports economic liberty, and indeed many of us believe that economic liberty is constitutionally based."[183] Bolick then proceeded to single out Bork as not being aligned with the Administration on this point: "much to our consternation Judge Bork has taken a dim view of such [economic liberty] arguments, just as he has held in disdain liberal judicial activism."[184]

The Senate rejected Bork just one month later. As mentioned above, the rejection of Bork signaled the demise of the old brand of legal conservatism, creating an opening for Bolick's movement. Whereas Bork's movement was tethered to the original constitutional order and its guarantee of state sovereignty, Bolick's movement viewed the Fourteenth Amendment's guarantees of liberty and equality as creating a new constitutional order. Whereas Bork's movement called for judicial restraint and viewed judicial review with suspicion, Bolick's movement celebrated judicial engagement but viewed state legislatures with suspicion. Whereas Bork's movement

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[182] *Id.*
[183] *Id.*
[184] DECKER, *supra* note 171, at 208.

mobilized against the Warren Court's expansive use of the Fourteenth Amendment, Bolick's movement not only celebrated the Warren Court's Rights Revolution but pushed for its expansion. As Decker writes, "[t]he traditionalist legal conservatism that Bork had long represented was no longer the only game in town."[185]

Now that there was a new game in town, Bolick had to frame how this game would operate. That is precisely what Bolick did with his first book, *Changing Course: Civil Rights at the Crossroads* (1988), which expands on many of the ideas he had developed as a government lawyer at the EEOC and DOJ. The book centers Bolick's "new civil rights strategy" (*i.e.*, his new legal conservative movement) around overruling the *Slaughter-House* decision's failure to transform the original constitutional order pursuant to the Fourteenth Amendment's guarantees of liberty and equality. Indeed, Bolick placed *Dred Scott*, *Slaughter-House*, and *Plessy v. Ferguson* in the same legal category—*i.e.*, as "departures from the principle of equality under the law."[186] And just as *Dred Scott* and *Plessy* had required radical responses to rectify the wrongs of slavery and segregation, Bolick likewise called for a "focused, aggressive legal agenda" to remedy the *Slaughter-House* Court's narrow view of economic liberty. Bolick thus recommended three prescriptions for this new movement, one of which was "to reverse the *Slaughter-House Cases*."[187]

Bolick's second book, *Unfinished Business: A Civil Rights Strategy for America's Third Strategy*, picked up where the first one left off, seeking to turn the civil rights strategy articulated in *Changing Course* into a litigation agenda for conservative public-interest lawyers.[188] In *Unfinished Business*, Bolick repeated many of the "good guy" and "bad guy" themes from the previous book, but devoted even more attention to the *Slaughter-House Cases*, dubbing it "a dark day for civil rights in America."[189]

Once again, Bolick placed *Slaughter-House* alongside *Dred Scott* and *Plessy*, because all three represent "the abdication by the

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[185] *Id*.
[186] CLINT BOLICK, CHANGING COURSE, *supra* note 176, at 122.
[187] *Id*. at 123. The other two goals were to ban affirmative action and expand the availability of school voucher programs. *Id*.
[188] The strategy is articulated most clearly in Part IV and Appendix 1. *See* CLINT BOLICK, UNFINISHED BUSINESS, *supra* note 176, at 135-149.
[189] *Id.* at 60.

judicial branch of its constitutional obligation to protect civil rights," which, Bolick asserted, "is one of the great failures of American jurisprudence."[190] Indeed, "just as *Plessy v. Ferguson* epitomized the denial of equality under law, so does *Slaughter-House* stand as a nullification of fundamental individual rights," and for this reason, "[t]he quest for civil rights is incomplete without dismantling *Slaughter-House*."[191] Bolick thus prescribed that "[a]s a long-range strategy, we should establish as our ultimate objective the reversal of the *Slaughter-House Cases*, much as the NAACP did when it set as its long-range goal the toppling of *Plessy v. Ferguson*."[192] Bolick's new movement therefore "require[d] the same tenacity, creativity, and commitment that were deployed by the NAACP and its allies."[193]

But how could this new movement get courts to overrule the *Slaughter-House* decision, a precedent that had stood for more than 100 years? Moreover, how could Bolick mobilize conservatives around this cause, which would involve invigorating the nemesis of legal conservatives, substantive due process?

Bolick acknowledged that any "[a]ttempt to expand contemporary versions of substantive due process to once again encompass economic liberty are unlikely to succeed," because of the stigma associated with *Lochner*.[194] So Bolick prescribed that this new movement pursue economic liberty through the Privileges or Immunities Clause, which "carries considerably less baggage than substantive due process and provides a sound constitutional vehicle with which to advance fundamental individual rights."[195]

Bolick also emphasized how to promote this narrative as a strategic matter. Bolick advised conservative public-interest lawyers to wrap themselves in the mantle of civil rights, carefully looking for "sympathetic plaintiffs" so that conservatives could expose how economic restrictions (such as occupational licensing) negatively affect African Americans.[196] By choosing plaintiffs that

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[190] *Id*. at 76.
[191] *Id*.
[192] *Id*.
[193] BOLICK, UNFINISHED BUSINESS, *supra* note 176, at 76.
[194] *Id*.
[195] *Id*. at 77.
[196] Notably, Bolick's law firm, Institute for Justice, perfected this strategy, relying principally on African-American plaintiffs and framing economically conservative arguments in terms of black advancement and empowerment. For

would appeal to liberals, conservative public-interest lawyers could make economic liberty prevail in "the court of public opinion."[197]

Bolick had a formidable obstacle in his way, however. How could Bolick make these arguments persuasive to conservatives? More specifically, how could Bolick get conservatives to get behind the Warren Court's view of the Fourteenth Amendment? To do this, Bolick's movement would need to develop a new intellectual framework, one that would make Bolick's agenda fit within the Federalist Society's unifying principle—fidelity to the written Constitution. Bolick needed a new originalism.

C. New Originalism

Bolick, as a practicing lawyer and legal strategist, never sought to construct a new intellectual paradigm that would make his agenda fit within originalism, the prevailing framework of legal conservatism. This was a job for academics. Several legal scholars took on this task within a decade of Bolick's enunciation of a new strategy for legal conservatism. This new originalist framework is now known as "New Originalism."[198] Over the past 20 years, New Originalism has come to dominate originalist

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example, as part of this litigation strategy, Bolick and his Institute for Justice have focused on urban issues, particularly those of interest to African Americans—such as the regulation of shoe-shining, the availability of school vouchers, and the licensing of hair-braiding practices. *See* CLINT BOLICK, VOUCHER WARS, *supra* note 176; Institute for Justice, *Washington DC Hair Braiding: Challenging Barriers to Economic Opportunity: Uqdah v. Board of Cosmetology*, https://ij.org/case/taalib-din-abdul-uqdah-v-district-of-columbia-2/.

[197] BOLICK, VOUCHER WARS, *supra* note 176, at 142.

[198] For a helpful summary of the differences between Old Originalism and New Originalism, see Lawrence B. Solum, *Legal Theory Lexicon 071: The New Originalism*, LEGAL THEORY BLOG (Oct. 14, 2018), https://lsolum.typepad.com/legaltheory/2018/10/legal-theory-lexicon-the-new-originalism.html. The term "New Originalism" was first used in 1996 by Evan Nadel, but the methodology itself was popularized in Randy Barnett's and Keith Whittington's scholarship on originalism and legal theory. *See* Randy E. Barnett, *The Relevance of the Framers' Intent,* 19 HARV. J.L. & PUB. POL'Y 403 (1996); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); and KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

scholarship, to the point that the form of originalism practiced by Bork and Berger is on the verge of extinction. New Originalism is a broad term, referring to a cluster of related changes in how originalism is conceptualized and practiced as a mode of constitutional interpretation. Below, I will focus on three conceptual and political distinctions between New Originalism and the "original intent" originalism or Old Originalism favored by figures like Bork and Berger. As this discussion will make clear, the development of New Originalism was a significant factor in prompting social conservatives like Vermeule to begin looking beyond originalism.

1. Three Conceptual Differences Between Old Originalism and New Originalism

One important conceptual difference between Old Originalism and New Originalism is that the New Originalists furthered Justice Scalia's "public meaning" originalism by rejecting Bork's and Berger's focus on "original intent" as the guidepost for originalist interpretation. The New Originalists rejected "original intent" on the ground that constitutional provisions are ratified through a collective process, with no singular intent arising from that process. The better approach, the New Originalists proclaimed, is to look at the text alone. The text, after all, is what the public understood the constitutional provision to mean. The text, then, is what constrains successive constitutional generations. In other words, it is not intentions that constitute the law; it is the text of the law itself.

This is all quite sensible as a theoretical matter, but this shift from intentions to text created a significant interpretive problem: How do we determine the meaning of the language itself, without regard to the intentions of the relevant framers and ratifiers? The answer was to distinguish between two facets of discerning textual meaning: interpreting the meaning and constructing the meaning.

The second important conceptual difference between Old Originalism and New Originalism is that New Originalists distinguish between text whose linguistic meaning is clear and may therefore be directly interpreted without regard to judicial doctrine, and text whose linguistic meaning is not clear and therefore must be constructed through judicial methods (such as the use of

precedent). New Originalists call these, respectively, the "interpretation zone" and "construction zone."[199]

This need for judicial construction is largely a problem of New Originalism's own making. While there was some indeterminacy under the Old Originalist focus on intentions (because, as mentioned above, it is difficult to discern particular intentions from the ratification process), there was at least consensus under the Old Originalism that the Constitution's relationship to topics that no one could have imagined being on the table in 1868 (such as the constitutional status of abortion, homosexuality, and same-sex marriage) was not changed by the Fourteenth Amendment. While "original intent" originalism left some space for disagreement about the scope of the Amendment in its relationship to race relations—*because that was the topic of the Amendment*—the Old Originalist framework at least foreclosed originalist arguments on matters outside of this subject.

New Originalism made all of these previously foreclosed arguments up for grabs. A good example of this is that, as soon as same-sex marriage became a constitutional controversy, several originalist scholars began wondering whether the original public meaning of the Fourteenth Amendment required expanding the definition of marriage.[200] Ilya Somin even concluded before *Obergefell* was decided that "it is no longer possible to claim that there is no serious originalist case for striking down laws banning same-sex marriage."[201] Why was it "no longer possible"?

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[199] *See* Lawrence B. Solum, *Legal Theory Lexicon 071: The New Originalism*, LEGAL THEORY BLOG (Oct. 14, 2018), https://lsolum.typepad.com/legaltheory/2018/10/legal-theory-lexicon-the-new-originalism.html.

[200] *See, e.g.*, Ilya Somin, *Originalism Is Broad Enough To Include Arguments for a Constitutional Right to Same-Sex Marriage*, THE WASHINGTON POST: VOLOKH CONSPIRACY (Jan. 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/originalism-is-broad-enough-to-include-arguments-for-a-constitutional-right-to-same-sex-marriage/; Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648 (2016).

[201] Ilya Somin, *William Eskridge On Originalism and Same-Sex Marriage,* THE WASHINGTON POST: VOLOKH CONSPIRACY (January 23, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/23/william-eskridge-on-originalism-and-same-sex-marriage/.

Because originalism was no longer the originalism of the Bork and Berger era. It was now the era of New Originalism. And this allowed for—and was arguably designed for—putting all of the progressive causes directly on the originalist table.

The third important conceptual difference is that New Originalism made originalism a distinctly *legal* enterprise, placing it firmly within the domain of law professors, lawyers, and judges. This is in sharp contrast with how Old Originalism had operated, as a question of historical intent, subject to the inquiries of political scientists and historians. This shift in New Originalism is often referred to as the "legal turn."[202] The cause of this legal turn is that New Originalism's focus on text over intent (the first conceptual distinction) led to the interpretation/construction distinction (the second conceptual distinction). And this meant that many constitutional provisions, and just about all of the constitutional rights subject to litigation, would fall within the construction zone—the exclusive domain of law professors, lawyers, and judges.

As we will see below, these three conceptual changes brought three important practical consequences.

2. Three Political Differences Between Old Originalism and New Originalism

One important political difference is that, because New Originalism brought with it a legal turn, New Originalists have tended to be more accommodating of judicial power than Old Originalists like Bork and Berger had been. Indeed, once originalism became a legal exercise in skillfully making "good faith" arguments in the construction zone, rather than a historical investigation of the ratification process, it followed that judges, under the direction of originalist arguments made by lawyers and law professors, are well equipped to effectuate the "public meaning" of the Constitution. Whereas the Old Originalists were concerned about the legitimacy problems in unelected, life-tenured

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[202] *See, e.g.*, John O. McGinnis & Mike Rappaport, *The Legal Turn*, LAW AND LIBERTY (April 2, 2018), https://lawliberty.org/forum/legal-turn-constitution-originalism-original-methods-law/. For a more critical take on the "legal turn," see Jesse Merriam, *Originalism's Legal Turn as a Libertarian Turn*, LAW AND LIBERTY (MAY 8, 2018), https://lawliberty.org/libertarian-originalism/.

federal judges constraining legislative majorities through amorphous constitutional language, the New Originalists have expressed a different concern—the legitimacy problems in federal judges abdicating their Article III responsibility to effectuate the Constitution's guarantees.

The policy implications of this legal turn are striking: Whereas the Old Originalists favored judicial restraint in all situations where the historical intentions were unclear, the New Originalists favor judicial activism (or what they call "judicial engagement") in precisely those situations where the text is unclear (because these are the cases that require the most judicial construction).[203]

This also has the consequence of shifting judicial archetypes. Whereas the Old Originalists saw the Warren Court's activism as a usurpation of governmental power, the New Originalists see the Warren Court's activism as a fulfillment of judicial responsibility. And whereas the Old Originalists saw the Rehnquist Court's restraint as a dutiful compliance with limitations on judicial (and indeed federal) power, the New Originalists see the Rehnquist Court's restraint as flouting judicial duty and facilitating majoritarian oppression.

A second important political difference is that New Originalism is, almost by definition, less conservative than Old Originalism. The old approach to originalism sought to bind judges to the political, cultural, and moral landscape that surrounded the adoption of the constitutional provision in question. That meant that the Fourteenth Amendment had the limited purpose of ensuring that—when it came to the administration of judicial procedures, the owning of property, and the enforceability of contracts—citizens must be treated alike, regardless of racial identity. Given that the framers and ratifiers of the 39th Congress were obviously not thinking about abortion, homosexuality, or same-sex marriage when they adopted the Fourteenth Amendment, the Old Originalist understanding of the Fourteenth Amendment forbad federal judges to use the Fourteenth Amendment as a basis for constraining state and local governments on any of these issues.

But New Originalism liberates federal judges from the chains of the past, sweeping away Old Originalism's anchor to the

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[203] *See* Merriam, *Originalism's Legal Turn as a Libertarian Turn*, *supra* note 202, for further explanation of how New Originalism expands judicial power.

intentions of particular historical figures. Under New Originalism, modern day interpreters—with modern day values about race, gender, and sexuality—are free, and perhaps even required, to supply new social understandings in the process of constructing the original meaning of the Fourteenth Amendment.[204]

The Old Originalism was conservative in that it tethered interpreters not just to the words of the past, but *the modes of life that animated those words*. The New Originalism, by contrast, seeks to liberate us from the past by warranting modern day interpreters to filter those words through modern day prejudices. And some New Originalists even celebrate this adaptability as essential to originalism: "Revising the application of fixed principles to take account of improved understanding," Somin writes, "is not only compatible with originalism, but actually an essential element of most, if not all, versions of the theory."[205] Without such adaptation, "the very principles that originalists seek to conserve and enforce are likely to disappear over time, as our knowledge increases and social conditions change from those prevalent at the time of enactment."[206]

This may be an accurate description of New Originalism, but Old Originalism did not seek to conserve *principles*. Old Originalism sought to conserve ways of life. That is what American conservatism, at least of the traditionalist variety, has sought to conserve. Moreover, "[r]evising the application of fixed principles to take account of improved understanding" was not only *not* essential to Old Originalism, but it was *incompatible* with it. The whole idea of Old Originalism was to forbid such judicial "revising." New Originalism has not only permitted it, but it has also made judicial revisionism "an essential element" of how originalism operates.

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[204] *See* Ilya Somin, *How to Figure Out When Laws Banning Same-Sex Marriage Become Unconstitutional and Why the Precise Date May Not Matter*, THE VOLOKH CONSPIRACY (Mar. 26, 2013), https://volokh.com/2013/03/26/how-to-figure-out-when-laws-banning-same-sex-marriage-became-unconstitutional-and-why-the-precise-date-may-not-matter/.

[205] Ilya Somin, *Originalism and same-sex marriage revisited – a further rejoinder to Orin Kerr*, THE WASHINGTON POST: THE VOLOKH CONSPIRACY (Jan. 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/29/originalism-and-same-sex-marriage-revisited-a-further-rejoinder-to-orin-kerr/.

[206] *Id*.

A third important political difference is that New Originalism's move from historically grounded intentions to linguistically determined meaning made more relevant *who* was practicing originalism. This *who* question is significant because, as discussed above, originalism has become thoroughly aligned with the Federalist Society (*i.e.*, the small number of originalists in the legal academy play leading roles within the Federalist Society, and just about all Federalist Society members identify in some sense as originalists).[207] By opening up this *who* question, New Originalism has empowered the Federalist Society to act as managers in policing the boundaries of originalism. These managers could decide what counts as legitimate conclusions within the originalist enterprise. This is significant because the Federalist Society's political orientation has shifted over time, to become less conservative and more libertarian, largely because the legal academy has become increasingly dominated by social progressives.[208]

As an example of the distance between the Federalist Society leadership and the Republican electorate, consider how, just a month before the 2016 election, an election largely determined by the white evangelical backlash against establishment Republicans,[209] many of the leading Federalist Society members signed a statement, *Originalists Against Trump*, pledging their opposition to the Republican candidate, purportedly on "originalist" grounds.[210]

This transition within the Federalist Society has been particularly striking on Fourteenth Amendment issues. Consider how many of the Federalist Society scholars were the leading voices in supporting further incorporation of the Bill of Rights – in *McDonald v. Chicago*[211] and *Timbs v. Indiana*.[212] As Michael

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[207] On the relationship between originalism and the Federalist Society, see AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2014).

[208] *See* Jesse Merriam, *Countering the Counterrevolution Narrative*, MODERN AGE, Winter 2018, at 5-12.

[209] *See* Jessica Martinez & Greg Smith, *How the faithful voted: A preliminary 2016 analysis*, PEW RESEARCH CENTER (November 9, 2016), https://www.pewresearch.org/fact-tank/2016/11/09/how-the-faithful-voted-a-preliminary-2016-analysis/.

[210] Originalists Against Trump, *2016 Statement*, https://originalistsagainsttrump.wordpress.com/2016-statement/.

[211] 561 U.S. 742 (2010).

Ramsey observed shortly after the *Timbs* decision, "full incorporation, or something close to it, has solid originalist foundations," and "the modern center-right Justices … are influenced by this view."[213] What had been *opposed* by legal conservatives, as a threat to state sovereignty and the original constitutional order, is now *celebrated* by legal conservatives. As Ramsey wrote, "originalists should be happy" that full incorporation will soon be the law.[214] In other words, precisely what stirred Berger and Bork into jurisprudential fits just 40 years ago should now make legal conservatives happy.

As a final note on this subject, consider a January 2019 Federalist Society panel, entitled "Who's Afraid of Substantive Due Process?", at the Federalist Society's 21st Annual Faculty Conference. The most striking thing about the panel is that *none* of the panelists—again this was a panel run by *the Federalist Society*, the most feared conservative organization in the country[215]—expressed fear of substantive due process. Indeed, the panelists all agreed that some version of our current doctrine is warranted by the original public meaning of the Fourteenth Amendment.[216] Keep in mind, again, that this was in 2019, just four years after the Supreme Court's landmark decision to redefine the meaning of marriage, partly through Justice Kennedy's use of the Court's substantive due process doctrine.[217]

The panelists not only expressed that they were not afraid of substantive due process, but they did not answer *who* was afraid of the doctrine. The answer, as discussed throughout this Article, is that the last two generations of legal conservatives have been terrified of substantive due process. More specifically, this

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[212] 139 S. Ct. 682 (2019).
[213] Michael Ramsey, *Apodaca, Ramos, Incorporation, and Kurt Lash*, THE ORIGINALISM BLOG (Mar. 25, 2019), https://originalismblog.typepad.com/the-originalism-blog/2019/03/apodaca-ramos-incorporation-and-kurt-lashmichael-ramsey.html.
[214] *Id*.
[215] *See* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2014).
[216] The Federalist Society, *Who's Afraid of Substantive Due Process? [21st Annual Faculty Conference]*, YouTube (Jan. 29, 2019), https://www.youtube.com/watch?v=eE10EIA9E4Q.
[217] I say "partly" because there is some ambiguity in Justice Kennedy's *Obergefell* opinion as to whether his reasoning also rested on equal protection grounds.

organization, the Federalist Society, the premier institution for conservative legal thought, was built on opposition to substantive due process, particularly through the work of its founding members, Justice Scalia and Judge Bork. Indeed, it is not an overstatement to say that the Federalist Society has been more responsible than any other group in the nation for articulating and developing a fear of substantive due process. If Federalist Society members are no longer afraid of substantive due process, then no one is.

Nor did the panelists discuss the *practical consequences* of substantive due process—namely that, over the last 100 years, substantive due process has meant two things: (1) the expansion of federal power through the incorporation of the Bill of Rights, and (2) the judicially imposed transformation of family structure and sexual morality. That is, it has meant more victories for progressive interventions in state and local affairs.

If that is what originalism means, then it should not come as a surprise that conservatives like Vermeule would start looking "beyond originalism."

CONCLUSION

Understanding the recent call among social conservatives to look "beyond originalism" requires an understanding of social movements and political trajectories. It is particularly important to understand what animated the rise of legal conservatism and originalism in the 1970s—the culture wars—and how the will to fight these wars, at least the will within the legal Right, began to fade away in the 1990s, leaving both conservatism and originalism hollow. This was not, however, a natural fading away, as though both the Right and Left came to a mutual agreement on sexuality, the family, and the role of religion. It was a fading away through defeat.

In the 1990s—after the triumph over Bork's nomination, the decline of marriage as an institution, and the drop in religious worship—the cultural Left's march through the institutions accelerated, and this was perhaps most evident on the Supreme Court. The core of the culture war, the *Roe v. Wade* decision, was pushed to the side in *Planned Parenthood of Se. Pa. v. Casey*, with three Republican-appointed Justices joining Justices Blackmun and Stevens to affirm *Roe's* "essential holding" regarding a woman's

right to an abortion under the Due Process Clause.[218] Just four years later, the first major gay rights case came along. Seven years after that, the Supreme Court, in *Lawrence v. Texas*,[219] overruled *Bowers v. Hardwick*,[220] again by appealing to substantive due process to find a right to engage in same-sex sodomy. That year also saw the first state supreme court decision finding a right to same-sex marriage, through a state version of substantive due process. It was just a matter of time before the Supreme Court would find such a right in the Fourteenth Amendment, which is precisely what the Court did, just 12 years later, in *Obergefell v. Hodges*,[221] through a hybrid of substantive due process and equal protection reasoning.

Obergefell was, for many, a watershed moment, illustrating just how transformative the Supreme Court's Fourteenth Amendment power over social relations can be. Indeed, the Supreme Court's substantive due process doctrine has, over the last 50 years, meant roughly a million abortions per year, a new conception of the family, and a new definition of marriage. Justice Alito's dissent in *Obergefell* sharply asserted the broader significance of the decision: "I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation."[222]

Scholars have taken note of the deep indictment of the legal academy in Justice Alito's phrasing. A "deep and perhaps irremediable corruption," indeed. But perhaps the corruption is also in originalism itself and the organizations with which Justice Alito identifies. The corruption, in fact, may be even deeper than Alito suggested it is, in that it is irremediable because there is no longer any opposition to it.

Now, six years after *Obergefell*, the Court is encountering a new crisis in the *Dobbs* case. This time the stakes are even higher, because there is now a growing movement on the Right against

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[218] 505 U.S. 833, 845-47 (1992).
[219] 539 U.S. 588 (2003).
[220] 478 U.S. 186 (1986).
[221] 576 U.S. 644 (2015).
[222] *Id*. at 742.

originalism and the Federalist Society—the two forces that in the 1980s promised to bring about a conservative counterrevolution but ended up facilitating the liberal revolution.

Josh Blackman claims that "*Dobbs* is the fulcrum on which [the legal conservative] movement pivots," and a *Dobbs* decision that affirms *Roe* "could be the end of FedSoc as we know it." But the analysis in this Article suggests that *Dobbs* is merely a flashpoint, bringing to the surface more profound problems within the legal conservative movement. In a sense, then, my prognosis for legal conservatism is not as dire as the one offered by Blackman: *Dobbs* will not determine the movement's future. But in another sense, my prognosis is more dire: *Dobbs* represents not the possibility of demise but the symptom of a disease that has already taken root. So while it may be too early to write the obituary for the legal conservative movement, it also may be too late to save it.