

THE FEDERALIST SOCIETY AND MOVEMENT CONSERVATISM:
HOW A FRACTIOUS COALITION ON THE RIGHT
IS CHANGING CONSTITUTIONAL LAW
AND THE WAY WE TALK AND THINK ABOUT IT

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ABSTRACT

JONATHAN RIEHL: The Federalist Society and Movement Conservatism: How a Fractious Coalition on the Right Is Changing Constitutional Law And the Way We Talk and Think About It
(Under the direction of J. Robert Cox)

This study is the first in-depth examination of the Federalist Society, the nation's preeminent organization of conservative and libertarian lawyers. Founded by a few enterprising young college friends in the early days of the Reagan administration, its participants now number 40,000 lawyers, policymakers, judges, and law students. The Society functions as a forum for debate, intellectual exchange, and engagement between the factions on the right as well as their liberal opponents—hence my use of rhetorical theory. I explore how Federalists have promoted conservative legal theories of interpretation, such as originalism and textualism, and also how have also fueled the broader project of the American right to unmake the liberal consensus on a wide range of legal and social issues from Affirmative Action and race to foreign policy.

By serving as a forum for the generation and incubation of conservative legal thought, the Federalist Society has provided an invaluable intellectual proving ground; and with chapters now active at all accredited law schools in the country, the Society is widening its reach and providing a home for aspiring conservative lawyers, whether they seek to go into private practice, public service, or the judiciary. This is the Federalist “pipeline”: an ever-expanding network that spreads conservative ideas. It is the engine that drives the boldest Federalist goal: changing legal culture.

I examine how Federalist conservatives are making headway with this project—“getting a seat at the table,” as former Attorney General Edwin Meese put it. My research draws on over 100 interviews conducted with the Federalist rank-and-file as well as conservative leaders, including a number of federal judges associated with the Society. In addition to providing a critical history of the group, I consider a number of conservative legal theories, often the subject of Federalist Society events and publications. I focus in particular on several key individuals: Justice Antonin Scalia and his modes of textual interpretation; Attorney General Meese and “originalism”; Professor Richard Epstein and libertarianism; former U.N. Ambassador John Bolton and national sovereignty.

I conclude that the Federalists deserve commendation for their efforts to engage intellectually with their opponents and with the many factions on the right. I also conclude that the left needs to counter the Federalist project with a similarly vigorous and open strategy—and organization—of their own.

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PROLOGUE

HARRIET MIERS AND THE MOVEMENT

Sandra Day O'Connor announced her retirement from the Supreme Court of the United States on July 1, 2005, presenting President George W. Bush with his first opportunity to nominate a Justice to the highest court in the land. Although it had hardly been a central issue in either of his presidential campaigns, Bush had let it be known that he preferred conservative approaches to the law and declared his intention to appoint Justices in the mold of Antonin Scalia and Clarence Thomas. Among the 40,000 conservative and libertarian lawyers of the Federalist Society—founded as a student group with then-Professor Scalia as their first faculty sponsor—Bush's backing carried a lot of weight.

Two and a half weeks later, Bush nominated D.C. Circuit Judge John G. Roberts Jr. to succeed O'Connor. Roberts had worked in the Reagan justice department, and also in private practice—where he had argued an impressive number of cases before the Supreme Court. He had no academic writings to his name and had been on the D.C. circuit barely long enough to author a dozen opinions; his “paper trail” was exceedingly thin. He seemed an ideal pick, well-respected, bright, and clearly conservative.

Then on September 3, 2005, Chief Justice William H. Rehnquist died in office, presenting Bush with another vacancy to fill. In a move that surprised some Court watchers, he bumped Roberts up to fill Rehnquist's seat—there is no requirement that Chief Justices already be sitting on the Court. Roberts had clerked for Rehnquist, and his familiar presence

as an advocate before his potential colleagues suggested he would be smoothly accepted as one of their brethren. There remained O'Connor's empty chair to fill.

Pressure quickly mounted in the press for Bush to nominate a woman. O'Connor, after all, had been the first female to be nominated to the high court and was generally viewed as a centrist with appeal to both liberals and conservatives; she consistently cast a swing vote in key cases on controversial issues like abortion rights. The leaks regarding Bush's "short list" included several women, but none mentioned the eventual nominee, White House Counsel Harriet Miers.

Washington, and the rest of the country, was baffled. Miers had never served as a judge and was hardly viewed as an intellectual luminary, as Roberts was. Her greatest qualifications for the post appeared to be that she was first, a Bush loyalist, having served in his administrations in Texas as well as Washington, and second, female.

It took several days for the punditocracy to react. It was unclear how Miers's name had been put forward in the first place; some said it was just another example of Bush's placing loyalty above all else; others claimed Democratic Senate Minority Leader Harry Reid had suggested Miers to Bush as a compromise candidate—perhaps because Reid had some inside knowledge about her views on abortion rights. As the hours and days ticked by, it became clear Miers's staunchest opposition would come not from Reid's Democrats, most of whom withheld judgment, but from the President's base. Most perturbed were those who had actually been toiling in the vineyards of the law since the last controversial nomination of a conservative judge—Robert Bork.

And Bork himself was out in front going after Miers, who had even less of a paper trail than Roberts. On CNN, Bork reminded viewers of Bush's pledge to nominate judges

like Scalia and Thomas. “That's what he said he would do.” Bork said. “There’s no evidence that this a judge like Scalia or Thomas.” He went further. Not only was Miers something of a blank slate, but there was no end of other qualified conservatives (people like Roberts) Bush might have selected. “It’s a slap in the face to the conservatives that have been building a legal movement,”¹ he intoned. A big part of that movement—if not the only part—has for the past 25 years been the Federalist Society. Bork taught one of the group’s founders Constitutional law, hired two others as his law clerks, and has served as national co-chairman of its board of trustees for sixteen years.

In the wake of Reagan’s election in 1980, part of the reason the group was started was to identify, mentor, and promote bright young conservatives who would work to change American legal culture—in academia, government, and on the bench. And as Judge A. Raymond Randolph of the Washington, D.C. Circuit Court of Appeals, a longtime Federalist Society booster, told me, “The legal culture starts with the Supreme Court.”

Among the people put in a real bind by the situation was Leonard Leo, the Federalists’ Vice President who was on a “leave of absence” to advise the White House on possible nominees. Stuck between the rock of strong conservative opposition to the nomination among the Society’s membership and the hard place of loyalty to the President, Leo walked the line. He supported the nomination, but told me he understood the opposition. “There’s no question that people made their assessment and felt this was not consistent with conservative legal principles that had been articulated over the years,” he said in an interview. “Individuals in the movement are not always going to embrace what the political power base does.”

¹ *American Morning*, CNN, New York, N.Y., 11 October 2005.

The Movement. Since World War II, conservatives in America have had an identity as a movement, launched in large part by William F. Buckley and his colleagues at *National Review*. There have since then been two kinds of conservatives: “movement” types, and...Republicans. The divide was there as far back as 1948, when conservatives who would eventually form The Movement backed Senator Robert Taft of Ohio against Eisenhower. The Movement balked at Nixon from the get-go, and shook its collective head when he self-destructed. The Movement was bored with Ford and backed Reagan first in '76 (some had already been backing him in '68) and then propelled him to victory in '80.

The distinction between movement conservatives and Republicans has been less a factor in contemporary politics, with Bill Clinton's presidency producing a largely unified Republican right in opposition to a Democratic administration and George W. Bush—until recently—producing unity from the other, affirmative side. Miers pulled the proverbial gauze off the wounds.

“You will either respond as a Republican—my party right or wrong—or as a conservative, from a perspective as ideas and principles,” said John Fund of *The Wall Street Journal*—one of Bork's allies in defeating the Miers nomination. Fund, though not a lawyer, has long been associated with the Federalist Society and was the keynote speaker at the Student Division's conference held less than a year after the Miers nomination was effectively torpedoed and the president sent back to the drawing board. “It was the finest hour of the Federalist Society, because Samuel Alito now sits on the Supreme Court,” he said to a record-setting crowd of over 1,200 young conservative law students. “When President Bush has his Harriet Miers moment,” he said, the conservative movement “rose up as one. It played an enormous role when President Bush decided he was going to be results oriented.”

“You and I and the Federalist Society are about something more important,” he continued, “a palpable and reasonable standing on principle.” This drew a standing ovation. Leonard Leo was watching, and probably not applauding, though I didn’t ask. “There’s no question in my mind that Judge Bork and John Fund believed that this was a difference between principle and politics, and that the principled thing to do would have been to nominate someone else,” he said.

The Movement, led by people like Bork, Fund, Bill Kristol of the *Weekly Standard* and ex-Bush speechwriter David Frum (author of the “Axis of Evil”) were relentless and were eventually able to muster enough force so that Bush had to back down—with this most stubborn of presidents, no small accomplishment. Before she had even been given a Congressional hearing, Harriet Miers was history.

Her demise proved that the difference between Republicans of the “I-support-the-president” variety and Movement Conservatives still exists. And when liberal critics often point out the apparent contradiction of the Federalists’ claim to “beleaguered minority” status when Republicans occupy the White House, have majorities in both houses of Congress, and a majority of GOP nominees on the Supreme Court, they miss the vital distinction between the Movement and the Party. There may be more or less congruence between the two on any given issue at any given time, but when it comes to legal conservatives—many if not most of whom are Federalists—this is a distinction with a very big difference. It is a difference that directly affected the makeup of the United States Supreme Court.

And while the Federalist Society *as such* did not defeat the Miers nomination—White House advisor Leo would chafe at the suggestion—“the legal conservative movement” did.

And there isn't much to the legal conservative movement other than the Federalist Society.
At least that's what Leonard Leo told me.

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By the time Miers was forced to withdraw her name from consideration, even most GOP loyalists had joined the conservative hard core in opposing a nominee who had started to look incompetent as well as ideologically unreliable. Coalition building like this has been integral to postwar movement conservatism since its inception, and part of my thesis in this work is to illustrate how much difference exists, still today, on the right. Even within the Federalist Society's explicitly more intellectual and professional forum, a veritable cacophony of different positions exist. Movement conservatism is a coalition, as is its Federalist flank.

Critics on the left who do not recognize the teeth-gritting unity of the right—and the legal Right in particular—do so at their own peril. As all rhetoricians know, it is impossible to persuade if one does not understand one's audience. Likewise, it is difficult to defeat a foe if without properly grasping its composition. If you see a conspiracy, your strategy will be aimed at undoing a conspiracy. If you perceive in your opponents a brainwashed herd of know-nothings, your rhetorical strategy to discredit them will reflect this perception. If the perception is wrong, the strategy will not succeed. It might even backfire.

The point is this: The right is a diverse, fractured coalition—social conservatives, libertarians, Wall Street Republicans, populists, foreign policy hawks, evangelicals, pragmatists. The Federalist Society is a microcosm of this diversity. Even among a self-

selecting group of politically conservative, highly trained professionals, the lawyers, law students, and academics that make up the Society's 40,000 participants² span a broad range of intellectual and political positions. Some of the divisions are stark; some are more nuanced; some can be confusing. Many are contradictory, and the factions frequently clash. The Federalist Society is anything but an echo chamber. It is a forum for debate—but always debate in the service of a political and legal project.

In Chapter One I will lay out the way movement conservatism challenged the postwar liberal consensus both intellectually and rhetorically. By rhetorically I mean persuasively, and that in turn meant conservatives had to identify their key audiences, build networks, appeal to existing sentiments and perceptions, and develop a strategy for political success. From the very start, ur-conservatives at Bill Buckley's *National Review* and among the Goldwaterites, understood they had to speak to multiple audiences at the same time. There was an intellectual and theoretical aspect to the movement, and there was a political one. Rhetorical strategies differed; Goldwater's *Conscience of a Conservative* was not written in the erudite, elliptical prose of Buckley's weekly columns. Conservative rhetoric has thus always reflected a continuum of style as well as substance. We see this starkly on the right today: One can hardly imagine *New York Times* columnist David Brooks or *Weekly Standard* editor William Kristol hamming it up with Ann Coulter. One can also hardly imagine them using her language.

With its striped-suit demeanor and wonkish agenda, the Federalist Society is clearly positioned on the intellectual end of the rhetorical continuum. (Though Federalist Society student chapters sometimes do indulge in the delight of hosting bombthrowers like Coulter

² This number reflects the mailing list, and is the number commonly cited by Federalist Society officials and by journalists. Dues paying membership is substantially lower.

on their campuses and watching their liberal friends pull their hair out.) These are the elite, and they know it. And while it may strike some as problematic that the conservative braintrust is content to make common cause with the bombthrowers, a solid majority of conservatives I asked about this did not. Ultimately, theirs is a practical political compromise: If Bill Buckley had written *Conscience of a Conservative* one must assume it would not have sold all those millions of copies. If Professor Richard Epstein were to take over Rush Limbaugh's radio contract, ratings would plummet. (No offense meant to Professor Epstein, a thoroughly witty and caustic raconteur.) An intellectual project speaks in a different language and to a different audience, but the project of modern conservatism has succeeded in large part because it always linked the intellectual to the popular. As Aristotle might say, using his definitions of two fundamental categories of rhetoric, the *logos* (logic, rationality) of elite political discussion compliments the *pathos* (passions, emotionalism) of the popular.

My work here is explicitly concerned with the intellectual project of the legal right, but the popular enters into consideration at some important moments. After all, turning "activist judges" into a term of common currency required that the Limbaughs, Coulters, and Pat Robertsons integrate that term, and its desired meanings, into their vocabulary. Popular support means political support, which means electoral victory, which means judicial appointments and policy changes.

In Part II, we move from a consideration of how the conservative movement has functioned rhetorically to a specific focus on the Federalist Society. In two chapters, I review the organization's history, expansion, networks, and functions. A great deal of this material is drawn from first-person accounts and my own experiences with the Society and its members.

The history of the Federalist Society is a case study in how conservatives have translated theory into practice: As Leonard Leo told me, the two missions of the organization are education and what he calls “the pipeline.” Ideas matter, but so do results. And as we will see, what comes out of the pipeline is not a brainwashed phalanx of Rush Limbaugh “dittoheads.” It is a cadre of independent-thinking young lawyers who embrace debate and engagement in the service of a very broad political ideology.

The ideology—legal conservatism—is, however, so broad that the term is almost inappropriate. There are varying levels of adherence to legal methodologies such as originalism, textualism, or strict constructionism. Some Federalists favor a consideration of social context; some believe traditions should impact textual meanings; some would have the conversation begin and end with Merriam-Webster (though even then there is the debate over whether to use a dictionary printed at the time the relevant law was *passed* or at the time it is being evaluated by the judge). We will take up some of these questions of legal interpretation in the first three chapters of Part III.

In Chapter Four, we review the controversies stirred up by Attorney General Edwin Meese when, in a series of speeches, he launched the popular debate over “originalism” and the “intent of the Founders.” Here I will consider the evolution of “original intent” as a rhetorical tool in both legal and popular settings. As we will see, originalists come in many varieties. In Chapter Five originalism is put to the test with the advent of the Civil Rights era and the undoing of legal racial segregation; many of the vaunted Founders owned slaves—what does this say about Meese’s theory, many ask? In our contemporary setting, we will consider how the debate over Affirmative Action has reignited many of the philosophical as well as legal controversies about the role of courts in righting past societal wrongs.

From here we turn to another essential tool in the Federalist toolbox: Textualism. Differentiated from originalism on conceptual grounds but still linked to it, textualists range in their persuasions from strict formalists to textualist-contextualists like Justice Antonin Scalia. The Federalist Society's first faculty sponsor when it was founded 25 years ago, Scalia is the focus of this chapter mostly due to his emphasis on the importance cultural traditions bring to bear on the law. Embraced by many social conservatives for this reason, Scalia's jurisprudence defends tradition against a rhetorically constructed assault by—you guessed it—those liberal activist judges. Scalia is additionally contrasted by a man who might, in another day, have been named as his colleague: Judge Robert Bork. A longtime Federalist booster, Bork's social conservatism is branded by more libertarian conservatives as "majoritarianism." The pejorative is meant to suggest the danger of putting everything to a vote. Majorities can be wrong, many formalists and libertarians argue. Even unconstitutionally wrong.

In Chapters Seven and Eight we turn to additional substantive areas of law that have been important to the past and future of the Federalists and legal conservatism. First, I review the development and impact of Richard Epstein's work on property rights, a vital component of both the broader "Law and Economics" school and the more controversial "Constitution in Exile" movement. The latter holds that Constitutional theory jumped completely off the rails during the New Deal era, calling into question both Supreme Court jurisprudence and the public policy legacy of the Roosevelt years. Epstein's accomplishments as a lifelong academic are considered alongside his role within the Federalist Society, where he impacted other conservative schools of thought.

Epstein is sometimes seen as libertarian, though he prefers the more specific label “classical liberal”; the gradations here do become complex and at times, heated. Enraging some conservatives, a cohort of libertarians actually embrace what social conservatives see as one more variety of dreaded “judicial activism”—if it means the undoing the New Deal. The libertarian-conservative split has been present ever since Buckley and company launched their “fusionist” project in the 1950s; the fusion being between anti-Communists and Wall Street Republicans. The project was put into effect by Buckley’s deputy Frank Meyer, whose son Eugene grew up to be...the Federalist Society’s only president.

We conclude with a look at the Federalist Society’s currently declared area of focus: international law and sovereignty. Led by high-profile figures such as former United Nations Representative John Bolton, these “New Sovereignists” have argued for a rejection of U.N. multilateralism and a bold assertion of American national interests, particularly in light of the terrorist attacks of September 11, 2001. The so-called “neo-conservatives” are part of this milieu, but only a part. The Federalist coalition has united around the issue of international law not necessarily because of Bush’s aggressive Middle East policies (which are no more popular among the Federalists than the population at large) but for deeper theoretical reasons. The Federalist elite are, in fact, deeply concerned with the philosophical underpinnings of law, and they have engaged sovereignty on this level. Given the mess in Iraq, though, the fate of their theoretical project is hardly secure.

A final word before we turn to the Federalists’ history. After years immersed in the group’s culture and its legal productions, the recurring question I landed on time after time was: What holds this surprisingly chaotic, argumentative group together? And how is it that

they, like the right in general—at least in its Reagan heyday—have managed to forge such a strong sense of unity and group identity?

Ultimately, as we will see, the answer is twofold. On a theoretical and even philosophical level, Federalists simply believe they have more in common with each other than with the liberal left. They know what they are against, or at least they think they do: The Living Constitution. And certainly, an enemy can be a strong unifier. Secondly, however, is a rhetorically more significant factor. The Federalists, for all their internal conflict and contradiction, are held together by an agreement on method.

Debate—with both liberals and conservatives of unlike mind—is the only real rule of engagement. Corresponding well with the rules of legal procedure Federalists know well, opposing advocates are heard and granted respect; debate is pointed but rarely personal. The medium, one might even say, is the message: Their common commitment is to a mode of discourse. One must conclude that it has served their broader political and legal project well: They have disrupted the postwar liberal consensus in the realm of the law and provided intellectual heft and manpower for the right's broader social and political project.

CHAPTER 1

RHETORIC AND THE RISE OF THE RIGHT

The Miers meltdown is our entrée, but before embarking on the exploration of how conservatives have fundamentally reframed the debate over Constitutional law and the role of the courts, we need to first take a step back and consider the broader context—the ascendancy of the New Right in postwar America. The goal here, however, is not to present a hyper-condensed version of this story; any number of good accounts are now available. Rather, I will be taking an explicitly rhetorical look at the rise of the right, considering the persuasive strategies put to use by conservatives as they went about upsetting the comfortable consensus of the Eisenhower era.

The later chapters on Constitutional law—and law in general—will show how rhetoric links the conservatives’ political project with their legal one. By rhetoric I mean not only my means of critical evaluation—rhetoric as a way of reading—but also the second sense I introduced earlier: the processes of persuasion, as it occurs in the interpretation and reinterpretation of texts and events, the reframing of questions and the means of rearticulating social reality. We are communicative animals, and we persuade each other all the time—from the water cooler to the high stakes of presidential elections. We don’t always realize how persuasion is being worked upon us—by our friends, teachers, and family, or by the advertisers, consultants, and other professionals who construct our modern day lived experience. As a discipline, rhetoric demands a wide-angle lens, for it asks us to attune

ourselves to the arguments being made to us (subtle as well as overt) and to question our assumptions about what is *unarguably* true. Much of politics—and law—boils down to just that. How receptive will an audience be toward your argument? How persuadable are they? When will they start seeing your persuasion as manipulation? How can you speak in a way that will resonate with them, engage them, help them look at their world in a new way? These are the questions faced by all rhetorical actors, from the PTA president to the Commander-in-Chief and the Justices of the Supreme Court.

My interest in this wonderfully arcane-sounding discipline was first sparked some years ago, before I entered law school or began “thinking like a lawyer.” A freshly minted graduate of the University of Virginia, I managed to land a job as a speechwriter and pollster with self-styled “language consultant” Frank Luntz. Frank’s fame as a conservative wordsmith was first showcased by the success of the Contract with America, the checklist of policies and reforms that helped Newt Gingrich’s Republicans capture the House of Representatives in 1994. Frank’s approach was seen as revolutionary. As he well knows—and as he explains in his recent book *Words that Work*—it is deeply rhetorical.³

Training in politics and debate at Cambridge helped Frank understand the fatal error committed by most pollsters and communication strategists. Rhetorically speaking, much public opinion research—and political discourse in general—puts the proverbial horse before the cart. Whether driven by ego, idealism, or (more rarely) genuine wisdom, leaders and their consultants present their audiences with choices, advancing one set of actions or policies over the others. We are taught from elementary school on that this process is what leadership is all about. This gets the process of persuasion exactly backwards. Before making an argument for

³ Frank Luntz, *Words that Work: It’s Not What You Say, It’s What People Hear* (New York: Hyperion, 2007), 150-160.

change (or against it), the smart rhetorician must first take account of audience. For politicians and other leaders, this means making a specific effort at *listening*. It means listening to how average people talk about the choices they perceive for themselves, their families, their communities, and their nation. As Frank writes in *Words that Work*, his method is essentially “listener-centered,” because the audience’s “perceptions trump whatever ‘objective’ reality a given word or phrase you use might be presumed to have...what matters isn’t what you say, it’s what people hear.”⁴ Though my personal politics have drifted a good distance away from Gingrich conservatism, I credit my old boss for introducing me to a new and wonderfully rich way of thinking about politics and law.

Luntz’s technique is hardly complicated, and mainly involves asking politicians to do something they’re not used to doing: listening. Try to understand not only how people perceive reality, but how they articulate their perceptions in everyday language. David McIntosh, one of the Federalist Society’s founders and a member of the Gingrich Revolution class of ’94, told me that when it comes to political persuasion, “Frank shows that it makes all the difference in the world how it’s presented.” Presentation affects understanding, providing us with a literal vocabulary as well as a broader, more conceptual grasp of what we call “common sense.” As liberal Yale Law professor Jack Balkin has written, movement conservatives have been working for decades to reshape just what is accepted as common sense in the law. “Political agitation and social movement activism followed by successful elections and judicial appointments change constitutional common sense,” Balkin writes. “They make arguments that were previously considered ‘off the wall’, ‘on-the-wall’.”⁵

⁴ Luntz, *It’s Not What You Say*, xvi.

⁵ Jack Balkin, “Wrong the Day It Was Decided: *Lochner* and Constitutional Historicism,” *Boston University Law Review* 85 (2005): 702. Balkin has elsewhere described this as a process of “ideological drift.”

Engagement with people, and with their understandings, informs the persuasive project of any social movement seeking to affect popular opinion and common sense understanding of the day's vital issues. Political language should "speak to the common sense of the common people," Luntz writes—even as it seeks to reshape it.⁶ Whether the task at hand is winning a presidential election, leading a meeting of a corporate board of directors, a nonprofit group's steering committee, or achieving confirmation for a nominee to the Supreme Court of the United States, the rhetorical process should be attended to in the same fashion: a goal-oriented communicative process grounded in the shared language and experience of the audience confronting the speaker.

The countercharges to this audience-centered approach are familiar, of course, and they exist alongside the deeply embedded idea of the "visionary leader"—the one who need not listen because he already knows what to say. Politicians are all just telling people what they want to hear, so runs the critique. And Luntz's focus groups and video feedback dials only prove that deception can be turned into a business.

The audience-centered model runs counter to the common understandings of rhetoric, which dominate popular and even scholarly discourse. First, there is "mere rhetoric," the view which sees language as inherently empty and divorced from "real" meaning. Second there is the understanding of rhetoric as hardly empty, but rather manipulative and exploitive—pandering to an audience's desires while harming their interests. I do not propose these categories as absolutes, but rather points on a sliding conceptual scale.

"Drift is always the result of human activity. It is the result of continuous attempts to understand and describe the world, and to persuade others about the right and the reasonable, the just and the efficacious, in a changing historical context." Jack Balkin, "Ideological Drift and the Struggle Over Meaning." *Connecticut Law Review* 25 (1993): 866.

⁶ Luntz, *It's Not What You Hear*, xvii.

The dismissal of rhetoric as either empty or inherently manipulative has a long pedigree, spanning the history of Western civilization from Plato to George Orwell.⁷ In the city states of ancient Greece and later in Rome—the birthplaces of democracy and law as we understand it—wordsmiths like Luntz had their similarly suspect forbears. These were the Sophists (think “sophistry”), traveling tutors who would—for a fee—assist the accused in honing their arguments for maximum persuasive effect (think “sophisticated”). The Sophists were vilified by Plato and his followers, whose philosophy of idealism regarded rhetoric as both superficial and dangerous. Superficial because mere persuasion could never approximate the absolute truths and ideals of the Platonic universe, and dangerous because abandonment of those ideals meant opening the door to immorality, deception, and exploitation by unscrupulous leaders. In many ways, very little has changed over the intervening two thousand years. Politicians still talk in terms of absolutes and moral rules, and pollsters like Luntz are still attacked as corrupting manipulators—even as their politician clients declare disdain for “following the polls.”

This anti-rhetoric argument couldn’t be further divorced from modern political reality; anti-rhetoric is just one more way of arguing and persuading—one more rhetorical strategy. Luntz’s success, and the success of conservatives since 1994, gives lie to the age-old “mere rhetoric” critique. Whatever conservatives might say about polls and principles, they are *listening* to people, finding a way to articulate their policy goals in a way that resonates with their audience of voters. They are acting rhetorically, aiming to persuade. Rhetoric, properly understood and skillfully deployed, becomes the means of enacting their ideas and bridging the gap between theory and practice—converting ideas into lived realities

⁷ As Stanley Fish writes, it is “a quarrel Plato was already calling ‘old’ in the fifth century before Christ.” *Doing What Comes Naturally* (Durham: Duke University Press, 1989), 478.

by persuading democratic majorities that it's the right thing to do. This is the third point on the conceptual scale.

At its worst, rhetorical strategies operate on the other end of that scale, devoid of any real attempt to *engage* and devolving into the rote regurgitation of clichés all too common on Sunday morning political talk shows. Truly artful rhetoric demands creativity and inventiveness, moving toward the goal of genuinely “bringing one’s audience around” and inviting them to perceive the world in a comprehensively new way. That is not to say that short-term political gains cannot be had in the process. In a representative democracy, they almost always are...for one side or the other.

As a critic and author, it is important for me to note that when we consider politically interested actors in the process of making arguments and changing the way people perceive the world—which is ultimately what this book is about—I choose not to take sides in all situations I might. Much of that I leave to you. But my own critical perspective is unavoidable; rhetoric is not only a *practice*, like the Federalist Society’s debates: it is a way of reading—a mode of inquiry attentive to language, persuasion, and framing. As a rhetorical critic, I will be evaluating the right’s arguments about legal interpretation and law, arguing that some of them hold up better than others (and some do not hold up at all). In these first chapters I will be using rhetorical analysis as a way of “reading” the rise of movement conservatism since World War II; in later chapters my rhetorical lens is applied in both a more theoretical, and a more practical way.

As a way of separating these different rhetorical functions, I suggest a kind of three-tiered model. In the first sense, rhetoric operates for a critic such as myself as a kind of lens—a way of reading texts and of evaluating arguments. In a second sense, rhetoric

operates as a practice, as it does for my primary subject here, The Federalist Society. Debate and argument are manifested in literal forms here, as different arguments are presented at conferences, meetings, and informal networks. This all fits well, I think: applying rhetorical criticism to a thoroughly rhetorical enterprise. But there is yet another level in which this project engages rhetoric. The Federalists are explicitly concerned with law—a rhetorical enterprise if ever there was one. Lawyers (and judges) are professional arguers, charged with the tasks of persuasion (of juries, for example) and interpretation (of the Constitution, for example). Persuasion is rhetoric in practice; interpretation is rhetoric as a way of reading.

Skillfully deployed rhetoric has allowed conservatives to reshape the terms of the debate in our national political life, enacting policy that has literally changed our lived realities. The rhetorical approach represents an attitude toward communication, politics, and leadership that accepts the need to understand before setting about the process of attempting to persuade. For the leader, listening can inform persuasion not as a mere means to ingratiate and flatter but as a way to attain a meeting of the minds between the citizens and their representatives. This understanding, in turn, makes possible collaboration for the common good and the realization of shared hopes and goals. The political actors involved in this process are necessarily *interested*, and I do not mean to establish rhetoric here as an idealized concept divorced from the world of majoritarian politics. Democracy necessarily implicates interests—as the Federalists’ hero figure James Madison so concisely laid out in the essays from which the Society takes its name. In a democratic system that guarantees open debate, pitting interest against interest and power functions systemically as a safeguard for liberty.

Each of Madison's "factions" have their own interests, necessarily opposed to their counterparts. There are winners in this framework, and there are losers. All are not persuaded by all—or to invert Lincoln, some of the people will be fooled some of the time, but not all of the time. Madisonian democracy can survive only through its rhetoricity: the competition of interested factions, each mustering their arguments in the public forum, each willing to abide by democratic results. Against *power*, rhetoric in this sense is neither empty or manipulative. It is the means to a democratic end, and it is enacted through discussion, debate, engagement with those of dissimilar casts of mind and background—above all, careful listening. In the most basic sense, democracy—and the law of democracy—is rhetorical. As the great defender of the Roman Republic Cicero argued two thousand years ago, "The Republic is constituted by discourse."⁸ If we surrender the debate, we surrender democracy.

In order for representative democracy to flourish, factions must embrace this attentiveness I describe not only in respect to their constituencies (often meaning their voters) but also in respect to their *opponents*. Our adversarial legal system functions on the same principle: counsel are charged with zealously representing their clients' interests to the best of their abilities, while recognizing ethical limitations. When a lawyer fails in this, he or she is may be disbarred. The legal system—a rhetorical enterprise if ever there was one—breaks down when there is no pushback from the other side. The same goes for our broader political and social debates. When one faction goes unchallenged, the process itself is threatened. As I will argue, the American political and legal left has rested too long on its laurels as the insurgents of the right went about the business of unmaking consensus, actively working to

⁸ Robert Hariman. *Political Style: The Artistry of Power* (Chicago: University of Chicago Press, 1995), 111.

persuade their many audiences in courts, classrooms, and in society at large. Indeed, this is my central argument in these pages: Not only has the right been able to undo the liberal consensus by legitimating its ways of reading and doing law, but the left has contributed to this by failing to engage with the diverse and fractured conservative coalition.

Rhetoric demands of its practitioners a sophistication not only in the ability to present arguments in ways that their audiences will understand, but to take the process a step further. After all, “empty rhetoric” isn’t hard to detect; people have an uncanny ability to tell when they are being pandered to. What the best leaders and speakers (and lawyers) are able to do is not only to grasp, but to *rearrange* the common sense understandings of their audiences. To reconstellate the universe of possibilities and limitations of their audiences perceived realities by taking account of the interests and values, causing them to move away from one understanding of reality and toward another. In the political and legal arena, “the meeting of the minds” should not be taken to suggest a naïve fifty-fifty I’ll-come-your-way, You’ll-come-mine compromise arrangement. Artful persuasion *remakes* understandings and reframes questions such that compromise is unnecessary. As we will see, conservatives argue against “judicial activism,” and in doing so tap into values, perceptions, and resentments present or latent in their audiences (their constituencies), eventually recharacterizing the popular view of the courts cemented during the Civil Rights era—as partners in the righting of social wrongs.

Conservatives have had an interest in this project; they believe they are right, of course, and they also have a larger social project in mind, a project at odds with the liberal project of the earlier era that *produced* the mainstream view of the courts that peaked in the

1960s. The right's rhetoric is interested and strategic in a Madisonian sense, and as I argue here, it has carried the day. Its successes have occurred on multiple levels and through a rhetoric operating at various levels of directness and sophistication. I do not engage in a critique here of Rush Limbaugh's rants, or Ann Coulter's diatribes. Both speak often on legal matters, but their contributions generally do not move beyond the level of sloganeering and what William F. Buckley calls *ipse-dixitism*—"it is because it is."

In saying this I am not dispensing with popular discourse. But for our core purposes here I am more concerned with the rhetorical carryovers generated for the polemicists and bombthrowers by the elites in intellectual circles: How the elites of *National Review* created the conditions of possibility for *Conscience of a Conservative*; how the Federalist Society laid the intellectual foundation for talk-radio rants about a liberal-activist-judiciary. Popular opinion can be genuinely altered by speakers and leaders who persuade people of another way to see what is happening, in ways that often resonate authentically with the values and beliefs of non-elites. The political—often meaning *elite* political—project is not necessarily contradicted by the popular one; indeed, the two have much to profit from each other. Recall the idea of the rhetorical continuum: Buckley at one pole, Coulter and Limbaugh at the other. The right has always understood this, and has been consistently succeeding in its project. The left has not—arguably because they have not taken sufficient account of the work—the legal work and the *rhetorical* work—conservatives, like those in the Federalist Society, have been up to.

The left's rather embarrassing catch-up attempts include such examples as the short book by would-be presidential candidate Howard Dean's linguist advisor, University of California Professor George Lakoff—of which the title, *Don't Think of an Elephant*, is

probably the most engaging aspect. Republicans like Luntz have long since grasped the power and impact of rhetorical thinking that Lakoff presents here as a revelation.

Yes...*language matters*.⁹ People are much more likely to support the elimination of a “Death Tax” than an “Estate Tax.”¹⁰ As professor Thomas Goodnight once reminded me, rhetoricians believe that naming *is* framing. The difference of a single word (“death” vs. “estate”) invokes different conceptual systems, different versions of what’s “really” going on in that particular section of the Internal Revenue Code. Are we taxing “death,” or taxing “estates”? Who among us has an estate? (A few, but not many; it’s only fair that they should probably pay their share.) Who among us dies? (Everyone, and beyond the egalitarian aspect, it seems *silly* to be taxing death.) In the law, as we shall see, the meanings of single words take on enormous importance. The Estate (or Death) tax affects a small number of people. The Equal Protection Clause of the Fourteenth Amendment affects hundreds of millions.

Even as I offer the “death tax” as an example, I hasten to make clear that the battle for rhetorical dominance over American politics is not a battle over slogans. Speaking to legal liberal leaders Ralph Neas of People for the American Way and Professor Erwin Chemerinsky of Duke Law School, as well as lawmakers including Sen. Dick Durbin, I encountered a similar refrain: “The right has better slogans.” As if sloganeering was the end-point of all political communication. Liberal scholar Geoffrey Nunberg, who has written extensively on conservatism’s persuasive strategies, shoots this cop-out defense down on

⁹ For a comprehensive critique of Lakoff’s approach from a sympathetic liberal, see Geoffrey Nunberg, *Talking Right: How Conservatives Turned Liberalism into a Tax-Raising, Latte-Drinking, Sushi-Eating, Volvo-Driving, New York Times-Reading, Body-Piercing, Hollywood-Loving, Left-Wing Freak Show* (New York: PublicAffairs, 2006) 98-104.

¹⁰ This was one of Luntz’s first major successes. See Luntz, *Words that Work*, 164-166.

page three of his wonderfully titled book *Talking Right: How Conservatives Turned Liberalism into a Tax-Raising, Latte-Drinking, Sushi-Eating, Volvo-Driving, New York Times-Reading, Body-Piercing, Hollywood-Loving, Left-Wing Freak Show*. “The right’s most notable linguistic achievement isn’t its skill in coining distracting catchphrases,” he writes, “but its success in capturing the language of everyday political discussion.”¹¹

The Bush administration understands rhetorical tactics quite well—and not just when it comes to tax policy. The rhetoric of “the war on terror” began promptly after the attacks of September 11th, 2001, and has subsequently functioned to frame everything from the invasion of Iraq to dubiously Constitutional secret eavesdropping on American citizens. “The War on Terror” thus functions as a “metanarrative”—a story that subsumes all others, a master frame fitted around the events of our chaotic world, deployed to contextualize and to persuade. In our “post-September 11th world,” we are told, everything has changed. To reject Bush’s version of the *meaning* of 9/11, Bush’s “narrative,” is to—we are told—still be living in September 10th.

As an argument, this is a master stroke. Seizing the moment, Bush and his advisors crafted a new narrative, an inventive way of understanding reality that resonated with many Americans’ patriotism as well as their understanding of history, their sense of responsibility, justice, and sacrifice. The Bush narrative was not the only way that the post-9/11 narrative could have been told. But Democrats have still not figured out how to respond, and five years after the attacks on that September morning, the coherence—and continuing persuasiveness—of Bush’s explanation has only now begun to crack under the military realities of a failed adventure in Iraq. Narrative is central to persuasion; it provides context—

¹¹ Nunberg, *Talking Right*, 3.

substantial steps beyond the focus-grouping of one slogan versus another. As Nunberg writes, “having a narrative involves something more than fashioning new campaign themes...it means making the story part of the fabric of American political discourse.”¹² It means “telling the right stories.”¹³ As we will see in later chapters, narrativity is central to the arguments conservatives have been making about the role of the Courts and the process of Constitutional law.

Opponents as diverse as Nunberg and Luntz readily acknowledge that there is something decidedly “Orwellian” going on here. And it is no coincidence that George Orwell decried the subversive, deceptive power of political language—most famously in the formulation that absolute power consists in the ability to declare that two plus two equals five. The language of Orwell’s *1984* dictatorship was “newspeak,” and the regime’s power to control truth, to announce “ $2+2=5$,” was explicitly linked to its ability to control language. A generation ago, the “heartland” of America—the Midwest and sections of the South—were reliable Democratic voters. No more. By rearticulating policy positions and relating them to values and principles, conservatives persuaded vast numbers of people they were something they had thought they were not—and to vote accordingly. It happened only because conservatives figured out how to be better communicators, and were able to persuade.

Working with Luntz did not convince me that Orwell was right. He was, like so many critics, right in one way and wrong in another. As my teacher Lawrence Grossberg often says, ideas are not responsible for the people who have them—and focus group data is not

¹² Nunberg, *Talking Right*, 15.

¹³ Nunberg, *Talking Right*, 34.

responsible for the politicians who use it. Luntz's lesson is that if we respect people we should listen to them, particularly if we put ourselves forward as leaders. The lesson is a nonpartisan one—I almost prefer to call it agnostic. It is a lesson as old as Western civilization, and perennially misunderstood. Just as the ancient Sophists understood that conceptions of “truth” varied among the many Mediterranean city-states where they offered their tutorials, modern conservatives have learned that effective argument requires an understanding of peoples' common sense before attempting to reframe it.

Furthermore, most people have an uncanny ability to know when they are being manipulated or being spoon-fed talking points. In the modern world of language consultants, focus groups, and polling-driven policy, there are fewer and fewer possibilities for what we might call “undiluted” rhetorical exchange in the realm of national politics. Within the law, I will argue that the tradition is kept alive by conservatives in the Federalist Society. The Federalist project, as we will see, is connected up with other political projects of the right and is therefore not entirely a cordoned-off domain, “rhetorically pure” in its promotion of reasoned debate. The levels of interaction between policy advocates, lobbyists, political pundits, law professors, and students is complex, and their interests are varied. Yet the Federalist Society provides a forum where their different perspectives, interests, and ideas can be shared and tested—in the service of a larger project that on its face seeks to unmake the liberal consensus that has dominated American law for generations. It is a project that is succeeding in part because the right has been resourceful, energetic, and persistent, in part because the left has been complacent and failed to engage its opponents, often dismissing them as either fanatics or fools. The Federalists are neither.

The conservatives' approach worked famously in the Gingrich Revolution of 1994, and it has worked for the legal conservatives I will be considering here. When I asked Ronald Reagan's Attorney General Edwin Meese about the vast difference between the self-conscious intellectualism of the Federalist Society and the anti-intellectual court-bashing of popular conservative authors like Mark Levin, Meese's answer was simple: *consider the audience*. It is simply not effective to talk the same way to a popular audience as one would talk to an audience of lawyers and constitutional scholars. There is an undeniable element of elitism at work here, but in the strategic context of politics this does not mean elitism. Different audiences operate with different levels of education and understanding, let alone vocabularies. The Federalist professoriate would not be able to write a bestseller like Levin; not even his boss Ed Meese was able to do that (Bork was, but more of that later). Recognizing that all audiences are not alike is not only a pragmatic concession. In its most affirmative sense it reflects a respect for the variety of perspectives among the American public, and the desire to speak to them all. Conservatives understand this. They also remain open to charges of whether or not they go beyond a respect for differences among their audiences to strategic manipulation is a different, but valid, question. Should intellectuals in the Federalist Society, or policy wonks like Meese, for example, be ethically comfortable in writing off their polemical cousins in the movement simply by saying they speak to a different audience?

Rhetoric has an obsession with audience—without which no persuasion is possible. In politics and in law, “losing your audience” means losing—period. Conservatives know this, and know it well. The conservative ascent has been a rhetorical one. As Luntz argues in *Words that Work*, conservatives have better come to understand the realities of modern

American common sense and have calibrated their message accordingly.¹⁴ “In another age,” writes Luntz’s liberal critic Nunberg, “William Jennings Bryan could earn the respectful attention of the common people with high-flown orotundity. Nowadays, Americans expect their leaders to talk the way they do.”¹⁵ The payoff has been electoral victory after victory. Until 2006, anyhow. It remains to be seen whether a Democratic presidential nominee will avoid the disastrous communication strategies of candidates Gore and Kerry.

Particularly in the realm of the law, conservatives’ success at reshaping the terms of debate have been nearly complete: in a very real sense, we are all conservatives now. Even if we oppose their ideas or their methods, we join the battle on their terms. Whereas a generation or two ago the liberal lions of the Supreme Court—Earl Warren, William Brennan, Thurgood Marshall—spoke eloquently (and persuasively) of a Living Constitution, the discourse today is dominated by the right’s originalism, traditionalism, strict constructionism, and textualism. As rhetorical scholar Rod Hart and his coauthors wrote recently, the assimilation of these key phrases into the popular discourse acts as a kind of “cultural barometer,” signifiers of the conservative ascent.¹⁶ In his recent book *Active Liberty*, Justice Stephen Breyer exemplifies the battered left’s struggle to stake out a pragmatic middle ground, having abandoned the liberal activism of the Warren Court era—

¹⁴ See Luntz, *Words that Work*, 179-228, a comprehensive survey of his polling findings on mainstream American opinion, and how these findings apply to political communication strategy. Luntz notes in an aside that not all conservatives are interested in the common sense of the common people. “I once invited [columnist George F.] Will to attend one of my focus groups to learn what’s on the minds of the American voter. His response: ‘Heavens no. What makes you think I want to know what “real people” are thinking?’” Luntz, *Words that Work*, 115.

¹⁵ Nunberg, *Talking Right*, 203.

¹⁶ Roderick P. Hart et al., *Political Keywords: Using Language That Uses Us* (New York: Oxford, 2005), 5.

an era when courts were seen as partners in the project of righting society's wrongs.¹⁷ With two more conservatives now on the Court, the most interesting and relevant discussions may not even be between the legal liberals and conservatives—they will be *among* conservatives. In many ways, they're the only game in town.

To set the stage for my discussion of conservative legal rhetoric and of the role played by the Federalist Society in its emergence, I will first take a look at six “rhetorical moments” showing how the modern conservative movement seized on circumstances to expand its national audience and persuasively articulate its vision in terms of the events and controversies of the times. Rather than discuss events that might come more readily to mind (Barry Goldwater's 1964 campaign, for example), I've chosen moments that are representative of the history movement conservatives tell about themselves, and that reflect the importance rhetorical strategy has played in the long-term conservative project.¹⁸ Drawing on the conservative literature and my own conversations with leaders of the movement, I include here the founding of *National Review* in 1955; the formation of the student group “Young Americans for Freedom” in 1960; the Draft Goldwater campaign of 1961-64; the American Conservative Union's opposition to the Nixon administration's 1970 welfare plan; the Panama Canal debate of 1976-1979; and finally the founding of the Moral Majority in 1979.

¹⁷ Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage, 2006).

¹⁸ In the “Conservatism 101” Introduction to his memoir, longtime conservative activist Richard Viguerie chronicles the importance of events such as those I include here. Richard Viguerie, *Conservatives Betrayed: How George W. Bush and Other Big Government Republicans Hijacked the Conservative Cause* (Los Angeles: Bonus Books, 2006), xi-xxi.

Each of these came to function strategically as a core around which a broader series of arguments could revolve. Each exerted a pull on the others. Despite its eventual failure, the Moral Majority, for example, established a literal and metaphorical center of gravity for a whole series of arguments about moral crises in the nation. The group's institutional structure created a kind of rhetorical inertia that gave persuasive coherence to festering social opposition to events like the Supreme Court's 1974 decision in *Roe v. Wade*¹⁹ and Phyllis Schlafly's fiercely waged campaign against the Equal Rights Amendment. But let us begin at the beginning.

The Founding of *National Review*

From the audience-based rhetorical point of view, this first “moment” is a natural. For the conservative movement to truly get off the ground, the creation of a national forum for discussion was pretty much indispensable. The pages of *National Review* would become a place where like-minded activists and intellectuals could communicate with each other, as well as a kind of broadcasting system for the dissemination of conservative arguments. The group of individuals who came together in the early and mid-fifties to found the magazine would remain as the movement's hard core, both within the rhetorical confines of the magazine and beyond it. *National Review* remains at the center of conservative discourse today, although in comparison with the grittier and more aggressive tone of the magazine's sister website www.nro.com, the pages of the magazine do come off a bit more staid (a bit more...conservative).

¹⁹ 410 U.S. 113 (1973).

NR's founding editor William F. Buckley Jr., aptly called the “patron saint of the conservatives” by his (liberal) biographer John Judis, had already emerged as a spokesman for the movement by 1955. In one sense, the movement as such had *started* with Buckley—and his publisher of 50 years, Alfred Regnery. In 1951, Regnery published the first of Buckley's many books, *God and Man at Yale* less than a year after his graduation from college; it was followed by the equally controversial *McCarthy and His Enemies* three years later. The first of these announced a theme still echoed by conservatives today, that “liberal academia” is hostile to religion; the second was a somewhat dubious defense of the reactionary Wisconsin senator who claimed, to his ultimate undoing, that there were bountiful communist enemies lurking in our midst. The two books stand in nicely for two strands of conservative thought that Buckley articulated, but by no means invented: traditionalist resistance to the secularization of society and ardent anti-Communism. These two themes remained constants in conservative discourse for decades, and *National Review* was the first large-scale soapbox from which they were seriously and coherently articulated. *NR* was the first major conservative forum. Though it exists not in print but in person, the Federalist Society is heir to the tradition of debate and discussion launched by Buckley's magazine.

Early conservatism's two themes—anti-secularization and anti-Communism—are also analogous to a clashing set of ideas that haunted the conservative movement every bit as much in 1955 as they do now: libertarianism and cultural conservatism. Buckley's defense of religion in *God and Man at Yale* is socially conservative in the same sense as modern-day cultural conservative David Limbaugh's best-selling book *Persecution: How Liberals Are Waging War Against Christianity*. And his brand of anti-statist anti-Communism

simultaneously paralleled the libertarianism today espoused by the legion of policy strategists at the Cato Institute, an influential Washington think tank—not to mention by Ronald Reagan himself, who mocked a New Deal truism by famously suggesting that the words “I’m from the government, and I’m here to help” could not be taken as anything other than a joke. Reagan, aided by Buckley and his *National Review* colleagues, created a conservative fusion that endured in spite of its many contradictions.

Under Buckley’s watchful eye the two camps were brought together in large part by another *NR* founding alum, Frank Meyer. Meyer, an ex-Trotskyite Jew who had a talent for brokering compromise, is credited with creating the libertarian-conservative “fusionism,” viewed by most historians as having made modern conservatism possible. The ideological distance between the “libs” and “cons” could easily have been a permanent stumbling block—and it remains a major division today; one need look no further than the fractured Republican response to certain provisions of the PATRIOT Act.

Frank Meyer’s son Gene, who has served as President of the Federalist Society since not long after its founding, has continued his father’s fusionism, although as Gene told me, his father was never comfortable with the label—for reasons that might be equally applied to the tensions Gene presides over among the Federalists. The “libs” and “cons” were never really fused. They learned to cohabitate, to live together and work toward common goals. As Roger Pilon of the Cato Institute told me, Gene Meyer has “played the good rabbi, like his father before him.”

Together with William Rusher, a lawyer who had founded the first Young Republicans chapter at Harvard University in the late 1940s,²⁰ Buckley gathered a cadre of conservative writers and editors, launching *NR* into a market dominated entirely by established liberal-consensus magazines such as *The New Republic*, *Commentary*, and *Harper's*. Having had his two books savaged by reviewers in magazines like these probably contributed to the young Buckley's determination to fix the new magazine's identity. Rusher recalls that from the very first issue, Buckley "flung down the gauntlet and practically dared his opponents to pick it up," "declar[ing] war on 'the Liberals who run this country.'"²¹ The author of books on persuasion as well as politics, Rusher writes in his memoir that "for several years *National Review* continued to capitalize the word *Liberal*, simply for the sake of emphasis." In such small gestures are future social trends revealed. Decades later, "liberal" was to become the dreaded "L-word" of the 1988 presidential campaign and beyond—recall Michael Dukakis's flustered denials. Even today, Howard Dean and other national democratic leaders dodge questions about whether they support "liberal" policies—or "liberal" readings of the Constitution.

Launching *National Review* required more than networking and a suitable staff—it required money. Buckley was point man here as well. Coming from a wealthy and cosmopolitan Texas oil family, he received support from his parents and also took his pitch on the road, selling thousands of dollars worth of shares and debentures to politically sympathetic investors.²² The personal, ideological, and financial networking that made

²⁰ William A. Rusher, *The Rise of the right* (New York: National Review Books, 1993), 10.

²¹ Rusher, *The Rise of the right*, 31.

²² Rick Perlstein, *Before the Storm: Barry Goldwater and the Unmaking of the American Consensus* (New York: Hill and Wang, 2001), 73; Rusher, *The Rise of the right*, 30

National Review possible would remain an indispensable source of support for the conservative movement in the decades ahead. Criss-crossing the worlds of finance capital, business, politics, and media during those early, formative years, Buckley and his colleagues at the new magazine were actively constructing networks that would endure for decades—creating a matrix of support as well as crafting an identity, the “movement conservative.” As seen with the Miers debacle, movement conservatives remain a breed apart even 50 years after *National Review* opened shop.

The magazine would become the movement conservatives’ mouthpiece, “militantly *engagé*—dedicated to waging political war against the Liberals,” rather than merely restating conservative principles in some “safely abstract form.”²³ Their arguments would be marshaled toward this end, their clearly stated goal to unmake the postwar liberal consensus by giving voice to principles they believed lay latent in the hearts and minds of the American population. The *NR* gang had little sympathy for the so-called Modern Republicanism²⁴ of Dwight D. Eisenhower, a middle-of-the-road approach that irked young Turks like Buckley, Rusher, and the others in the Draft Goldwater camp. They had backed staunch conservative Sen. Robert Taft of Ohio against Ike in 1948 and again in 1952, and they remained committed to moving the GOP to the right.²⁵ The political gauntlet they took up was

²³ Rusher, *The Rise of the right*, 24. This was fully laid out in Buckley’s Statement of Intentions and “Credenda” for *National Review*. Gregory L. Schneider, ed., *Conservatism in America Since 1930* (New York: New York University Press, 2003), 195-206.

²⁴ On Modern Republicanism see E.J. Dionne, *Why Americans Hate Politics* (New York: Simon and Schuster, 1992), 170-208.

²⁵ Rusher, *The Rise of the right*, 9-20; Jonathan M. Schoenwald, *A Time for Choosing: The Rise of Modern American Conservatism* (New York: Oxford University Press, 2001), 22-34; Godfrey Hodgson, *The World Turned Right Side Up: A History of the Conservative Ascendancy in America* (Boston: Houghton Mifflin, 1986), 47-50.

substantial in the light of the liberal, Modern Republican consensus, just as the legal order would be upset by the Federalist Society critique beginning in the Reagan era.

Reception of Buckley's magazine was hardly positive. *Harper's* called it "an organ, not of conservatism, but radicalism"; *Commentary* dismissed Buckley's audience as "lumpen-bourgeoisie provincials."²⁶ Buckley was unfazed, and the magazine managed to stay afloat. In short order, *National Review* became the site of serious political and social debate, much more than a forum for radical rants. As liberal critic Rick Perlstein has written, "*National Review* readers were finding each other," in corporate offices and college dorm rooms across the nation.²⁷ Years later, it would be through placing a notice in the pages of *National Review* that the founders of the Federalist Society would first attract national attention and decide their initially modest project had broad potential. Through the process of writing, reading, and identification with the articles and opinions in *NR*, a new identity was being formed: readers of this magazine came to see themselves as *different*, standing there with Bill Buckley "athwart history, yelling, 'Stop!'"²⁸

Their identity was formed through argument against the postwar consensus: opposing containment as a strategy in the cold war on moral as well as geopolitical grounds; urging rejection of the New Deal as a way station on the road to socialist dependency; renouncing both secularism and materialism. These were new ideas, flowing against the current of the times. Historian John Andrew, writing about the conservative "other side of the sixties," talks

²⁶ Rusher, *The Rise of the right*, 32.

²⁷ Perlstein, *Before the Storm*, 74-75.

²⁸ Quoted in Rusher, *Rise of the right*, 31. (*National Review* issue of Nov. 19, 1955.)

of this growing identity as embodying the “thrill of treason.”²⁹ Conservatives, too, can be revolutionaries.

“*National Review* became the right’s debating chamber,” write John Micklethwait and Adrian Wooldridge in their recent chronicle of American conservatism.³⁰ In the rhetorical sense, it really was a forum: a space devoted to the testing of ideas that at the time were far from acceptably mainstream. But the forum created by *NR* extended in a metaphorical sense—to the dining rooms, the office water coolers, bars, and classrooms where readers carried the conservative conversation forward. I will argue in these pages that today, the Federalist Society is performing a very similar rhetorically expansive function. The Federalists have become the new debating chamber of the right.

What Buckley did with *National Review* was remarkable in a specific sense. By producing high quality content and forging a reputation for serious contrarian argument, he was able to successfully resist the labels being attached to the magazine by its critics. Far from being outcasts and oddballs, *NR* and its authors cast themselves as the “keepers of the tablets,” the last reasonable men in a society and world gone horribly awry. To the chagrin of his critics, then and now, Buckley touched a chord. The *conserving* being done by conservatives was, under the Movement Conservative narrative, the stuff of the hero legends of ancient times. It was to be described as a Sisyphean struggle against all odds, even—to

²⁹ John A. Andrew III, *The Other Side of the Sixties: Young Americans for Freedom and the Rise of Conservative Politics* (New Brunswick, N.J.: Rutgers University Press, 1997), 75.

³⁰ John Micklethwait and Adrian Wooldridge, *The right Nation: Conservative Power in America* (New York: Penguin Press, 2004), 51.

borrow a phrase from the other side of the ideological aisle—the challenge of speaking truth to power. And it unfolded in the pages of a magazine.³¹

Young Americans for Freedom: “The Other Side of the Sixties”

I borrow this heading from historian John Andrew, quoted above. Andrew was one of the few historians to take interest in the New Right, to perceive its role as a 1960s social movement that actively articulated arguments about politics and policy just as fiercely as the counterculture left. There was, indeed, a side to the sixties apart from Woodstock and draft-dodging and the horrors of the Chicago convention. Being conservative, the other-siders worked much more “within the system”—and, to an extent, one has to admit that it is thanks to their realism that they have been more successful.

Five years after the first issue of *National Review* hit the streets, we again find William F. Buckley behind a critical moment in the conservative movement. Excited and mobilized by Arizona Senator Barry Goldwater’s immensely popular *Conscience of a Conservative*, Young Republican clubs on college campuses across the nation were becoming increasingly energized.³² Many young activists formally joined together in the “Youth for Goldwater” organizations and converged on the 1960 Chicago GOP convention only to see their candidate defeated by the Modern Republican—but ardent anti-Communist—Richard Nixon. Following Nixon’s nomination, a group of college students and their older mentors formed an ad hoc committee with the goal of establishing a structure for

³¹ See generally, Jeffrey Hart, *The Making of the American Conservative Mind: National Review and Its Times* (Wilmington, Del.: ISI Books, 2006).

³² Andrew, *The Other Side of the Sixties*, 1-52 *passim*; Gregory L. Schneider, *Cadres for Conservatism: Young Americans for Freedom and the Rise of the Contemporary Right* (New York: New York University Press, 1999), 7-30 *passim*.

conservative youth activism. They caught Bill Buckley's attention, and he offered his Sharon, Connecticut estate as the site for the meeting that became known among movement conservatives as the Sharon Conference.³³

Held September 9th through the 11th of 1960, the conference produced a manifesto and spawned a campus organization that would flourish through the late 1970s, spreading conservative ideology and recruiting activists, leaders, and future officeholders. Young Americans for Freedom became one more means for disseminating the conservative message through debate and discussion—encouraging students to speak out, to engage their peers and their teachers, to assert themselves and their beliefs as contrary to the dominant ideology of the times. This was a rhetorical project: by rejecting the dominant understandings of the liberal consensus, it sought to provoke debate where none existed before, and to *win* those debates. The YAFers who came to think of themselves as conservatives because they subscribed to the principles laid out at Sharon were indeed the “cadres of conservatism.”

An alternative to College Republican chapters, YAF came into being as an explicitly ideological, philosophical entity, less concerned with practical politics than with ideas. Throughout the turbulent 1960s, YAF stood as a defiantly counter-countercultural presence on college campuses across the country, openly confronting the self-declared “progressives” of the anti-war New Left.³⁴

As one of the few chroniclers of the conservative youth movement in the sixties has written, Sharon and the YAFers should be viewed alongside the leftist equivalent held by Students for a Democratic Society two years later in Port Huron, Michigan.³⁵ Despite

³³ Andrew, *The Other Side of the Sixties*, 53-55; Schneider, *Cadres for Conservatism*, 31-32.

³⁴ Schneider, *Cadres for Conservatism*, 110-126 *passim*.

³⁵ Schneider, *Cadres for Conservatism*, 32.

Goldwater's devastating loss to Lyndon Johnson, YAF's membership increased by 5,400 in 1964 while SDS's total membership for that year was only 1,500.³⁶ Conservatives were proving their remarkably adept ability to reframe defeat as victory. Rhetorically, these membership statistics remind us that victory is in the eyes of the beholders. A defeat is a defeat in the sense of demoralization and failure only if you *call it one*; it is also a wakeup call, cause for redoubled efforts and increased efforts to persuade.

The Sharon Statement is a blueprint for political and ideological struggle, expressing a vision of socio-political reality at odds with and directly antagonistic toward the generally received common sense of the era. "In this time of moral and political crisis," it begins, "it is the responsibility of the youth of America to affirm certain eternal truths."³⁷ What follows is a sweeping manifesto of social and economic individualism, an attack on centralized government and regulation of the market economy (which "tends to reduce the moral and physical strength of the nation"), and the assertion that "the forces of international Communism" were the "greatest single threat" to individual liberty, and that "victory over," not "coexistence with this menace" should be the country's goal. By rearticulating and recasting issues of political, economic, and international importance, conservatives were literally *inventing* a new identity. Ronald Reagan's 1980 victory was built on these arguments, though that was still many years away. But the rhetorical groundwork for his ability to connect with American voters was laid in these early days of the conservative movement.

³⁶ Micklethwait and Wooldridge, *The right Nation*, 51.

³⁷ Schneider, *Cadres for Conservatism*, 183-184.

The YAFers of the 1960s and '70s carried this gospel forth on their campuses. Already perceiving a “moral and political crisis” in 1960, YAF “spread like wildfire across the country,” as Micklethwait and Wooldridge write,³⁸ and young conservatives were already in battle mode by the time the counterculture took hold.³⁹ When the election of 1980 arrived, generations of YAF graduates had entered positions of power and leadership across American society. John Andrew concludes that the “founding of YAF was, in retrospect, probably the most important organizational initiative undertaken by conservatives in last 30 years.”⁴⁰ An almost identical comment was made by Constitutional lawyer and law school dean Rodney Smolla, who said in 2006 that the Federalist Society was “the most successful law school student organization in history.” YAF and the Federalist Society were both also important *rhetorical* projects, helping to spread the conservative message and persuade large numbers of young Americans that they were conservatives.

The “Draft Goldwater” Campaign

Both YAF and the editorial staff of *National Review* were up and running by the early sixties when a handful of conservative leaders produced one of the most stunning coups of modern American politics: the forced-hand candidacy of Barry Goldwater for president of the United States. As I mentioned at the outset of this chapter, my focus here will not be on the campaign of 1964 but on the period of time preceding Goldwater’s acceptance of the nomination. There have been many reluctant candidates in American history, and reluctance

³⁸ Micklethwait & Wooldridge, *The right Nation*, 51.

³⁹ Schneider estimates that YAF membership in 1970 was around 10,000, in several hundred chapters nationwide, though official listings placed the figure at several times that number. Schneider, *Cadres for Conservatism*, 238-239.

⁴⁰ Andrew, *The Other Side of the Sixties*, 216.

itself functions rhetorically as a *trope*—a turn of argument aimed at producing effects based on its commonly understood meaning. In our culture, thus, reluctance functions *as an argument*, an indication of modesty (indicating the candidate is not power hungry) and integrity (the candidate's unease at involvement in the hurly burly of politics).

Almost immediately following Nixon's loss to Kennedy in 1960, a cluster of *National Review* conservatives led by Rusher had set about the business of persuading the feisty Arizona senator that he should be the party's next nominee. They weren't completely shooting in the dark. After all, In that same election year Goldwater *had* been persuaded by the *NR* crew to allow *The Conscience of a Conservative*, a short paperback book summarizing his policies and ideas, to be published under his name. A surprise hit that helped launch Goldwater into the public eye, *Conscience* also introduced a central theme in conservative discourse maintained down to this day in GOP talking points memos and strategy briefs from Frank Luntz: Always frame your policy proposals in terms of principles.

Principles, those early conservatives understood, resonate well. Despite their loftiness, people organize their lives around them; they are the beliefs and values that lend structure to our disorganized lives. And to talk of utilitarian or economic calculations, pragmatism, and compromise—all of this smacks of cynicism...and our ideal leaders are not cynical. Even if many of us ultimately make decisions on practical grounds, the aspiration to principle is deeply embedded in our social values and our culture. The mindful rhetorician is attentive to his audience's principles and values because he wishes to relate to them, not exploit them; to show how they can be put into effect through policy. Framed in terms of highly generalized values like liberty and freedom, Goldwater's aggressive foreign policy stance against communism, for example, becomes easier to agree with. Who, after all, is

against freedom? (Lots of people were, as it turned out—at least in the way Lyndon Johnson said Goldwater understood it. The most biting response from the Johnson campaign featured the memorable image of a mushroom cloud and the incumbent president intoning: “We must love one another, or we shall surely perish.”)

But leaving the election aside, the problem for conservatives in 1960 was that most GOP functionaries had little interest in the *National Review* crew’s plan to move the party to the conservative right and away from Eisenhower’s amiable Modern Republicanism. Goldwater’s talk of extremism in the defense of liberty was seen by many as lunacy, and to some within the centrist core of the Republican Party as...well, mere rhetoric. The consummate pragmatist Nixon, I have been told, literally sat on his hands rather than applaud when the Senator from Arizona uttered his famous line about extremism, moderation, and liberty at the Republican convention in 1964. Serious politicians don’t talk that way, after all—they talk about problem solving, consensus, and compromise. (This critique continued decades later against Ronald Reagan, whose recourse to principle was taken straight out of the Goldwater playbook.)

Rather than bemoan their position vis-à-vis the mainstream, however, the conservatives saw the exciting possibility of a direct, uncompromising frontal assault. “The GOP seemed ripe for a takeover,” recalls Rusher.⁴¹ Rather than launch their project as a nationwide social movement aimed at a national audience—the strategy used by most liberal movements in the 1960s—Rusher and the conservatives turned their sights on the existing power structures of the GOP. The party would provide them with the means to expand their rhetorical reach nationwide.

⁴¹ Rusher, *The Rise of the right*, p. 71.

In October of 1961 Rusher called a caucus with 26 friends, former colleagues from the Young Republicans, business leaders, a few elected officeholders (in 1961 there weren't many), and trusted political scientist and strategist F. Clifton White.⁴² In a Chicago motel room that autumn this handful of men from different walks of life pledged their lives and fortunes—literally, in some cases—and launched the “Draft Goldwater Committee.” With no real foothold in the GOP and only a few years of national exposure thanks to *National Review*, the project must have seemed a bit quixotic, even to these hard-core conservatives. They resolved to marshal their resources for party takeover and a national presidential campaign. Their would-be candidate was not informed.

Given the continuing popularity of *Conscience of a Conservative*—by 1964 it had sold 3.5 million copies⁴³—the press was often heard inquiring as to the senator from Arizona's ambitions for higher office. Goldwater was a defiant non-candidate. (“Writing” the book hadn't even been his idea, after all.) The efforts necessary to persuade him were matched only by the nationwide organizational and fundraising efforts needed to persuade—or force—the Republican Party to choose him. The story of how Rusher, White and their handful of self-styled revolutionaries set up a shadow national political party structure operating out of a secret suite of offices across the street from Grand Central Station is one of the great untold tales of modern American politics.⁴⁴

⁴² Rusher, *The Rise of the right*, 70-73; Schoenwald, *A Time for Choosing*, 26-27.

⁴³ Micklethwait & Wooldridge, *The right Nation*, 59. It was supplemented by the “sequel” *Why Not Victory*, as well as Phyllis Schlafly's biography/campaign tract *A Choice Not an Echo*.

⁴⁴ White's memoir is the best (read: only) source. F. Clifton White, *Suite 3505: The Story of the Draft Goldwater Movement* (Ashland, Ohio: John M. Ashbrook Center for Public Affairs, 1992) [originally 1967]. Perlstein devotes a chapter.

Following several additional meetings, the core of 26 began expanding, with White acting as impresario. He spent months criss-crossing the country, flitting from boardrooms to country clubs, local political meetings, and chicken dinners, raising funds and spreading the word. White was networking with groups including the American Medical Association and the Republican Women's Committee, and YAF helped set up "Youth for Goldwater" across the country.⁴⁵ State and local "Draft Goldwater" volunteers were sowing the seed of grassroots politics—all outside of existing GOP state organizational structures.⁴⁶ To be sure, this was institutional work. But it was also rhetorical work—persuading party activists and donors that Goldwater was their man.

The "thrill of treason" continued to be both a motivator and a source of mistrust among the Republican Party elders. By positioning themselves against *both* the reigning liberal regime (the rather less-than-liberal Kennedy administration) as well as the milquetoast Modern Republicans of the "Eastern Establishment," conservatives like Buckley and Rusher reaped the maximum rhetorical benefits for their cause. They were not just Republicans, they were *conservatives*, a breed apart; they were not just sensible, they were principled. These redefinitions of identity functioned as arguments, and they continue to do so today—as the Miers fiasco bore out. There, as we saw, the president's defenders were, all of a sudden, the *Republicans*. The conservatives were the ones who put a stop to it all. As John Fund put it in his address to the Federalist Society quoted above, "the Movement said no."

Goldwater was eventually drafted, but only after Clif White's organization had become so extensive and capable of exerting so much leverage that the Senator had no

⁴⁵ Schneider, *Cadres for Conservatism*, 72-92; Schoenwald, *A Time for Choosing*, 129-131.

⁴⁶ Perlstein, *Before the Storm*, 181, 192; Lee Edwards, *The Conservative Revolution: The Movement That Remade America* (New York: Free Press, 1999), 102-114.

choice. When the liberal wing of the GOP was blindsided by their favored candidate Nelson Rockefeller's marital troubles, the *NR* crew made the tactical decision to bring the Draft Goldwater organization fully out of the shadows. And their candidate—their hero, really—thus moved (ever reluctantly) into the electoral spotlight. The “plunge into politics,” as Rusher calls it, was complete.

From the rhetorical standpoint—and the larger historical standpoint—what happened at the polls that November is almost irrelevant. Conservatives had established themselves as legitimate participants in the national political conversation, and had done so with genuine force and vigor. Modern Republicanism was dead. Post-1964, any viable Republican candidate had to make the case for his or her genuine, principled conservatism. As one longtime GOP strategist put it, Goldwater fundamentally “changed the rhetoric of politics,” attacking the ideas underlying the post-New Deal consensus on both foreign and domestic policy.⁴⁷ The terms of the discussion had been fundamentally shifted. Decades later, the project of legal conservatives would be to accomplish a similar shift in the debate over Constitutional interpretation and the role of the courts. First, however, came politics.

Goldwater and his backers were instrumental in redefining Republicanism as essentially conservative, embodying Frank Meyer's fusion of cultural traditionalism with laissez-faire, anti-government libertarianism. As Micklethwait and Wooldridge write, this shift coincided with (and was perhaps due to) the “growing intellectual ferment on the right...of autodidacts poring over Friedrich Hayek, Milton Friedman, and William F. Buckley's *National Review*.”⁴⁸

⁴⁷ Edwards, *The Conservative Revolution*, 139 (quoting John Sears who was, among other things, Ronald Reagan's 1980 campaign manager).

⁴⁸ Micklethwait and Wooldridge, *The right Nation*, 9-10.

But to return to our theme in this section, it is most important to see how conservatives proceeded on a two-track plan—today the party, tomorrow the culture. As Stuart Hall, dean of Britain’s Cultural Studies scholars, has written about the parallel capture of the British conservative party, “Thatcherism thus won and transformed the Conservative party first, before setting about winning and transforming the country.”⁴⁹ And it was rhetoric that provided the means for this transformation, taking ideological belief and transmitting it to the voters and citizens of the nation—making it *theirs*. It is a strategy that has worked for conservative politics, and it mirrors the strategy of the legal Right. Public arguments about the role of the judicial branch, after all, take on much more meaning—and capture much more public attention—when Republican presidents are in the position of power required to nominate judges to the bench.

The American Conservative Union and Nixon’s Welfare Plan

More than casting a pallor over movement conservatives, the primary result of Goldwater’s loss was to leave them without a project. And for people used to being busy, the main thing was to come up with a new focus for their energies. Even without a candidate, though, the conservative cause remained. One channel into which massive time and resources would be devoted was the Washington phenomenon of the “think tank,” a conservative invention.

⁴⁹ Stuart Hall, *The Hard Road to Renewal: Thatcherism and the Crisis of the left* (London: Verso, 1988), 38. In the most recent survey of the conservatives’ ascent to power, the Goldwater candidacy is treated as some kind of mystical, perhaps inevitable, results of demographic and intellectual shifts (with *National Review*) the exemplar of the latter. Despite their proper acknowledgement of Goldwater’s “achievement,” Micklethwait and Wooldridge include no mention of the grassroots movement that got him nominated and thus misses the major point of the importance of the Goldwater candidacy for the conservative *movement*. Micklethwait and Wooldridge, *The right Nation*, 40-62.

The prototype was the American Conservative Union, envisioned in a confab just days after Goldwater's defeat⁵⁰ and officially chartered a month later.⁵¹ With a conservative member of Congress as its first director, the group aimed to “unify the conservative movement,” to solidify the conservative role in national politics by capitalizing on the Goldwater support base across the country and on Capitol Hill.⁵² Think tank research and organized lobbying—now staples of Washington's political dynamic—were both in their infancy, and it would be conservatives who wrote the playbook. Forty years later, the left is still playing catch-up: No liberal think tank matches the reach and resources of the conservative triumvirate of The Heritage Foundation, The American Enterprise Institute, and the Cato Institute.

Among the ACU's lasting innovations was a rating system whereby members of Congress were given a 0-100 percentage-point score based on their legislative record⁵³ and a “Conservative Victory Fund,” which collected and distributed campaign funds nationwide—a predecessor to the Conservative Public Action Committee (CPAC) established in 1973.⁵⁴ While both of these innovations are interesting from what we might call a political science standpoint, it is their rhetorical impact that I wish to focus on here.

Consider the 100-point score. As a rhetorical tool it is a strikingly simple—and tremendously important—innovation. Since the dawn of Western civilization, the precision

⁵⁰ American Conservative Union, “The American Conservative Union: A History,” <http://www.conservative.org/about/history01.asp> (accessed April 14, 2007).

⁵¹ Schoenwald, *A Time for Choosing*, 234.

⁵² American Conservative Union, “A History”; Schoenwald, *A Time for Choosing*, 233-234.

⁵³ Micklethwait and Wooldridge (*The right Nation*, 2-3, 10, 93, 101, 355, 400) rely repeatedly on ACU ratings for empirical proof of the rightward shift in American politics, but have little to say about the organization.

⁵⁴ American Conservative Union, “A History.”

and perceived objectivity of numbers has been contrasted with the unreliability of language and “mere rhetoric.” The ability to cite statistics (no matter how dubious) remains a powerful persuasive technique, and is part of the reason the ACU ratings became so popular; competing liberal groups quickly devised their own matrixes for rating lawmakers. But as one participant in those early ACU ratings told me, the choice of votes considered in the calculus was often determined retroactively so that standard bearers like North Carolina Senator Jesse Helms would wind up with a 100% rating. As any pollster or statistician knows, statistics are themselves the result of a rhetorical process—how you ask the question.

During the later 1960s the ACU evolved into a large membership organization with a national newsletter, state chapters, and a fundraising apparatus. As its membership grew (topping 40,000 by 1975)⁵⁵ so grew its financial power and political leverage.⁵⁶ It is worth noting that among those who contributed to the ACU’s direct-mail operations was Richard Viguerie, a man generally seen as the Godfather of direct mail and modern political fundraising.⁵⁷ As a congressional aide to one of Viguerie’s clients once told me, the difference between the old way of doing business and Viguerie’s direct mail was “the same

⁵⁵ Rusher, *The Rise of the right*, 133; Edwards, *The Conservative Revolution*, 187.

⁵⁶ Schoenwald, *A Time for Choosing*, 236-243.

⁵⁷ A former YAF Executive Director, Viguerie began developing his techniques—and building a master mailing list—on the Goldwater campaign. He was not directly involved with the ACU’s fundraising, but in 1972, he coordinated nationwide direct mail operations for the group’s chairman, Rep. John Ashbrook of Ohio, who challenged Nixon for the GOP nomination—the bitterness evident in the ACU’s reaction to the Nixon welfare plan was ratcheted up to a new level with the president’s trip to “Red China.” The Ashbrook campaign was politically insignificant on the national level, but it has legendary status among movement conservatives. One reason why is that it resulted in Viguerie’s consolidation of the various extant conservative mailing lists, an irreplaceable resource which was instrumental in Ronald Reagan’s 1980 victory. Rusher, *The Rise of the right*, 224; Hodgson, *The World Turned Right Side Up*, 109, 112-114; Edwards, *The Conservative Revolution*, 173-176. By 1980, Viguerie’s database contained about 15 million names of contributors. Micklethwait and Wooldridge, *The right Nation*, 82; see also Viguerie, *Conservatives Betrayed*, 129-133; 190-192.

as the difference between the Pony Express and Federal Express.”⁵⁸ Which is also a reminder of an essential rhetorical truth: however sophisticated and well-honed an argument may be, its persuasive power is ultimately dependent on the ability to reach the audience.

The key moment in this particular evolution in thinking about communication and persuasion arrived just shortly after Richard Nixon had assumed the presidency. The ACU launched what its own institutional history describes as the “first authentic lobbying program,”⁵⁹ which probably set the model for the modern concentrated and coordinated media and lobbying campaign run out of a centralized political and research advocacy office. The target was not “the liberals” but rather the sitting Republican president, who with conservative acquiescence⁶⁰ had eked out a plurality victory just months before introducing his “Family Assistance Plan,” a controversial revision of the nation’s welfare system. Supporters called it a “negative income tax” and saw it as visionary; detractors, including conservatives, labeled it a “guaranteed annual income,” a step on the slippery slope to socialism.⁶¹ Conservatives felt betrayed and went on the attack. Hence the ACU’s extensive campaign literature: research, documentation, flyers, memoranda, and pamphlets which were distributed among Republicans in Washington and across the nation.

⁵⁸ Jane Bennett, interview by author, written notes, Ashland, Ohio, 1998. In *Conservatives Betrayed* Viguerie lists among its indictments of “big government conservatives” adrift from the moorings of the movement he helped found a failure to keep up with developments in communication technology. Viguerie, *Conservatives Betrayed*, 190-192.

⁵⁹ American Conservative Union, “A History.”

⁶⁰ The ACU, for example, had urged its membership not to support George Wallace’s populist candidacy. American Conservative Union, “A History.” The hard core at *National Review* held out for a last-minute convention challenge by Ronald Reagan, which never got up a full head of steam. Rusher, *The Rise of the right*, 153-163.

⁶¹ Joan Hoff, *Nixon Reconsidered* (New York: Basic Books, 1994), 128-137.

The 25-page ACU portfolio was a genuine harbinger, a kind of prototype that sits at the top of the family tree of Washington think-tank lobbying as it has evolved over the past 40 years. Released by the ACU immediately prior to Congressional action on Nixon's proposal,⁶² the cover of the report blares: "The Nixon Welfare Plan...SOLUTION OR SOCIALISM?" and features an image of open hands grasping into the darkness.⁶³ The image is strangely reminiscent of the stylized title for Otto Preminger's 1955 film *The Man with the Golden Arm*,⁶⁴ and though I have no reason to believe the similarity was intentional, a parallel would probably have been embraced by the ACU advocates. Like the junkie's relationship to his drug dealer in Preminger's film, conservatives argued that welfare creates a tragic system that traps poor people in a cycle of dependency. The grasping arm becomes the symbol of desperation and despair.

What follows behind this evocative cover is part ad-campaign and part policy research: an extensive review of existing welfare policy history and a rigorous economic analysis of Nixon's plan. It is an early model of what has become a common Washington phenomenon, the think tank policy brief—part research, part number-crunching, part talking points memo. Today, these types of ready-made policy and media kits are readily available online from the three major conservative think tanks. These organizations' websites feature massive amounts of downloadable research reports, opinion columns, policy analysis, statistical portfolios, magazine and journal articles. The rosters of resident scholars, fellows, and researchers cover a comprehensive range of topics ranging from monetary policy to

⁶² Schoenwald, *A Time for Choosing*, 240.

⁶³ American Conservative Union, *The Nixon Welfare Plan: Solution or Socialism?* Washington D.C.: 1970. On file with author.

⁶⁴ Twentieth Century Fox, 1955. Based on the novel by Nelson Algren.

international affairs and political philosophy. The names familiar to any reader of the op-ed page or viewer of cable television news programs—these are the nation’s opinion leaders.⁶⁵

The ACU functioned as a nexus for the *National Review*, YAF, and YR crowds as well as conservative members of Congress, and explicitly took up an intellectual and research-focused mission. While the ACU was not the first GOP think tank-type organization in Washington, it set the ideological tone that has come to dominate political discourse in the decades since. In the battle for rhetorical control of the national debate over policy and ideas, the think tanks as envisioned by the conservatives were, and continue to be, on the front lines.

The Founding of the Moral Majority

The incorporation of religious themes into conservative rhetoric did not take place until more than a decade after Barry Goldwater was drafted to run for president. The crystallizing moment was the founding of the Moral Majority, predecessor to the Christian Coalition of more recent times. In early 1979, the Reverend Jerry Falwell believed he was called by God to bring “the good people of America” together to fight permissiveness and moral decay.⁶⁶ With prompting from leaders of what was by then being identified as the New Right, Falwell followed his divine call and set up the Moral Majority, an explicitly conservative religious organization that would assume a direct role in electoral politics. That said, conservative historian Lee Edwards has written that Falwell was himself chosen by

⁶⁵ Rosters are available at: http://www.aei.org/scholars/filter.all/scholar_byname.asp; <http://www.heritage.org/about/staff/experts.cfm>; <http://www.cato.org/people/experts.html> (note the special icon indicating TV experience) (accessed April 14, 2007).

⁶⁶ Quoted in Hodgson, *The World Turned Right Side Up*, 180.

New Righters Paul Weyrich (founding president of the Heritage Foundation⁶⁷) and Howard Philips (founder of the Washington-based Conservative Caucus) because he was able to reach 15 million Americans weekly with his television and radio programs.⁶⁸ So much for divine inspiration; ultimately it appears to have all come down to audience.

By election day 1980, the Moral Majority under Fallwell's leadership had come to include in its membership hundreds of evangelical Christian ministries, most of them in the South including notable "megachurches."⁶⁹ At one pre-election ministers' conference, Weyrich made the goal crystal clear to his listeners: to "mobilize their flocks to vote for Republican candidates in general and for Ronald Reagan in particular."⁷⁰

"It turns out traditionalism had a genuine base among those who looked to the Bible rather than Edmund Burke for authority," wrote columnist E.J. Dionne in 1992.⁷¹ Dionne's comment points to the same split among conservatives discussed above—libertarians and social conservatives, held together by the fusion of common interests (fighting government growth and international communism) and common enemies (liberals). What's more, key events such as the Supreme Court's ruling in *Roe v. Wade* and the proposed Equal Rights Amendment to the Constitution had prompted a polarization around a set of moral questions, "values" questions related to sexuality, gender, and social life. The Moral Majority spoke to these concerns.⁷² Once again, conservatives were rhetorically rearticulating the political

⁶⁷ Micklethwait and Wooldridge call Weyrich "the Lenin of social conservatism—a revolutionary with a rare talent for organization." Micklethwait and Wooldridge, *The right Nation*, 81

⁶⁸ Edwards, *The Conservative Revolution*, 198.

⁶⁹ Hodgson, *The World Turned Right Side Up*, 181-182.

⁷⁰ Hodgson, *The World Turned Right Side Up*, 182.

⁷¹ Dionne, *Why Americans Hate Politics*, 232.

⁷² Edwards, *The Conservative Revolution*, 198-199; Dionne, *Why Americans Hate Politics*, 230-231.

scene. And despite its claim to both majority and morality, the Moral Majority cast itself into a position of oppression and ethical obligation: Conservative Christian evangelicals *needed to act*, lest the slide toward moral decay under liberalism's misguided rule be allowed to continue. We were, as Robert Bork would title a book some years later, "Slouching Toward Gomorrah."

The sermonizing by Fallwell and company was matched with political action on a mass scale. In the lead-up to the 1980 election, the Moral Majority and affiliated Christian organizations registered 2.5 million new voters.⁷³ And while it is probably not accurate to say that the Religious Right single-handedly elected Ronald Reagan,⁷⁴ this massive cohort of citizens was speedily subsumed into the conservative movement and its favored narrative of a traditional, Christian, neo-liberal, anti-Communist state. As former GOP chairman Haley Barbour of Mississippi put it, what happened with Southern evangelicals in this period was about much more than election results. "After 1980, they not only voted for Republican presidential candidates, but *began thinking of themselves as Republicans*."⁷⁵ This was happening because conservatives took up the language of evangelicals—listened to them—and framed policy questions in terms that resonated within their system of values and perception of the world. The reconfiguration of Jimmy Carter's evangelical Left—the Solid South was still democratic in 1976—into Ronald Reagan's evangelical Right was, ultimately, rhetorical. The right's persuasiveness extended to the ballot booth, and thanks to this the Moral Majority could ensure that its traditionalist, conservative Christian concerns about

⁷³ Edwards, *The Conservative Revolution*, 199.

⁷⁴ Dionne, *Why Americans Hate Politics*, 233-236.

⁷⁵ Quoted in Dionne, *Why Americans Hate Politics*, 235 (emphasis in original).

feminism, gay rights, school prayer, and abortion would remain a central part of the national political dialogue.⁷⁶

It's worth noting that all of this happened before Ralph Reed was out of college—and also before he became an evangelical Christian. By the 1990s, as Godfrey Hodgson writes, “neoconservatives, the Heritage Foundation, the Christian Right, and the rest ha[d] built a network of funding foundations, fundraising bodies, direct mail operations, journals, and channels of communication to mass media to disseminate their interpretation of the world and their policy prescriptions. In the process...they had gone a long way toward marginalizing all who disagreed with their ideas.”⁷⁷ They were, in other words, rhetorically reshaping the terms of national political discourse.

The Panama Canal, Sovereignty, and the National Will

With the moderate wing of the GOP excised after the defeat of Gerald Ford in 1976, Ronald Reagan's conservative ascendancy never looked more secure. A longtime darling of the *NR* hard core, Reagan—despite what his detractors often persist in saying—had been politically active and attuned since the 1950s. He came onto the national political stage as an eleventh-hour spokesman for Goldwater, with the foundering presidential campaign attempting to recover from the withering critiques invited by its own uncompromising (principled) rhetoric. Reagan's televised speech on behalf of the Goldwater candidacy, known as “A Time for Choosing” or—in certain circles—simply “The Speech,” remains a

⁷⁶ Edwards, *The Conservative Revolution*, 198-199.

⁷⁷ Hodgson, *The World Turned Right Side Up*, 282.

classic of the genre. One can imagine the hard core cons like Bill Rusher watching him then and knowing that in the long haul, Reagan—even more than Goldwater—was their man.

Reagan's authoritative aura and forceful persona were a perfect tonic for the sense of powerlessness and lost prestige that grasped late 1970s American political culture. The dots were all too easy to connect, one might say; rhetorically, the story was all too easy to tell—and it was powerfully persuasive. It was a story that included those last humiliating and tragic days in Saigon; the incapacitation of hostages held in the Tehran embassy; the pathetic response to the Soviets' invasion of Afghanistan. In part because each of these holds a more prominent place in our collective memory, I will focus here on a less-remembered moment: the return (or “surrender”) of the Panama Canal. As with the five rhetorical episodes already discussed, the Canal debate also holds pride of place among movement conservatives. It functions as what rhetoricians call a *synecdoche*: a part which stands in for the whole, a verbal and mental trigger, a code for big ideas compacted into two little words—The Canal.

The Canal was built by the United States under Theodore Roosevelt, and negotiations to repatriate the territory had been under way since the Nixon administration. On this issue, as with many others, conservatives broke ranks with that Republican president. Reagan seized on the issue during the 1976 presidential campaign and conservatives, including Weyrich at the Heritage Foundation, hammered away at it throughout the Carter presidency.⁷⁸ “We’re going to ride this hard,” said fundraising maven Richard Viguerie.⁷⁹ Why? Because the situation presented them with an ideal rhetorical opportunity. The

⁷⁸ Hodgson, *The World Turned Right Side Up*, 225-231.

⁷⁹ Quoted in Hodgson, *The World Turned Right Side Up*, 229.

conservative reframing of the situation presented America as a global military power neglected and abused under rule by supine liberals like Jimmy Carter.

For Reagan, Carter's stance of conciliation and repatriation was a "giveaway" to the "dictator," Panamanian General Omar Torrijo—"Castro's good friend" to boot. "We built it, we paid for it, it's ours," was Reagan's defiant line in 1976.⁸⁰ Never mind that the Canal was built in an era of imperialism; never mind that from an economic standpoint, the Canal was hardly worth defending. *Forbes* magazine seems precisely to have grasped the point when it editorialized that the Canal "is more symbol and substance."⁸¹ Exactly right...but the dichotomy is a false one. Rhetorically speaking, symbols *are* substantive, the very building blocks of our political consciousness and identity. As literary critic Kenneth Burke argued, language is at its root a system of symbolic action.⁸²

So, we have The Canal: a symbolic moment of crisis coalescing in the context of a weakened president and a decade of less-than-inspiring national politics. Therein lay the conservatives' opportunity. Like Howard Beale in the classic 1976 film *Network*,⁸³ the Canal "giveaway" captured a sentiment, a moment where a frustrated patriotic, nationalist citizenry might vent their spleen, declare (or cheer as leaders like Reagan declared for them) that they were *mad as hell and not going to take it anymore*. As E.J. Dionne summarizes the New Right's argument, it was symbolism pure and simple: "The Canal was *American*—end of

⁸⁰ Quoted in Hodgson, *The World Turned Right Side Up*, 226

⁸¹ Hodgson, *The World Turned Right Side Up*, 227.

⁸² Kenneth Burke, *Language as Symbolic Action* (Berkeley, Calif.: University of California Press, 1966), esp. Part I.

⁸³ Warner Brothers, 1976. Directed by Sydney Lumet.

argument.” Or maybe drop that last ‘n’: In conservative rhetoric, The Canal *was America*. And America does not hearken to tinhorn dictators.

So staunch was the New Right leadership’s commitment to the Canal issue that Reagan—who went as far as publicly facing down Buckley, a supporter of Canal repatriation, on his *Firing Line* television debate show—eventually became seen as soft on the issue. The short-lived New Right favorite for president in 1980 was not Reagan but Congressman Philip Crane of Illinois, a debonair history professor who had contributed to the ACU’s political research and who flanked right of Reagan on the Canal.⁸⁴ Crane released a popular paperback just prior to election season, *Surrender In Panama*—the title says it all.⁸⁵ Crane and his argument lost out, a Supreme Court challenge over the matter by none other than Barry Goldwater notwithstanding.⁸⁶ We will revisit the broader questions of international law and state sovereignty in Chapter Eight.

The Symbolic meaning of the Canal controversy cannot be overestimated. By 1979, the President of the United States was being described as hostage in the White House, impotent against a mob of hostage-takers in Iran; South Vietnam had fallen to the Communists; the American response to the massive Soviet invasion of Afghanistan was...a boycott of the Olympics. But it was with the Canal controversy that foreign policy was finally and specifically incorporated into conservative discourse. While the nascent *NR* coterie had raised foreign policy concerns as early as the 1956 Soviet invasion of Hungary, it was not until conservatives had established themselves rhetorically and politically that their

⁸⁴ Dionne, *Why Americans Hate Politics*, 231,

⁸⁵ Phillip F. Crane, *Surrender in Panama: The Case Against the Treaties* (New York: Dale Books, 1978). Crane still serves in Congress, where he is the dean of the House Republican delegation.

⁸⁶ *Goldwater v. Carter* 444 U.S. 996 (1979).

aggressive foreign policy message could be articulated to a wider audience. And find an audience it did: An ACU-financed television documentary-cum-telethon on The Canal generated half a million dollars—and half a million new names for Viguerie’s ever expanding database⁸⁷

Nothing the conservatives have achieved in reshaping attitudes toward Constitutional interpretation and the courts could have come to pass without the groundwork laid by 50 years of activism, organizing, and rhetorical strategizing. The Federalist Society can only be understood in this context, and brief as this introduction has been, it serves to highlight the tactical acumen and coherence of the conservative movement of which the Federalist project is a part.

The project was, from the outset, an ambitious one. Through the efforts of its advocates and organizers, the conservative message has reached into more and more domains of our national life. With the founding of *National Review* the project was launched in the realms of news media and mass communication. Young Americans for Freedom pushed the movement and its ideology on to fertile ground of the college campus. In mounting the “Draft Goldwater” campaign, conservatives took the plunge into party politics, which has ever since borne their stamp. In establishing the ACU conservative intellectuals and policy advocates began aggressively translating their ideology to the project of governance and legislation. The Moral Majority incorporated religion into conservative discourse, reconfiguring the identities of millions of evangelical Christians into Christian conservatives. And in the Panama Canal episode, conservatives seized on a moment of seemingly obscure

⁸⁷ Schoenwald, *A Time for Choosing*, 242; Rusher, *The Rise of the right*, 224.

foreign policy as a symbolic example of the nation's decreasing stature on the world stage. In doing so they prefigured the New Sovereignty of a later generation of legal conservatives, discussed in Chapter Eight.

The Federalist Society would never have been possible—or even imaginable—were the fields of social, political, and legal life not made fertile by the conservative movement. The Society was created by children of the conservative era, literally so in the case of Gene Meyer, son of *NR* guru Frank Meyer. The Federalists continue to foster the kind of sharply strategic rhetorical invention that has characterized the movement from its earliest days. Like the profession of law, the Society is an institution built on debate and argument—but plugged into a network of political conservatism. Like *NR*, the Federalists function as a forum, the debating chamber of the right. And as with Buckley's magazine, the Federalists operate their debating chamber for the benefit of a politically and ideologically interested project. In the following chapters we will examine how these interests—how the conservative project—is advanced by the Federalist Society. Their story begins with three friends at Yale University.

CHAPTER 2

THE BIRTH OF AN IDEA

The Federalist Society is the brainchild of a small, tight-knit group of Yale undergraduate friends who came of age in the 1970s, years when the New Right—as we have just seen—was working to change the way Americans thought about politics and culture. The Federalist Society was, in a sense, a natural outgrowth of their shared experience as precocious and politically attuned undergraduates, though hindsight always tends to make such developments seem natural. At the time, Lee Liberman, David McIntosh, and Steve Calabresi were simply three Yalies who met in a campus debating club, the Yale Political Union...as opponents.

McIntosh, a quiet kid from Indiana raised mostly by his widowed mother, was something of a leftist radical. Liberman, a more sophisticated East-coaster who volunteered in the Washington office of Ronald Reagan's 1976 campaign for president, was already fairly conservative. She was a member of the debate union's Party of the right, through which she got to know Gene Meyer, an older student who would later become the Federalist Society's President. Calabresi, the child of upper-class liberals who, he told me, started following politics "at about age ten," was head of the Union's moderate Independent Party. While Lee was volunteering for Reagan years before he even made it onto the ballot, Steve cast his first presidential vote for Jimmy Carter in 1976. The Federalist founders didn't all start off on the same page.

In a moment that foretold the kind of coalition building that the three friends would put into action with the Federalist Society, these three odd-people-out in the debate union (none of their respective “parties” was very large) put together a strange bedfellows majority that in 1978 ousted the reigning officers. Calabresi assumed the presidency that year, succeeded by McIntosh in 1979.

That said, the three friends found their political views increasingly converging during their time at New Haven. In spending time together, talking and debating politics and schoolwork, their views evolved together. After graduation, several of them decided to live together in Arlington, Virginia while working across the Potomac River in Washington D.C. Steve joined the staff of U.S. Senator John Chafee of Rhode Island, Lee was hired by Senator Richard Schweiker of Pennsylvania, and Gene Meyer was with the National Tax Limitation Committee. They shared the house with another future Federalist activist, Richard Vigilante, as well as Gene’s brother, John, who continues working in politics today; David was around the Beltway in Maryland, and the group hung together.

The Arlington house became a site of constant political bull sessions, with the trend moving in an increasingly conservative direction. This was hardly a new environment for Gene and John Meyer who, of course, had grown up in the rarest of all conservative air—their father Frank having been Bill Buckley’s right hand man at *National Review*. There must have been some persuasion going on: Calabresi abandoned his 1976 candidate, Jimmy Carter, in favor of Lee’s man, Ronald Reagan. The two volunteered together for Reagan in 1980, a formative moment for so many young conservatives. And David credits Lee with “convincing him that he was conservative.” As with the rest of the Yale gang, Lee and Steve

carried their campaign enthusiasm with them to law school in 1981. The Federalist Society would result.

For Calabresi—probably the most intellectual of the founding group—Reagan’s campaign became an almost existential exercise that stretched into the past and the future, tapping into his own family history and his hopes for the future in the Cold War era. “The Carter administration was a complete and utter fiasco,” he told me, focusing particularly on the foreign policy failures in Iran—abandoning the Shah and then proving unable to secure the release of American hostages—and in Afghanistan, where the Soviet invasion went almost unnoticed. Calabresi faulted Carter for a failed energy policy, economic policy—everything, really. Reagan seized on this feeling of “malaise,” as it became known, and Calabresi was hardly alone in feeling that the man at 1600 Pennsylvania Avenue was incapable of doing anything right. “His presidency absolutely went through the roof,” Steve told me. Carter’s gloomy visage in his final months in office was more befitting a kind of political prophet of doom, not the leader of one of two world superpowers, supposed leader of the free world. He paid the price.

Young Calabresi rarely talked politics with his parents, but—as with so many future leaders in the conservative movement—he had an outlet in likeminded friends who were motivated enough to become active at a time when their ideas were not in the mainstream. Steve’s family was not without politics, however. His uncle Guido—eventually dean of the Yale Law School, appointed to the federal bench by President Bill Clinton—has been a lifelong sparring partner, from childhood on. Indeed, Guido and Steve still duke it out on Federalist Society panels. “He drives his uncle crazy,” said Professor Richard Epstein, an

early Federalist Society booster and leading conservative scholar. In a wonderful example of the concentric circles that govern so much of the worlds of politics and law, it also happens that the liberal Guido taught the conservative Epstein years earlier at Yale; he still insists on addressing his one-time student as “Richie.” Epstein in turn taught both Lee Liberman and David McIntosh at Chicago in the early ‘80s, when the Federalist Society was still an idea waiting to be born.

Calabresi remembers taking on Uncle Guido almost as long as he remembers doing anything; at age twelve he recalls a Red Sox game that provided the background for a debate on the Vietnam War (Steven for, Guido against). Guido’s father, Steven points out, “was even more to the left”—but was an important figure in the younger Calabresi’s emerging political worldview. Calabresi’s ancestor agitated against Benito Mussolini in the 1920s and eventually fled Italy to escape political persecution. “I thought that the Vietnam war was the right thing for the country to be involved in,” Calabresi said. “I saw the struggle against communism as a continuation of the struggle against fascism my family had been involved with.” This was exactly the line conservatives like Reagan and Goldwater had been taking for the previous 25 years, equating communism with fascism. When Truman and Eisenhower said “containment,” these conservatives asked, with Goldwater, “why not victory”? In our own time, George W. Bush has attempted to extend this metaphor of moral and military struggle to the “War on Terror,” and Calabresi support him just as strongly. As we will see, however, his view is by no means the Federalist Society party line.

Calabresi arrived at Yale law school less than a year into the Reagan presidency. He would study Constitutional law with Reagan judicial nominee Robert Bork. Bork, who had

served in the Nixon and Ford Justice Departments, had taught at Yale since 1962 and was one of the few well-known conservative legal intellectuals of that period. Calabresi gravitated toward him, as Lee Liberman and David McIntosh gravitated toward Epstein at Chicago. Bork “was a tremendous teacher, very outspoken, very friendly,” Calabresi said. He invited his students to take him on, and as Calabresi recalls, they did so. In one memorable incident, Gary Lawson (one of Calabresi’s few conservative Federalist allies) tacked to the professor’s door a list of 98 theses on why Bork was too liberal on anti-trust—the area of law in which he’d staked his firmest conservative claim, publishing a book that remains today a definitive work on the topic. A few years after law school Bork recommended Calabresi to future Attorney General Edwin Meese’s chief counsel. “There is one person you must hire,” Ken Cribb remembered Bork telling him, “and that person is Steven Calabresi.” Bork and Cribb have served in leadership capacities with the Federalist Society practically since Steve and his friends created the group in 1981.

Hot off the campaign trail with the Reagan Revolution and a thorough immersion in the world of conservative activism, Steve and his friends were in for a rude awakening upon their arrivals at Yale and Chicago—the New Right had hardly, if at all, penetrated the protective ivied walls of the ivory tower. The energy and enthusiasm Reagan stirred up among young people of this era, Calabresi told me, should be understood as being in the same category as the passion inspired by the Civil Rights Movement in the 1960s. And in fairness, our understanding of Reagan’s place in contemporary culture and history remains obscured by the shrillness of his critics on the left who insist the man was either stupid or evil or both. Then, as now, this type of attack only stands to fuel conservatives, including young conservatives, who respond to the right’s idealism.

In the early eighties there was a pervasive feeling of electricity among the young Turks who had backed Reagan, the man the liberal (and academic) establishment loved to hate. If the Yale debate gang expected to find kindred spirits on their Ivy-walled law school campuses, they had another thing coming.

“There was no student organization that seemed interested in Reagan’s legal ideas,” Lee Liberman—now Lee Otis—told me, “and this seemed a little odd given that he had just won the presidency.” This sense of cognitive dissonance, we might call it, was a big part of what drove the Federalist Society’s founders to bring it into existence. “The fact was that all of the student groups seemed to be talking about legal ideas in somewhat the same way as they might have been talking about them in the early seventies,” Otis says, “without any kind of acknowledgement that there was anything other than racism and sexism going on in the whole world.” There *was* something going on—Reagan was going on. She and her friends from the house in Arlington had been batting around the idea of forming some kind of conservative law students’ organization, and their experiences as first-year law students would prompt them to turn that idea into reality.

William Bradford “Brad” Reynolds, Reagan’s controversial Civil Rights chief and an early backer of the Federalist Society, recalled his impressions of Otis and her friends, the Society’s founders. This younger generation of conservatives, he said, seemed “frustrated.” “All they were hearing was the same old same old—and it didn’t sound right to them, it didn’t sound well-reasoned.” As all of the Federalist conservatives of Otis’ generation I spoke with confirmed, the Reaganites provided them with an alternative—both in the ballot box and rhetorically, as exemplars of how arguments against the liberal consensus could be made. “These kids were hearing from Ronald Reagan, from Ed Meese, from Ted Olson, from

Brad Reynolds, from Nino Scalia before he went on the bench, and from Bob Bork,” Reynolds said. “They were hearing people who were bold enough to stand up and say ‘that doesn’t make sense’. I think that was attracting them more than anything else.”

Bork is even more forceful, suggesting that the contextual frame must be widened a bit to include the effects of the 1960s and early 1970s student movements, what he calls the “troubles”—and its effects on the tone and atmosphere of college campuses. “The Federalist Society is in a sense a reaction to the student turmoil and the radicalization of the faculty,” Bork told me. “It was not only the professors who got tenure after having been student revolutionaries or rebels or whatever they were,” he told me, “but some faculty members at the time decided to run with the students—maybe radicalized is too strong a word. I think these kids were disgusted by that atmosphere and formed the Federalist Society as a way of bringing some other ideas into what was not a discussion up to that point. They wanted to create a discussion.” Randall Rader, a federal appellate judge appointed by President Reagan after working as counsel to Senator Orrin Hatch, personalized his own experience in almost exactly this way. His story is similar to what I heard from dozens of other Federalists, both rank-and-file practitioners and political appointees in Washington.

“I can remember being taught Constitutional law, and the professor asked if anyone had any contrary views on a particularly important Constitutional case,” he said, “and I raised my hand and promptly got chewed to death by the professor and by the students.” The incident provided Rader with what he now sees as valuable motivation to educate himself on the issues in question. And he sees the Federalist Society as helping young conservatives no longer face such situations on their own. “I didn’t have any place to go in 1974,” he said, “*I was it.*” Things are different now, he says, thanks to the Federalist Society and the network it

has built up. The student in Rader's situation would, if he chose to avail himself of it, have access to information, publications, and people (perhaps even some professors on his campus) who could help him articulate the argument Rader expressed mostly as an intuition. Many conservatives think back to formative experiences like Rader's; Bork, for example, recalls a standout student of his named John Bolton, who as far as the professor can remember was the only conservative in his Constitutional law class at Yale that year in the early 1970s.

When I reached this point in conversation with many Federalists, I often found them turning to an economic or market metaphor. "The Federalist Society was really responding to a market void because in the legal academy, the ideological left had almost a total monopoly upon the faculty and the range of discussion—and much the same is true of the organized bar for practicing lawyers," said Ted Cruz, a clerk to former Chief Justice William H. Rehnquist and now Solicitor General of Texas. "The Federalist Society was filling this yawning vacuum," he said. "In many law schools it can be difficult to be the lone voice on campus, and one of the things the Federalist Society provided was fellowship and discourse for conservatives and libertarians."

The notion of postwar liberal consensus as a bad thing—as foreclosing conversation and shutting down debate—is a theme of conservative discourse that owes much to Buckley and his *National Review* contingent; their project, staged in an age of consensus, was explicitly anti-consensual. Conservatives owe much to Reagan and his acolytes for providing political leadership, but movement conservatism really began with Buckley, even before he founded *National Review*. Reagan's first appearance as a political spokesman was on behalf of Goldwater, after all, and it was Buckley and his *NR* crew who managed to convince him to

run for president in the first place. But Buckley's first book, published barely a year after he left college, 1951's *God and Man at Yale*,⁸⁸ was more concerned with education than presidential politics.

His critique of an insular, liberal academia out of touch with political reality remains a staple of conservative criticism, still being recycled by contemporary anti-academic crusaders like David Horowitz. Horowitz and his ilk perceive a nefarious ivory tower plot every bit as expansive and liberal as was Hillary Clinton's vast right-wing conspiracy. Neither, the reasonable critic must conclude, is accurate; both are extreme views resulting from a kind of pathology that sees unified conspiratorial motives where there are, at best, only contingent alliances—if there are alliances at all, and not just superficial similarities. All this might explain why Calabresi and his Ivy League friends did not really attempt turning themselves into Buckley's torch carriers, despite the Yale connection. Calabresi says he never met the *NR* founder until years later, though another of his projects did figure—subconsciously, perhaps—in the Federalist Society's genesis.

This was *Firing Line*, Buckley's hour-long television debate show, which a young Calabresi watched, we might imagine, along with Sesame Street and Captain Kangaroo. What Calabresi says he took in from *Firing Line* was not only Buckley's crackling repartee and debating skill, but his willingness to take on the best the other side had to offer. The Panama Canal controversy is a case in point: Buckley, who supported the return of the Canal, might have invited some lesser-known figure. But he chose Reagan, the front-runner for the Presidential nomination and perhaps second only to himself in terms of cache among the

⁸⁸ William F. Buckley Jr., *God and Man at Yale* (Washington, D.C.: Regnery, 1986 [1951]).

conservative hard core. Left or right, the bottom line for Buckley was that one should be able to defend one's positions against the most articulate, intelligent opponents. In that case, it meant taking on Reagan.

"Buckley was very articulate, very conservative, very interested in ideas," Calabresi says, "but he was completely unafraid"—an interesting dichotomy there, between ideas and fear, and an insightful one. "I didn't think of that when we were forming the Federalist Society," he adds, "but when I look back I think the example Buckley set was probably quite important. One of the lessons I took away from it, besides becoming a conservative myself, was the value of debate."

And here is the birth of the idea: rather than having law school classrooms function only as glorified podiums for lecture and "Socratic" inquisition by the professoriate, have them function as forums. Take the *Firing Line* model and replicate it; let a million little Buckyblooms bloom, Calabresi nephews taking on their many figurative uncles in the academy. It was that simple, in a sense—and it's stayed that simple. By replicating the *Firing Line* model across the country in law schools and in countless—now almost daily—panel events, luncheons, and dinners, the Federalists have opened a kind of national debate tournament. Rhetoric is at its core, for the point of all these debates and panels and questions-from-the-audience is both intellectual and strategic. "People show up," one national Federalist official told me, because "they want to hear the arguments from the other side and be able to dissect them."

These conservatives, like Frank Luntz, are very good listeners. And the results pay real dividends when it comes to legal, political, and social change. Like any good activist, the average Federalist will still tell you the cause has miles to go, and things may or may not

even have improved since the project got off the ground. (The difference between *conservative* and *Republican* success means all the difference here—this is why the Miers nomination mattered.) At a minimum, however, legal conservatives now have a “seat at the table,” as Meese told me.

Getting off the Ground

The first Federalist Society conference came after the friends had been at law school for a year. Despite being separated by thousands of miles, Steve, Lee, and David were in almost daily contact—all this before the Internet made the work of organizational activism so much easier. “We were so overwhelmed during our first year that nothing happened,” Calabresi recalls. During the summer they talked about organizing some kind of group a bit more, he says, and the following fall semester they started trying to get people together to do...something—at this point there was still no plan for a national organization. But even manpower seemed lacking. “I was able to find about four other people at Yale,” Calabresi says. “So the five of us met as a kind of steering committee.”

The “steering committee” helped coordinate with Lee and David at Chicago, and the first conference was eventually planned for Spring 1982, at Yale, where Uncle Guido was teaching (he would become Dean in 1985). The Yale club, the first to be officially known as the Federalist Society, hosted a 1981 debate over *Roe v. Wade* between two academics. It did not attract much attention, but success would come the following semester with the conference hosted in conjunction with Lee and David at Chicago and Spencer Abraham’s fledgling journal at Harvard.

Lee and David had recruited their own faculty advisor at Chicago. At that time, neither of them had taken a class with Professor Scalia, who was not even on campus that semester—he was visiting at Stanford. But, Otis recalls, they had looked into his background and felt he would be a good intellectual fit for the club they were looking to get off the ground. “We were looking for an academic with a somewhat practical cast of mind,” she said, “and it seemed like based on his reputation and experience that he would be a good choice.” It was Scalia’s ability to cross the boundary between academia and politics that particularly attracted her attention.

“He’d done things. He’d been in government,” Otis said, pointing to his work in the Justice Department under President Ford. As would continue to be the case for the Federalist Society, knowledge is always paired with practical application. And Scalia had done this—he’d bridged the gap between theory and practice. That was what these kids wanted to do, too. “So anyway, I called him up and he said he would do it,” Otis said. The rest is history. Antonin Scalia’s involvement with the Federalist Society had remained constant, before and after his appointment to the Supreme Court. As with Bork, Scalia remains committed to his students long after they left his classroom or his campus. “I was not a moving force behind it,” he told me in an interview. “I don’t want to take credit for that. They brought the project to me and needed a faculty sponsor. And I was happy to do that, because I thought there was a need for such an organization.”

As a teacher, Otis says Scalia was good at calibrating the level of sophistication in presenting material to students, often arguing that “Life is simpler than it seems.” She also recalls a “Joe Six-Pack” character that often appeared in his lectures. “How would Joe Six-Pack react to this?” he would ask—a kind of populist interruption very much in keeping with

his future jurisprudence, explored in a later chapter. And as Otis recalls, Joe Six-Pack was also “a kind of a healthy correction to some of the more esoteric ways to talk about legal issues.”

Scalia recommended speakers for the club’s first conference, including Ted Olson—a Reaganite from the California days who was then in the Justice Department, and who would go on to become Solicitor General under President George W. Bush. Scalia also suggested funding sources, which included the conservative John M. Olin Foundation, which in the coming two decades would contribute over \$2 million toward the Society’s projects.⁸⁹

Olson accepted the Society’s invitation, as did Professors Bork and Epstein. Calabresi credits Bork with helping the conference become more of a success than the Yale club’s first event. “It was Bork who had the star power,” he said. “At the time Scalia was still a professor at Chicago and relatively unknown.”

The Yale event was well publicized and attended by nearly as many faculty members as students. To maximize interest and exposure, Otis had contacted law student Spence Abraham at Harvard after having learned of his similarly conservative project in a conservative newspaper. Abraham, a future member of Congress and Secretary of Energy under George W. Bush, has started the *Harvard Journal of Law and Public Policy* as a conservative alternative to mainstream academic law reviews. “I must have seen his name in the article or found a copy of the journal,” Otis recalls, “and told him we were starting this thing and were holding this conference—and they really ought to cosponsor it and they also ought to publish the proceedings. He tells me I was extremely definitive about that!” The partnership that was initiated with that first conference continues to this day. The *HJLPP*

⁸⁹ John J. Miller, *How Two Foundations Reshaped America* (Washington, D.C.: The Philanthropy Roundtable, 2003), 29.

publishes transcripts of most major Federalist Society conventions and is widely recognized as the journal of choice among conservative legal academics. In many ways, it is the legal equivalent of *National Review*—a kind of clearinghouse for serious academic critique among those in the conservative camp. A free subscription is included with every Federalist Society membership.

So the Harvard journal was brought on board as a co-sponsor, as was a similar group at Stanford that Prof. Scalia had brought to the attention of Lee and David. By all accounts the event was a success. There were lively debates, very much following the *Firing Line* formula. “We believed, from our undergraduate days, that debate was more interesting than speeches,” McIntosh recalls. Epstein did his part, particularly riling the professoriate in the audience by defending the pre-New Deal jurisprudence of the Supreme Court. During that era the Court recognized much wider “economic liberties” and struck down many of Franklin Roosevelt’s policies as interfering with those liberties, particularly the freedom to enter into contracts unencumbered by government rules and regulations.⁹⁰ I will consider Epstein’s arguments in detail in Chapter Seven.

“There was a lot of faculty in that room, and a lot of students—but more faculty than students,” Epstein remembers, noting the hostile and dismissive reaction of some of the more liberal attendees. “It went over its appointed time. People like [Guido] Calabresi and [liberal professor Bruce] Ackerman sort of looked at me and realized that this was obviously heretical in a very deep sense. And I would say, to their credit, they tried to land a knockout

⁹⁰ Progressives of that earlier era presaged their 20th century successors in arguing against the orthodox formalist reading of the law favored by the Supreme Court until 1937, when Justice Owen J. Roberts’ “switch in time saved nine.” Roberts’ change of heart staved off Roosevelt’s infamous court-packing scheme by flipping the 5-4 vote in favor of FDR’s ever-expansive administrative state. Ronald Reagan often cited Roosevelt as his favorite president, for somewhat obscure reasons; his youthful Federalist acolytes, to be sure, can hardly be considered New Dealers. Their first conference was something of a broadside against FDR’s expanded welfare state, and it sticks in the minds of attendees decades later.

blow to let this thing die on its birthday. And it didn't die." He says that his own work, focused on economic liberty and particularly on the Takings clause of the Constitution, was facilitated by the Federalist Society debates, from that very first conference onward.

Reagan's Solicitor General Charles Fried, who was also on the program that Spring day in 1982, has similarly vivid memories of that first Federalist Society event. "It had the smell of success right from the beginning," he said, recalling the students' enthusiasm. "They were very confident of themselves." But they also impressed him with "a good natured willingness to involve people who didn't agree with them." Fried is currently the advisor to the Harvard chapter of the Society, which—to the surprise of some—has the most active student chapter in the nation. A recent article in the *Harvard Journal of Law and Public Policy* effectively makes the claim that the Federalists have demonstrably changed the tenor of academic life at the most iconically left-wing of the Ivy League schools, beginning with their involvement in the confrontation with leftist Critical Legal Studies law faculty and continuing to the present day.⁹¹

CLS was largely the project of the generation that came of age during the 1960s, heavily influenced by Marxist-materialist critiques grounded in the concepts of race, gender, and class, as well as European poststructuralist philosophy—where rhetorical theory plays an important part. For the "crits," as for all of us involved in the project of rhetoric, texts obtain meaning through acts of interpretation.

The impact of the radical anti-authoritarian, anti-traditionalist critique of the 1960s on law as in other humanist disciplines, including rhetoric, cannot be underestimated. Fueled by the idealism of the sixties social movements, the generation of legal academics who came of

⁹¹ George W. Hicks Jr., "The Conservative Influence of the Federalist Society on the Harvard Law School Student Body," *Harvard Journal of Law and Public Policy* 29 (2006).

age during the years of the counterculture turned their sights on what they viewed as the institutionalized myopia and discrimination of both the law schools and the broader legal culture. As one recent survey concludes, CLS writers believed that “legal doctrine sustains the established social or political order by disguising its contradictions and by rationalizing its outcomes as logically necessary and politically neutral.”⁹² Though it has opened up some possibility for different modes of analysis, CLS has not changed the course of traditional, mainstream legal scholarship.⁹³ As law professor Gerald Wetlaufer wrote in a searing critique, legal education is still dominated by a positivist outlook. “The lawyer will do everything in his power,” Wetlaufer writes, “to speak in objective and authoritative tones.”⁹⁴

Legal critics, he argues, adopt “a voice that is objective, neutral, impersonal, authoritative, judgmental, and certain.”⁹⁵ Legal pedagogy instills these norms—and does so through “a pedagogy of assault.”⁹⁶ There are Right Answers to legal questions, and students either identify them or they do not.⁹⁷ “Our rhetoric operates by predisposing us to render as black and white that which is gray,” he concludes.⁹⁸

Wetlaufer’s critical voice is a lonely one. Many of the idealistic ‘60s generation in academia were influenced by the deconstructionist and Marxist-materialist philosophies

⁹² Arthur F. McEvoy, “A New Realism for Legal Studies,” *University of Wisconsin Law Review* 2005 (2005): 444.

⁹³ Two general surveys are James Boyle, ed., *Critical Legal Studies* (New York: NYU Press, 1992) and Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986). Perhaps tellingly, both are out of print.

⁹⁴ Gerald B. Wetlaufer, “Rhetoric and Its Denial in Legal Discourse,” *Virginia Law Review* 76 (1990): 1558.

⁹⁵ Wetlaufer, “Rhetoric and Its Denial,” 1568.

⁹⁶ Wetlaufer, “Rhetoric and Its Denial,” 1578.

⁹⁷ Wetlaufer, “Rhetoric and Its Denial,” 1577-1587.

⁹⁸ Wetlaufer, “Rhetoric and Its Denial,” 1589-1590.

emerging from continental Europe—thinkers like Michel Foucault, Jacques Derrida, and others. These thinkers emphasized the traditional Leftist categories of race, gender, and class as organizing principles; the broader failure of CLS notwithstanding, many legal scholars continue work in these areas. But continental philosophy also influenced many young scholars’ thinking on the nature of texts and interpretation in general. As Yale Professor Jack Balkin writes, deconstruction took on an explicitly political and persuasive role for the young leftist lions of the academy. “Deconstruction would become a series of rhetorical strategies for criticizing certain legal doctrines...in order to show that they were unjust, ideologically biased, or incoherent.”⁹⁹

Balkin and others associated with CLS sometimes express surprise that their theories have been seized upon by conservative critics as inviting legal and intellectual chaos. In a recent article, for example, Balkin calls it “something of a mystery” that the deconstructionist project has been “translated into the claim that people can make texts mean whatever they want.”¹⁰⁰ Why this is so mysterious for Balkin is itself a mystery: As Wetlaufer’s withering critique makes clear, legal scholarship (not to mention legal practice) subsists on a steady diet of essentialized, fixed meanings. Could Balkin *really* still be shocked at the unfriendly welcome deconstructionists have met with in the law, let alone from politically and ideologically motivated critics like those in the Federalist Society? Whatever the merits of the deconstructionist project, Balkin’s arguments fail in achieving much other than reassurance for those who already agree with him.

⁹⁹ Jack Balkin, “Deconstruction’s Legal Career,” *Cardozo Law Review* 27 (2005): 721.

¹⁰⁰ Balkin, “Deconstruction’s Legal Career,” 720.

Consider this passage, a nicely condensed definition of deconstruction:

“Deconstructive readings do not assert that texts have no meaning or that their meanings are undecipherable. Rather, deconstruction argues that texts are always overflowing with complicated and often contradictory meanings.”¹⁰¹ For the non-academic audience not versed in critical theory and notions of linguistic contingency, these two sentences would surely seem to contradict each other. Indeed, once law is admitted to be indeterminate, and overflowing with contradictions, it ceases to function *as law*. Intellectual and political conservatives have seized on this argument and, for thirty years, turned it against CLS and deconstruction in the legal academy and the legal profession. That Balkin and others persist in making their arguments in ways that play directly into the critiques of their opponents does not speak well of their rhetorical choices. Indeed, it gives conservatives a sword.

Later in the same article I’ve been quoting here, Balkin seems to half-acknowledge this point. “If deconstruction meant incoherence,” he says, “then it also meant the incoherence of any positive progressive program for Critical Legal Studies and any radical alternatives to mainstream legal thought.”¹⁰² The problem is that whatever Balkin or anyone else believes, for many deconstruction *has* come to mean incoherence.

In a democracy that purports to operated under “the rule of law,” legal rules, while changeable, depend to a large extent upon their perceived determinacy for their popular legitimacy. I emphasize *perception* here: perceptions shaped by context and history—and by argument.

¹⁰¹ Balkin, “Deconstruction’s Legal Career,” 727.

¹⁰² Balkin, “Deconstruction’s Legal Career,” 735.

In the legal academy, unlike in some other humanities disciplines, the “crits” probably overplayed their hand, and paid for it. At Harvard and other law schools, their radical critiques struck many students, faculty, and alumni as both wrong-headed (from a conservative point of view) and counterproductive to achieving change (from the traditional liberal side). Federalists and many traditional legal scholars launched a broadside attack, often lapsing into hyperbole—charging CLS with “nihilism” and denying their legitimacy as legal thinkers. At Harvard, they certainly seem to have succeeded—at least insofar as an avowedly anti-CLS professor, Robert Clark, was chosen to be the Dean. He held the post from 1989 until 2003.

So much for liberal Harvard? The editor of that law review article on the Federalist chapter, on her way to clerk for Judge Bill Pryor, who was nominated to the 11th Circuit Court of Appeals by President Bush in 2005 and confirmed as part of the compromise reached after a Democratic filibuster, assured me that conservatives have by no means captured the majority. “The law school is so overwhelmingly liberal that Federalists unite against that,” she told me, mentioning a professor left over from the Critical Legal Studies crew who “thrust our class into a sort of existential despair.”

The phrase echoes Rorty, who has written that the left’s retreat into theory, away from politics and its necessary acts of compromise, represents a “gesture of despair.” And within the community of liberal-minded rhetoricians there are those who follow Rorty’s lead. The silence on the left is deafening, concludes rhetorical critic Maurice Charland, and “is symptomatic of a reluctance to deal with practical politics and realistic terms.”¹⁰³ But there is

¹⁰³ Maurice Charland, “Rehabilitating Rhetoric: Confronting Blind Spots in Discourse and Social Theory,” in *Contemporary Rhetorical Theory: A Reader*, ed. John Louis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: Guilford, 1999), 470.

more than just rejection of gloomy CLS to the Federalists' success, I was assured.

"Federalists share more than 'not being liberal'; there's also a positive commitment among Federalists of all stripes to its core values of limited government, freedom, and judicial restraint."

Discussing these debates, Judge Pryor described the unifying effect CLS played for the various factions of the right at Harvard and elsewhere. The attitude that interpretation creates meaning, for many conservatives, is the same as saying that "politics" determines meaning; and politics, grounded in popular opinion and majority rule, is fickle. We wouldn't want to turn interpretation of our free speech rights over to a referendum, would we? Thus the tendency among conservatives to often insist on fixity and certainty of meaning. Not to do so brands one a "relativist," that nastiest of intellectual epithets. Progressive legal thinkers of an earlier generation embraced this label as a pragmatic fact of life, if not a moral guide—conservatives raged against the idea 100 years ago, as they do today. "There can be no wisdom in the choice of a path unless we know where it will lead," wrote the unabashedly realist Judge Benjamin Cardozo in 1921, in a work that set off fireworks among his conservative critics. "The juristic philosophy of the common law is at bottom the philosophy of pragmatism," Cardozo wrote. "Its truth is relative, not absolute."¹⁰⁴ Conservatives like Scalia cringe at the label "pragmatist" almost as much as they do "relativist"—though Federalist conservatives often acknowledge that the Courts do not proclaim the Law of the Land, only the Law of the Case. Pragmatism by any other name may still not yet smell as sweet, particularly in our hyperpoliticized current environment.

¹⁰⁴ Quoted in Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1994), 190. The quotation is from Cardozo's 1921 book *The Nature of the Judicial Process*.

The Federalist Society's statement of purpose says it all: the role of the judge is to say what the law *is*, not what it *should be*. But...even in saying what the law *is*, there is interpretation going on. It is not unknown to occur, in fact, that good conservatives like Scalia and Clarence Thomas will disagree on what the law is. They may even both claim to be referring to "objective" history and the original meaning of a law—but even these two committed conservatives sometimes disagree. They interpret differently.

Pragmatists shrug their shoulders at all of this—it's rather obvious, and unremarkable. Of course there will be disagreement, because that's what judges do: they interpret texts and events, applying the former to the latter.¹⁰⁵ For that matter, interpretation is what we all do when we try to figure out the meaning of complicated situations and texts, and to persuade each other of the right interpretation.

The distinction between meaning as inherent and meaning as produced by interpretation may seem a fine one but it is of deep importance in the practice of law, as Wetlaufer argues. I come down in the middle of two extreme positions—conservatives who claim meanings are fixed, knowable and concrete, and radical contextualists who consider meaning to be wholly context-dependent and ungeneralizable. As a pragmatist, I would argue that what matters is not so much the philosophical underpinnings of some justification of a text's meaning, which in a democracy is almost always the result of consensus arrived at through debate, but its practical effects.¹⁰⁶ Effects, after all, are what most of us have to go on. In the world of the law, particularly Constitutional law, effects manifest themselves in the most essential building blocks of a free society: freedom of speech and assembly; civil rights;

¹⁰⁵ See Richard Rorty, *Philosophy and Social Hope* (New York: Penguin, 1999), 93-112.

¹⁰⁶ Cf. Rorty, *Philosophy and Social Hope*, 36 ("beliefs are rules of action rather than attempts to represent reality").

privacy and autonomy. As citizens, we observe judges and politicians interpreting texts and affecting our lives; we come to our own conclusions about whether they deserve to be voted out of office. Or in the case of non-elected judges, whether politicians who appoint such judges deserve to be voted out of office.

Textual meaning is always already, and always necessarily contextual—when pushed, even the most conservative Federalists acknowledge this point. Asked about differing interpretations of law among conservatives, Federalist Society Vice President Leonard Leo said something quite telling. Sure, it is language, and text, that matters—but, “It’s not the language in a vacuum.”

“Where conservatives and libertarians end up getting into debate amongst themselves is not generally over just a specific clause or piece of language,” he said, “but the way in which that clause or language is supposed to interrelate to some other part of the document”—context, in other words. For textualists like Scalia and Leonard Leo, the context stops at the bounds of the text itself, what lawyers call the “four corners”—at least until they begin discussing *intent*, which necessarily involves going beyond the text. Intent—knowing someone else’s mental purpose—is not a foreign concept to the law. Criminal law revolves around intent, which separates murder from manslaughter. Determining intent requires consulting outside sources, and when dealing with the Constitution, that means sources over 200 years old, like *The Federalist Papers*. This is what Meese’s “originalism” is all about, as a way of determining meaning, and we take this up in detail in Chapter Four.

Law and Politics, Text and Context

For the crits and the postmodernists, the very notion of the bounded text, of the “four corners,” is artificial and illegitimate, a rhetorical gimmick used to justify imbalances in power that often perpetuate social and legal inequality. Consider it this way. Does taking interpretive context seriously mean just thinking about the tensions between the two religion clauses of the first Amendment (“free exercise of religion” and “establishment of religion”) or does it mean thinking about the ways these social processes affect individuals’ lives? Does it mean taking the history of religious practice into account? If so, whose version of history? And how comprehensive? When it comes to Constitutional law, why include *The Federalist Papers*, which, after all, have no legal standing? From whose perspective should history be considered? Whose side of the story, whose history, are we leaving out, and how does that exclusion affect our understandings of textual meaning—of what the text itself *is*? And so on.¹⁰⁷

Drawing these interpretive lines is judges’ work, and it is deeply rhetorical, bearing on the adjudicator’s ability to persuade that a right decision has been arrived at, that justice has been done. It also bears directly on the advocate’s ability to persuade judges and juries of the proper context; and again when appellate judges on the Supreme Court and elsewhere must negotiate majorities from their uneven numbers. That law is rhetorical in this sense doesn’t mean law is “just” politics carried out by other means. Pragmatists feel this way because we don’t have a problem with the adversarial, rhetorical nature of democratic politics, as some on the far left do—those who see our system of representation as inherently

¹⁰⁷ See Daniel Couzens Hoy, “Interpreting the Law: Hermeneutical and Poststructuralist Perspectives,” in *Interpreting Law as Literature*, ed. Sanford Levinson and Steven Mailloux (Evanston, Ill.: Northwestern University Press, 1988), 319-338 *passim*; Mark Tushnet, “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,” *ibid*, 193-214 *passim*.

repressive. Some even see the Constitution as itself an artifact of repression, with its infamous “three-fifths” clause declaring slaves were to be counted in the census as less than whole persons. In a remarkable moment, a student who described himself to me as a “liberal federalist” raised exactly this point with Steven Calabresi following his presentation at the Society’s 2005 national student conference. Does not the legitimacy of this text fall away in light of the inequalities and immoralities embedded within it?

No, he responded. The text still matters, and the text includes its amendments, which rectified its immoralities. The text is ultimately the source of law, the boundary of context for a court of law. Again and again Federalists tell me, from the rank-and-file lawyer to judges who sit on courts of appeal, that what binds the group together is their view of the Constitution as *the law*. “For the left,” as Leo says, “it’s ‘Well gosh, I don’t know if I like that interpretation of the Establishment Clause, because what happens to this guy over here?’ Suddenly you’ve left the four corners of the document and you’re having a debate or dispute over what this means.” Social consequences—“what happens to this guy over here”—are off limits, in other words. Social consequences are not unimportant, but they are questions of policy for the legislature to consider and act upon. This *interpretation* (and that’s what it is!) is rooted in the conservative reading of the Constitutional separation of powers, and explains in part why many on the right wince at the notion of “social justice.” From their standpoint it’s an oxymoron. Or, as libertarian economist Friedrich Hayek wrote, “a mirage.”¹⁰⁸

CLS questioned this attitude, demanding an accounting of law’s actual outcomes for “this guy over here”—who, if you take the time to study the situation, might turn out to be a member of a much larger group of guys over here, who just might happen to be poor,

¹⁰⁸ Friedrich A. Hayek, *Law, Legislation, and Liberty, Volume Two: The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976).

uneducated, or marginalized. And this might just mean that their ability to effect change through the legislative channel is practically impossible. Fundamental issues of fairness are implicated, and conservatives have long been labeled uncaring or cold precisely because of their dismissal of what happens to society's many "guys over here." These critiques are legitimate, I think; but so too is the conservative rebuttal—that ultimately, fairness of process is the best way to ensure fairness of results. CLS raised the question of procedural fairness and went far beyond it, arguing that the very way legal education is structured undermines fundamental (social) justice. And CLS was torpedoed, at Harvard in particular.¹⁰⁹

The debate over textualism will be considered in greater depth in a later chapters, where we will look the influence of conservatives like Scalia and Meese on the way judges read the Constitution, other laws, and other court opinions—just how much of a difference they may have made. While it is safe to say CLS never made much of a dent on the dominant schools of legal thought, one of their fellow travelers continues to write for a wide academic and popular audience: Professor Stanley Fish, a lifelong academic who has taught at some of the country's most prominent institutions. As a literary critic Fish has engaged with rhetoric and law through most of his career. Often stressing radically pragmatic views on the deeper philosophical aspects of interpretation and meaning, Fish works with a somewhat lighter touch than the boldest of the CLS professors, particularly because he does not take issue with the notion of intent.

As he writes in one of his most recent articles, "a text means what its author intends...If you are not trying to determine intention, you are not interpreting"—though Fish

¹⁰⁹ Hicks, "The Conservative Influence of the Federalist Society," *supra* note 87.

says that intent answers a question and does not establish a *method*.¹¹⁰ At the same time he refuses to consider texts as things that exist independent of their contexts. “The text,” he writes, “has no independence; it is an entirely derivative entity.” Context, in other words, makes the text what it is. In a pragmatic vein he goes on to suggest that the important question is not really “what does this text mean,” but “what can we do with this text?”¹¹¹

Fish gets slippery on this issue, though. He goes on to immediately address the fears of conservative textualists like Scalia who “fear that searching for intention runs the risk of legitimizing the interpreter’s desires”—implicating the conservative shift away from original *intention* (an unknowable psychological phenomenon) to original *meaning* (an audience-centered phenomenon)—an important distinction we will explore further in later chapters. But for now we can point to Fish’s answer to this objection.

He argues that the “stopping rules” that constrain a judge’s power to legitimize his own desires—to read his or her own agenda into the inherently unknowable *intent* of past lawmakers or judges—these “are not rules of interpretation, but rules that tell you when the effort to interpret should cease and something else should take over.”¹¹² Balkin makes a similar point when he writes that “the possibilities of deconstruction are endless, but, in practice...must come—at least temporarily—to a halt,” demonstrating the ultimately pragmatic nature of all legal interpretation.¹¹³ In Fish’s formulation, we see a clever rhetorical maneuver at work, establishing categories of “interpretation” and “something else,” categories we will see again (oddly enough) when considering a conservative take on

¹¹⁰ Stanley Fish, “There Is No Textualist Position.” *San Diego Law Review* 42 (2005), 643.

¹¹¹ Fish, “No Textualist Position,” 639.

¹¹² Fish, “No Textualist Position,” 639-640.

¹¹³ Balkin, “Deconstruction’s Legal Career,” 723.

the judge's role from Attorney General Edwin Meese. It's striking that Fish here seems almost to be resisting his own pragmatism; to say that cutting off interpretation is not an act of interpretation but "something else" is a bit mysterious, but in a scholarly way St. Thomas himself might admire.

As many conservatives see things, the Federalists are making their stand against Fish and the postmodern critics' delicate parsing, which is often derided as "relativism"—though in Fish's case, at least it is not quite that simple.¹¹⁴ Sure, conservatives place a primacy on process. But process, by its very impersonal quality, ensures fairness (unless...unless the process itself is unfair). Federalists, Judge Pryor told me, "were interested in taking the Constitution seriously," not as an interesting relic of a racist past, with (perhaps) some bearing on aspects of modern law. "Taking the Constitution seriously" in this sense means viewing it as the fundamental law, from which all other law and the political process itself derives its legitimacy. Our system of representation is established by the Constitution, as are the domains of each of the three coordinate branches of government. And for conservatives this means rejecting the view of "the Constitution or the law as just another form of politics."

There is question begging at work here, though. Winning elections (politics) means getting to appoint judges (law) who subscribe to your theories of interpretation. The lines blur in the sense that politics is so often (if not always) *about law*—passing new laws, opposing old laws, confirming judges to sit in adjudication of those laws, and attempting correctives when those judges interpret a law in a manner unsatisfactory to the legislators who passed it to begin with. Procedurally, law and politics are two sides of the same coin. As

¹¹⁴ It is my conclusion that many conservative critics miss Fish's nuance and simply want to pin him with the Scarlet Letter "R" for "Relativist." For example: "The effect of Fish's assault on theory is to make no theory the ultimate theory: to make an absolute out of the relative." R.V. Young, *At War with the Word: Literary Theory and Liberal Education* (Wilmington, Del.: ISI Books, 1999), 127.

Morton Horwitz wrote in his landmark history, the trope of a law-politics divide was central to legal debates dating back over a hundred years. Orthodox legal thinkers of the 19th century, he writes, “sought to represent legal reasoning as fundamentally different from political reasoning.”¹¹⁵ The realist critique paved the way for their twentieth century successors; that law is just politics carried on in another form was the central thesis of the realists like Holmes and his acolytes such as the prolific and provocative Karl Llewellyn, author of the Universal Commercial Code. What Horwitz writes of the defenders of orthodoxy against the realists sounds a lot like the rhetoric of Bork, Meese, and their Federalist protégés: “If political reasoning was subjective, legal reasoning was objective; if the one was discretionary and a matter of opinion, the other was non-discretionary and not subject to the whims of the judge.”¹¹⁶ As Horwitz puts it, realism was less a coherent movement than “an intellectual mood,” as much concerned with progressive politics as with legal doctrine and methodology;¹¹⁷ it was in fact the New Deal, and the Supreme Court’s eventual upholding of its major tenets, that represented the full flowering of this “mood.”

Countering the realists, orthodox traditionalists and positivists emerged, including legendary law professor H.L.A. Hart. Hart’s positivism dovetailed with the broader trends in logical positivist philosophy, trends drastically challenged by the postmodernists who rejected absolutes and “logical” proofs existing independent of context and culture. Hart’s emphasis on law as *positively* knowable through cognizable texts is clearly at odds with the contextualism (or relativism) of the theoretical critics—though it bears mentioning once more that positivist textualism with its four corners *is itself* a theory and a way of discerning

¹¹⁵ Horwitz, *The Transformation of American Law*, 199.

¹¹⁶ Horwitz, *The Transformation of American Law*, 199.

¹¹⁷ Horwitz, *The Transformation of American Law*, 169.

meaning. As we shall continue to see, the realist style in legal rhetoric is not the restricted realm of postmodern theorists. Conservatives, too, are realists in their assertions about the “plain meanings” of texts. But they have never had much appetite for the sophisticated, context-dependent approach that was first fully voiced by 19th century progressive thinkers like the Sociologist and philosopher William James, whose works included the groundbreaking *Varieties of Religious Experience*—perhaps the opening salvo in the Culture Wars, suggesting, as it did, that all religious belief is in some sense culturally dependent. The legal realists of this period read James and other progressives. But as Horwitz puts it, “Existential doubt has never been welcome within the oracular culture of American legal discourse.”¹¹⁸

Whether or not one thinks judges make decisions on the basis of anything more than their political views, the structural relationship between the executive and judicial branches remains independently significant. Federal judges are appointed by the President and confirmed by the Senate, both of whom are elected by the people. “It’s a harmonious circle,” is how John Fund put it. “The more you win elections, the more judges you get to appoint.” And when those judges decide cases in ways that respond to popular or political sentiment, more people win more elections. Balkin, the liberal Yale Law professor, acknowledges this point in a recent article. “The New Deal settlement occurred because the Democrats kept winning elections,” he writes, “and eventually replaced all of the older justices with committed New Dealers.”¹¹⁹ When I asked Democratic Senator Diane Feinstein, then the

¹¹⁸ Horwitz, *The Transformation of American Law*, 177.

¹¹⁹ Balkin, “Wrong the Day It Was Decided,” 701.

only woman on the Senate Judiciary Committee, about this, she was strikingly direct.

“You’ve got it,” she said. “Elections do matter.”

Perhaps conservatives have reached this stage, where their electoral victories are genuinely affecting the balance of power on the Supreme Court—though the Miers fiasco complicates that conclusion. When the Federalist Society was just getting off the ground, however, the muscle-flexing that put an end to her nomination would have been unthinkable.

Building the Organization

Attendance at that first two-day student conference may or may not have been bolstered by a brief ad taken out by the organizers in the April 2, 1982 edition of *National Review*. The blurb gave the conference’s official title, “The New Federalism: Legal and Political Ramifications” and mentioned Bork and Scalia as speakers. “The point of announcing the thing in *National Review* was to let people know about the conference, people in the area who might want to come,” Otis recalls. But the actual effect was quite different—and illustrates the function *National Review* had come to play in the conservative community. “In fact what happened was that we started getting letters from all around the country saying, ‘How do I start a chapter of the Federalist Society?’” Now we didn’t even know we had chapters, frankly!” These missives prompted Lee and David to consider, for the first time, an organization of national scope. “If you would have asked us at the time,” she says, “we would have said the Yale organization was called the Federalist Society.” As for the club she and McIntosh were promoting with Prof. Scalia’s guidance, “I’m not sure we even had a name...we didn’t really anticipate that we’d start getting these letters wanting to start chapters of an organization that didn’t exist.”

With a certain sense of pride, some of the Society's early supporters thus refer to its emergence as "market-driven." Lee and David responded eagerly to the demand presented by the "market" and promptly set about assembling a how-to manual for other law students wishing to set up their own chapters of the Federalist Society, which by late 1982 would indeed exist as a national, non-profit corporation. McIntosh, the organization man, handled the particulars. Around fifteen chapters were up and running by then; by 1984 there were thirty-two. "I remember very well staying up all night a couple of nights with Lee, drafting a membership manual that basically said how you can set up a Federalist Society chapter at your law school," McIntosh recalls. "That was the first point that we started thinking about the demand for a conservative-libertarian legal organization." Twenty-five years later there are chapters at nearly all accredited law schools in the country. The demand has been met—or, as a good supply-sider might say, the supply has created demand.

Thus did the Society emerge: two brainy second-year law students in a Chicago dorm room working and talking late into the morning hours, thinking about how they would write grants to fund this new "thing" and how it would be structured, how the logistical side would work along side the political and rhetorical side. Today, the lawyers' division dwarfs the student division in terms of numbers, but most of the leaders I spoke with insist that the heart of the organization remains the law school chapters. By maintaining this focus, the Federalists keep their eye always on the future, in a sense—there will always be new students arriving in the Fall. This perpetual turnover presents challenges, such as when a strong chapter withers and dies when its leaders graduate without a strong set of successors. But it also means that the Society has a kind of fountain of youth from which to derive both energy and—more practically—talent. The law school chapters are the front end of a pipeline, as

Leonard Leo, the Society's Vice-President, puts it. The pipeline runs through law school, into the lawyers' chapter, and from thence into the world of legal practice, public policy, and the judicial bench.

Compared to today, with a Federalist chapter at every accredited law school, in those early days it took real entrepreneurial efforts to get a chapter up and running. Ask around at any Federalist Society event, however, and it isn't hard to find chapter founders or charter members.

Pryor is a good example. Confirmed as part of the compromise reached after a Democratic filibuster in 2005, Pryor showed up at Tulane Law School twenty-one years earlier with experience in Republican activism. A former head of the College Republicans and regular reader of *National Review*, he says he first learned about the Federalist Society through Buckley's magazine. He arrived at law school itching for a fight, and ready to hoist the Federalist banner. "I arrived at orientation and an upperclassman stood up and told everyone about the newly formed chapter of the National Lawyers' Guild," he told me, referring to the prominent liberal lawyers' organization. "I thought then that I might be interested in the organization about which I had read in *National Review*."

So he called the national office, which at that time was operating out of donated space at the Washington offices of the American Enterprise Institute, a major conservative think tank. The national office got Pryor in touch with an older student who had also been interested in starting a chapter and had a commitment from a faculty member to serve as the inaugural advisor. The group proved almost immediately successful, and by Pryor's third year, they were hosting a private reception for Attorney General Meese, who had been invited to delivered a speech on campus. The Tulane Speech, which many interpreted as

attacking the Supreme Court’s right to say what was “the law of the land,” provoked no small amount of controversy—which we will explore in a later chapter. Pryor, then serving as editor of the *Tulane Law Review*, approached Meese at the reception before his talk to ask whether he would like to have it published in his journal. “It was quite a coup,” he recalls.

After clerking for federal appellate Judge John Minor Wisdom, a liberal Republican who famously wrote in a Civil Rights case that the Constitution must be “both color blind and color conscious,”¹²⁰ Pryor went on to practice law in Birmingham. Having stayed active with the Federalist Society, he helped found its Birmingham chapter. Such local chapters were not chartered by the national office; there was no map in the Washington office with the nation divided into precinct territories and membership districts. Whether a city or state had a lawyers’ division chapter (or law school chapter, as well) was entirely a result of local initiative. Pryor came up with a plan to assemble an “advisory board” to the chapter, mostly as a way to be taken seriously. “If we send something out about our first event to the Birmingham bar, they’re going to ask, who are these guys?” Working with a friend, he came up with a list of potential board members— prominent members of the local legal community whom they’d heard of or identified through research—their target list included members of the state supreme court (“it wasn’t hard to identify who they were!”) as well as academics and prominent lawyers. Washington sent them some promotional materials, which were included along with the invitation letters. Pryor’s idea worked: every single person accepted.

The intellectual cast of the Federalist Society is pervasive and has been central to its identity since the founding. McIntosh, now a Washington attorney, lights up when the talk

¹²⁰ *United States v. Jefferson County Board of Education* 372 F.2d 836, 876 (5th Circuit 1967).

turns to the more philosophical aspects of what the Federalist Society is about—despite the fact that compared to the more cerebral Calabresi he has assumed more organizational responsibilities. But McIntosh has the glow of the idealist to him, as do so many of the Federalist contingent. It strikes one almost immediately that most of these people care deeply about and understand the Constitution, though by day they may be managing mergers and acquisitions. In conversation after conversation over several years of research, it is clear to me that the commitment held by the overwhelming majority of the Federalists is intellectually earnest. “Here is an organization formed to have an impact on the intellectual underpinnings of law,” McIntosh says. For twenty-five years, the key to the formula has been debate—the testing of ideas. Debate, not speeches; debate provides feedback, pushback, and rhetorical challenge. Their time in the Yale Political Union had convinced them of that, as *Firing Line* had convinced Steve years before.

It is a formula that has endured. “I have far less interest in listening to people who I agree with talking about something,” Ted Cruz, who had served as editor of the *Harvard Journal of Law and Public Policy*, told me. “It’s far more interesting to see debate.” GOP Chairman Ken Mehlman, another Harvard Law Federalist and *HJLPP* editor, agrees. “My experience when I was at the law school was that the idealism, the intellectual rigor, the debating of new ideas, the desire for discussion was much more on the right than on the left,” he said. Mehlman stayed involved with the Society after graduating and joining a law firm in Washington. The proving grounds served him well; though not formally trained as a debater he rose to a position that demands constant political debate—national party chairman. Mehlman was also active with his fellow Federalists as a Washington attorney practicing property law; such interactions are typical and involve both professionally related networking

as well as informal social interactions—though even the Society’s luncheon events feature panel presentations from representatives of various positions on a currently topical issue.

Debate is part of almost all Federalist events, which necessarily involve inviting some member of the loyal opposition to present the proverbial other side. But the “other side” sometimes comes from within the ranks; the libertarian-conservative split is as alive and well today as it was when Gene’s father was engineering fusionism at *National Review*. Erik Jaffe, a committed libertarian and longtime head of the Society’s First Amendment Practice Group, suggested with a wry grin that I ought to ask the much more conservative Leonard Leo, “why they keep me around.”

Jaffe, a rare solo practitioner of Constitutional law in Washington, D.C., holds views that—as he puts it—“would make Robert Bork’s head explode.” I asked Leo this question, and he basically confirmed what Jaffe had predicted—as predicted. “I think Leonard actually takes this debate thing seriously,” Jaffe said. A nonchalant way of putting it, but an accurate one. “How can it be that this libertarian Erik Jaffe is all for smoking pot and whatever,” Leo said, “and you’ve got a Christian conservative sitting across the room from him who is in favor of legislating various aspects of public morality?”

The answer, he went on, is that the organization itself does not itself put forward a view. It provides a forum where the Erik Jaffes can duke it out with the Borks and the Robert Borks, the more socially conservative types. The libertarian-conservative split within the Federalist Society mirrors the proxy duel between the major Washington think-tanks, The Cato Institute (libertarian) and The Heritage Foundation (social conservative). The divide has been a fact of life for movement conservatism since the days of *National Review*’s Frank Meyer and fusionism. It has held together in part because of the willingness to support an

environment in which reasoned debate was the rule and no one was forced out because of principled disagreement. No less important, it has held together because the right's factions perceive more in common with each other than with the left.

The Federalists' rationalist model can hardly be said to be the rule for all conservative commentators or all conservative forums. Although some law school chapters of the Society aim more to provoke liberal ire than to actually engage in discussion, the environment in the Lawyers' Division, at least, is a very long way from the polemical attacks and partisan name-calling practiced daily by people like Rush Limbaugh and Sean Hannity. The continuum of conservative discourse runs a long gamut. The shrill, hyperbolic noise that passes for discussion on conservative talk radio is, by and large, far removed from the Federalists' formalism. At times it seems almost genteel by comparison to the invective of popular writers like Ann Coulter and Mark Levin, a radio host and lawyer whose bestselling book *Men In Black* attacks the Supreme Court in a barely-controlled 230 page rant. The subtitle is "How the Supreme Court is Destroying America."¹²¹

"I think the Federalist Society is the acme of an intellectual approach, whereas Mark's book was written largely for a popular audience, which has eaten it up," Meese told me when I asked him about the apparent disconnect between Federalists and the popularly directed voice of conservative legal critique. "You need to have the materials that will appeal to a very broad audience," he said. Including, apparently, the audience that Meese wants to believe that the Supreme Court is "destroying America."

Although Bork has become a kind of conservative eminence gris, he insists in putting his work in a different class from the popular right-wing critics of the blogosphere and talk

¹²¹ Mark Levin, *Men In Black: How the Supreme Court is Destroying America* (Washington, D.C.: Regnery, 2005).

radio. “I couldn’t do what Rush Limbaugh does, even if I had the showmanship,” he said. “And I don’t think he could do what I do. We’re talking to very different audiences.”

Reynolds agreed. “We have different people who talk in different terms...in [Levin’s] view you have to be a little bit strident in order to be heard through the din. There are a lot of different people who approach these issues differently, and I say hallelujah.”

The concept is a simple one, but key to conservatives’ success—even as it opens them up to charges of hypocrisy. Different audiences exist in different places within American society, and the same message will not resonate equally in each rhetorical situation. All audiences, and all people, do not think alike or perceive the world in the same way; if you want to go about the business of effecting large-scale political and social change, it behooves you to take account of these differences. Conservatives have, even if it means there exist vast intellectual and stylistic chasms between the arguments that are put forward by sophisticated, engaging Federalist debaters and the unabashedly anti-intellectual know-nothing polemicists of talk radio and Fox News.

That said, the Federalist Society plays a positively vital part in the larger conservative project, and for its first quarter century it has managed to maintain its specific identity, providing forums for a certain kind of debate and discourse that connects up with the broader aims of the movement. Even as he applauded the more polemical strategies of other conservative critics, Reynolds declared, “We haven’t allowed ourselves to be pushed in the direction of the more provocative spokesmen.” One of the ways the right has held together *at its core*—its idea factories like the Federalist Society—is by maintaining the decorum necessary for the neo-cons and the paleo-cons, the libertarians and social conservatives and the majoritarians to coexist, to feed off of each others’ shared enthusiasm for the cause.

Leo also points out something deeply rhetorical that links the libertarians and the social conservatives they deride as “majoritarians.” As Leo sees it, the glue holding the factions together is a “textual” approach to law, a topic we will explore in more detail in later chapters. “Language can be open-textured, language can be open to different interpretations,” he told me. “There are libertarians who are perfectly fine with abortion, who are perfectly fine with saying homosexual sodomy can be found in the Constitution...or a muscular interpretation of the Takings Clause, or varying and conflicting interpretations of the commerce power. But all of them are textually based,” he said, “We’re within the four corners of the document, more or less.” Here come the “four corners” again, the “text itself,” the “plain meaning.” But this absolute—or this more-or-less absolute, anyway—is not what it seems. The disparate views of individualist libertarians, populist majoritarians, traditionalist social conservatives, Goldwaterite paleo-conservatives, and so on, all claim to explain themselves “textually.” This implies, of course, that other readings—illegitimate liberal “activist” readings—are somehow extra-textual.

Even among conservatives in the Federalist Society, though, there is no agreement about what the four corners hold. Conceptually, setting those four corners down makes all the difference. How *much* context should the judge consider? How much original understanding should we take into account? Should the infamous 3/5 Clause be read “out” of the Constitution because in light of later events, its racist implications were held to be legally and culturally unacceptable? The problems of interpretation occur when a libertarian and a social conservative—let alone a liberal and a conservative—look at the same text (the separation of church and state provisions in the Bill of Rights, for example) and end up with very different conclusions for public policy; school prayer or no school prayer, Under God or Not Under

God. The debate between these opposing camps—very much alive among the Federalists—is what keeps the Constitutional debate alive. One might even say that it keeps our civic culture alive.

If we ever *stop* having these debates, we risk everything—we risk democracy, we risk the value democracy puts on listening to each other, trying for consensus, and when consensus proves unreachable, agreeing to disagree. Since Buckley’s conservative project got under way in the 1950s, conservatives understood this and put it into action far more effectively than most on the left. When I asked Epstein about his conflicts with the social conservatives or “majoritarians,” as he calls them, those in the Federalist Society like Bork who take serious issue with his classical-liberal views, he was both typically frank and typically wise. “I don’t vote to expel people from Societies. I vote to debate.” Ultimately it is that commitment to debate that sustains the tensions within the organization.

When the founders of the Federalist Society graduated from law school in the early 1980s, the “Reagan Revolution” was up and running at full tilt, despite some legislative defeats in the president’s first term. Lee Liberman Otis landed a career track job at the Justice Department—Ed Meese was not yet Attorney General; when he did move into that position, Otis would join his team. As Reagan’s chief policy advisor, Meese would prove a vital sponsor (and employer) for the early leaders of the Federalist Society. It was Meese’s deputy, Ken Cribb, who first made the Federalist connection. A self-described talent scout for the administration, Cribb would end the Reagan era as Assistant to the President for Domestic Affairs. Among his final acts in that office was convincing President Reagan to deliver the keynote address at the second Federalist Society National Lawyers’ Convention in 1988. The

coverage of Reagan's speech in the Society's newsletter *The Federalist Paper* concluded with this description of the convention's purpose: "It enables lawyers from the many Federalist Society chapters across the country, and those from areas which do not yet have Federalist Society chapters established, to meet each other, share ideas, and return to their own cities and states with increased enthusiasm which should yield a substantial return in Society activity at the local level all over the country." In that same issue of the newsletter, the number of law school chapters was listed as having risen to 91.

Cribb understood that having Reagan present at that event was important on both a symbolic level, for the wider audience, and on a motivational one, for the membership. Cribb's personal history says much about the ways conservatives have bridged the gap between theory and practice—a strategy certainly not pioneered by the Federalists. Since his first day as an undergraduate, he says, Cribb had been active with a group called the Intercollegiate Studies Institute (ISI) founded in 1953 by Frank Chodorov, a hard-core libertarian academic and writer.¹²² Like Steve Calabresi, Cribb was a precocious political critic; as he tells it, his mother would regularly claim that young Ken's first political act was to "paint a moustache on Adlai Stevenson in the *Weekly Reader*!"

Cribb was active as a youth volunteer in South Carolina GOP politics, but it was ISI that introduced him to the intellectual side of conservatism. "It gave me the pedigree," he said. "I found out what conservatism meant back to Kirk and Burke." In a scene that suggests a kind of conservative take on *The Dead Poets Society*, he recalls dinner gatherings with his ISI college friends where they would read and discuss Kirk's then recently-published

¹²² Lee Edwards, *Educating for Liberty: The First Half-Century of the Intercollegiate Studies Institute* (Washington, D.C.: Regnery, 2004).

magnum opus *The Conservative Mind from Burke to Eliot*. Cribb would later travel with Kirk to the moors of Scotland, and remains one of the keepers of the philosopher's flame.

It was Bill Buckley himself who served as ISI's first president, the position Cribb now holds. ISI currently claims 50,000 members nationwide and hosts several hundred panels and conferences yearly, in addition to publishing books and offering an array of fellowships. For Cribb, involvement with ISI in the 1970s led to his introduction to Meese, when the Reagan campaign was in need of lawyers to help it navigate the intricate new campaign finance laws enacted in the wake of Watergate. He had also been involved with CPAC, the Conservative Political Action Committee—one of the first "PACs," the now notorious fundraising and lobbying organizations targeted by campaign finance laws. As with the ACU's innovations in lobbying and research, CPAC was also largely a conservative innovation. During the mid 1970s CPAC helped accelerate the move away from Ford's moderate policies in foreign and domestic policy and towards Reagan's aggressive conservatism. After Nixon's self-destruction in 1974, "conservatives decided they weren't going to take it any more," Cribb recalls.

Cribb learned of the Federalist Society in the early 1980s not long after its founding, through mutual friends. "I ran into Gene Meyer at a cocktail party," he told me. "Gene was a little surprised that I knew about the Society, and I offered to be helpful." "Being helpful" would eventually mean hiring both McIntosh and Calabresi—and a cadre of committed young conservative lawyers who would go on to careers in all legal walks of life, in politics, academia, legal practice, and the bench. Some have risen further than others, in business as well as government and public office. As Ted Olson recalls, "One of the people who walked into the Justice Department in 1981 was John Roberts. Another was Sam Alito."

“Ed Meese asked me to hire experienced people, ‘gray hairs’,” Cribb explained. “Well, there were no conservatives among the gray hairs,” he continued. “The typical assistant in the Meese Justice Department was in his mid thirties. We did the same thing with judges, we put a lot of young judges on the bench.” This investment in youth would pay off—and is just plain smart thinking for any social movement that is looking to effect long-terms change. “We filled up those slots all across the Department with people who were in the Federalist Society or just like people who were,” Cribb said, “and it made a difference. For the period from 1986-1987 the spark of the whole administration was at Justice, because that’s where the brainpower was.”

His enthusiasm helped encourage these young lawyers. “Ken is bubbly, intellectual, and full of ideas,” Calabresi told me, “and when he heard about the Federalist Society and heard what we were doing he became very interested.” Others did as well, including Reagan’s Civil Rights chief Brad Reynolds. “I thought the Federalist Society was the best damn idea that had come along in 20 years,” Reynolds told me. “I don’t deserve credit for it,” he quickly added. “I was there; I was supportive. I was helping to take it from a brilliant idea to a reality...I’ve been on the Board of Visitors from the beginning, someone who was pushing this as the best idea since sliced bread.”

“The strength of the Federalist Society today, as it always has been, is to force a debate,” Reynolds said. “I think that the weakness of our adversarial system, especially now, is that it does not force debate. It allows for conversation by sound bites; it allows for people to come out and state a position on a television show and then—no pushback unless you look at another show...but no confrontational pushback or direct engagement. That is a weakness in our political process and in our discourse generally.” Reynolds had plenty of experience

with political confrontation himself, and often seemed to thrive on it—something common among the breed of lawyers and debaters who populate the Federalist Society. And in those crucial early years, Reynolds, Meese, Olson, Bork, and other nationally known personalities from conservative circles and from the Reagan administration gave generously of their time, speaking at Federalist Society events across the country. Bork, particularly, “helped down in Washington, where he knew a lot of people,” McIntosh said. Although he had maintained his teaching role at Yale, Bork had served as Solicitor General during the Ford Administration.

It was Bork’s cache with the incoming Reagan administration, in fact, that introduced these younger Reaganites to the older generation that had come into power. Ultimately, as Brad Reynolds put it, the question was how to support the Federalist Society project, “how to we make this a bigger deal?” The logistical end was left to McIntosh and the other co-founders who were continuing to grow the national organization. But the presence of top Reagan deputies was vital to the establishment of the Society as a viable and serious force in the legal culture, and Reynolds and others were by all accounts extremely generous with their time. They knew talent when they saw it, though, and considered their investment worthwhile. Pryor, for example, remembers how awed he was as a law student that the Attorney General would come to a reception at Tulane, and when asked to make some informal remarks to the group—which was mixed company, politically speaking—all he talked about was the Federalist Society. Pryor also remembers who Meese had with him that afternoon in 1987. “The first time I met him was with Steve Calabresi, and that should tell you something,” he said. “Meese was hiring members of the Federalist Society because they were bright and able people...here he was, willing to meet with or speak to student chapters

around the country.” It left an impression, and made young conservatives like Pryor feel like they were part of something bigger than themselves.

Meese, who at age 75 still works overtime in Washington as a Senior Fellow at the Heritage Foundation, remembers seizing on the project of the young deputies Ken Cribb was hiring for him. “I thought what they were doing was doing was a great idea,” he told me. Meese particularly recalls the impact his 1985 speech to the American Bar Association—outlining his theory of “originalism”—had on the Federalist contingent. “They picked up on that at a very early stage,” he said. One of the Federalist Society’s first publications, a monograph collection of several speeches entitled *The Great Debate*, included Meese’s ABA speech. The pamphlet, Meese noted, was widely distributed to the fledgling student chapters around the country. The current director of the Society’s Student Division credits it with first interesting him in legal conservatism. Meese says that the pamphlet “was the device that really capsulized the argument.” Thinking of rhetoric and its focus on audience, he added, “The distribution of that facilitated getting more people involved...The Federalist Society was a catalytic influence.” Or, as Otis put it, Meese had the same project she and her friends had, “and we were all working on it together, and were influencing each other.” The timing was fortuitous, and as Bork told me, the idea of a Federalist Society would have been unthinkable just a decade earlier. “They were riding the crest of a wave,” said Judge Alex Kozinsky of the Ninth Circuit Court of Appeals, a longtime Federalist booster. “The organization performed a great service, but I think it would not have been nearly as successful in raising money or gaining the hearts and minds of people if the country were not going in the same direction.” And part of that movement has been registered at the polls, of

course—the Federalist crowd has been playing with a home team advantage for quite a while now.

Liberal critics often point this out as a way of suggesting the Federalists' claims to minority status are blatantly disingenuous. "Even though they've got the President, both houses of Congress and the Supreme Court," their refrain remains the same, said Professor Erwin Chemerinsky—who has appeared many times as an invited Federalist Society panelist. "It's still 'the liberal domination of law' that they're out to get," he adds, "the ascendancy of the Federalist Society happens when Reagan is president and Republicans take control."

Law and Culture

The project of changing legal culture—distinct from the political project of Reaganism—was a daunting one, and remains so. Holding power opens many avenues for intellectuals, of course. "How do you approach the challenge of translating theory into practice?" Roger Pilon, a Ph.D. and the Cato Institute's top Constitutional lawyer, asked rhetorically. "You do it through being in power!" Still, some cultural terrain is less affected by electoral politics—including higher education. "Law schools are very insulated from the political process," Calabresi said. The Federalists have always seen themselves as actively engaged in a struggle over the academy and education in general. Politics and policy are a part of their project, but the pipeline, to use Leo's phrase, begins in the universities. It *ends* in politics or policymaking or business.

The law is a rhetorical enterprise, grounded in argument and concerned with the structure of society, and cultural change often parallels legal change. Legal cases have winners and losers, real results. "Part of Reagan's policy was to build up forces in

battleground nations in order to help topple enemy regimes,” Calabresi told me, “and I thought of us as kind of the same equivalent in law schools.” There remains a kind of Contra mentality to the Federalist project, the “thrill of treason” when confronting the liberal legal establishment, whether on campuses or on the bench. The Society’s statement of purpose does in fact begin by declaring, “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.”

“What value do we contribute?”—Leo poses the central question. “We contribute human capital. We’re building a community of lawyers who embrace a set of principles; we’re cultivating them in law school; we’re moving them out of law school and into the legal profession. They’re becoming citizen-lawyers. Human capital is an important byproduct of what we do. But what else is? Well, the answer is ideas.”

Where do these ideas come from? In the most basic sense, they are the byproduct of the interactions facilitated by the Society’s incessant programming. Take every luncheon-with-panel-debate or guest speaker or cocktail reception and multiply all the ensuing conversations by the number of attendees at a given Federalist event, and then by the number of times they each recount those debates with their law partners, faculty colleagues, coworkers, fellow students. Local lawyers’ chapters schedule events on their own, sometimes coordinating with Washington to increase publicity via email, attain funding, or identify possible respondents for debates; the *Firing Line* formula makes it virtually taboo to *not* have a 50-50 liberal/conservative presence at Federalist events. As a longtime supporter of the group, Judge Rader of the Court of Appeals for the Washington, D.C. Circuit, told me, “If you’re going to have Robert Bork, somebody’s got to go get Larry Tribe.” The culture of the

Federalist Society is a culture of debate—even if the Larry Tribes are unlikely to persuade many of the Robert Borks they go up against. “These people enjoy the clash and thrust and parry of ideas,” longtime Federalist booster John Fund of *The Wall Street Journal* told me, “these are people who love to argue.”

The Society has developed a small but loyal band of liberal guest speakers, including ACLU President Nadine Strossen and Bill Clinton’s Solicitor General Walter Dellinger; Strossen recently told the *Washington Post* “the Federalist Society has become kind of mythologized.”¹²³ That is to say, the name “ACLU” has itself become an *argument*, in the guilt-by-association sense, thanks in part to President George H.W. Bush’s “card-carrying member” attacks against Michael Dukakis. But the effect runs deeper, giving the lie to “mere rhetoric” critiques. In a broader, rhetorical sense, “ACLU” has come to mean something that may or may not be divorced from what the organization sets forth as its mission. It becomes a stand-in for the worst nightmares of social conservatives: an irreligious, immoral, iconoclastic machine, working to undermine traditional society, family and gender relationships, and capital punishment. Conversely, Strossen said, “Federalist Society” has become an argument in certain circles, a way of pointing to the nightmare vision in what Sen. Edward Kennedy once described as “Robert Bork’s America” in the speech that many consider to have sunk the ill-fated 1987 nomination.¹²⁴

Robert Bork’s America would be governed by judges who denied that the Constitution stood for living, evolving values, Kennedy announced in a widely covered speech just moments after the Bork nomination. It would be a land without civil liberties,

¹²³ Michael Fletcher, “What the Federalist Society Stands For,” *The Washington Post*, July 29, 2005, A21.

¹²⁴ *Congressional Record*, July 1, 1987.

affirmative action or even desegregation; it was a land without abortion rights or privacy rights of any kind. The attack stuck, whether or not it was accurate; Bork received little support from the White House, then mired in Iran-Contra.

Twenty years after the Bork meltdown, Federalist Society member Samuel Alito was asked if he still believed that that man, Robert H. Bork, was one of the finest Supreme Court nominees of the century.¹²⁵ He did what Bork didn't do. He dodged. He'd made it through the pipeline.

¹²⁵ Alito said this in 1988. Democratic senators raised the matter in Alito's 2006 confirmation hearings. Responding to Senator Herb Kohl of Minnesota on January 10, 2006, Alito said, "When I made that statement in 1988 I was an appointee in the Reagan administration and Judge Bork had been a nominee of the administration and I had been a supporter of the nomination. I do not think the statement goes beyond that. There are issues with respect to which I probably agree with Judge Bork and there are a number of issues with which—on which I disagree with him." Hearing transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011001087.html>.

CHAPTER 3

THE PIPELINE DELIVERS

Robert Bork: The Dispensable (and Indispensable) Man

In order to deliver its fuel, every pipeline needs its pumping stations. During the lifetime of the Federalist Society, certain events have helped infuse the membership with new zeal and boost recruitment on campuses and among conservatively inclined lawyers. The first of these was the defeat of Robert Bork's nomination to the Supreme Court in 1987.

Many of the founders and otherwise "first generation" members of the Society were working for the Reagan administration at the time, and even more had been students of Bork's at Yale (some, like John Bolton, were both). Known as being exceptionally generous with his time and attention, several of his former students told me, Bork inspired intense loyalty. By 1987 he had taught at the nation's finest law school for a quarter of a century, reshaped the antitrust law through his academic work, and served as a federal appellate judge for six years. He was a rare role model for conservatives of Calabresi's generation, and when their hero Ronald Reagan nominated him to the Supreme Court it seemed like his ship was finally coming in. It was not to be.

The defeat of Bork's nomination, which began with Kennedy's speech and never really let up until the final vote was cast, was not helped by good planning or organization. "The White House basically disappeared because of Iran Contra," future judge A. Raymond Randolph, who was helping shepherd the nomination through Congress, told me. He said that

at one point the White House apparently even began forwarding press calls to his home number. Bork was basically left to fend for himself—and he didn't seem to be much in the mood for fending. Randall Rader, then counsel to Orrin Hatch on the Judiciary Committee, remembers the frustration of those difficult days which, as he sees it, had Bork winning the debate on the merits but losing it “politically”—the law/politics divide again, so much a part of the way conservatives see things. Rader tells of a meeting with Brad Reynolds and Bork in the midst of the hearings. Reynolds asks Rader to repeat a comment to Bork, which he does. “Judge Bork,” the young aide says,

...You're debating marvelously. But you simply have to get a little tear in your eye and look at the camera and say, “I wish to go on the Court to defend the equal rights of all citizens, man and woman, Black and white, whoever, in our society, and they will know that in me they have a champion.” And don't talk about all of these cases, *Bolling* and *Maryland* and the third footnote. You need to appeal better to the public in the political sense. And he turned to me—and this line I can quote: “Randy, I'm a judge, not a politician.” And Brad pulls me away and says “We've been beating on him for months and he won't move.”

Thus in the minds of many conservatives Bork becomes a kind of latter-day Thomas More, who went to his death rather than betray the law at the behest of King Henry VIII. In Robert Bolt's famous play *A Man for All Seasons*, More utters a line that echoes the theme Bork would take up in the years following the failed nomination: “the political seduction of the law.” Bork uses the line for the subtitle of his first bestselling book, *The Tempting of America*.¹²⁶ The “temptation,” with all of its Biblical referents, depends greatly upon the law/politics dichotomy: law (pure, objective, nonpolitical, the realm of the judge) and politics

¹²⁶ Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1990).

(fickle, dependent on the popular will, the realm of the legislator). From Bolt's play: "The currents and eddies of right and wrong...I can't navigate," More says. "I'm no voyager. But in the thickets of the law, I'm a forester."¹²⁷

Here we see Moore the lawgiver disavowing fickle morality in favor of the knowable certainty of law grounded in texts, with their plain meanings. Morality and public whim is on one side, law on the other. In the forest of the law, Moore finds no currents and eddies, but rather (with skill) the certain knowledge of a way through. Moore's own purposes are served by this, of course—he plays the ethical trump card of principle by setting up the straw man of flimsy, unreliable public opinion. Bolt's Moore is a hero because he remains true to a law that allows for no compromise, that is ethical per se. Bork takes on this mantle for modern conservatives.

At a 1989 Federalist event Cribb in fact quoted from Bolt's play in introducing Bork, though not the passage I cite above. Cribb's passage also focuses on objectivity, though—Moore's claim that he would fairly give the devil the benefit of the law, if the law commanded him to do so (again: no moral agency at work; apply the law, whether to the devil or not). "This country's planted thick with laws from coast to coast—man's laws, not God's," Moore says. "And if you cut them down...do you really think you could stand upright in the winds that blow then? Yes, I'd give the devil the benefit of the law, for my own safety's sake."¹²⁸ One is prompted to wonder what Sir Thomas would have made of the detention facility at Guantanamo Bay.

¹²⁷ Robert Bolt, *A Man for All Seasons* (New York: Random House, 1990 [1960]), 66.

¹²⁸ T. Kenneth Cribb, "Robert Bork: A Man for All Seasons." *Harvard Journal of Law and Public Policy* 12 (1989): 126. See also Robert Bork, "Thomas More for Our Season." *First Things* 94 (1999): 17-21 ("In the culture war of the sixteenth century, More was an active combatant for the binding force of law and the uniformity of religion under the Catholic Church. Our culture was is more confusing and diffuse, but at its center it too is a struggle over the uniformity and stability of law.").

After defeat in the Senate in 1987, of course, Bork went on to great success as an author and cultural critic. He shares with many on the left an explicit concern with the concept of culture—in his 1990 memoir, he addresses it directly in the context of his nomination battle with Senator Kennedy, presaging the “Culture Wars” of the 1990s and beyond. Resigning from the federal bench after the nomination vote, Bork sent a remarkable letter to Reagan which explained his decision to take the conservative fight from the judicial to the cultural arena. “I wish to speak, write, and teach about law and other issues of public policy more extensively and freely,” Bork wrote. “My decision to participate in the public debate...is what prompts my decision to leave the bench at this time.”¹²⁹ And Bork took the fight to another audience, a much broader audience.

On the spectrum of conservative rhetoric, Bork at his finest straddles the intellectual, political, and polemical domains. His post-nomination memoir *The Tempting of America*, for example, combines critiques of legal theory with political commentary. In more recent years he has drifted from the George F. Will audience and toward the hyperbole of Coulter and Limbaugh—“the grumpy old man of the right,” as one otherwise conservative ally put it. “He did point to the cultural battle that was going on, but cast the battle in such a way that probably undermined his efficacy,” adds Roger Pilon of the Cato Institute. “He came across as too stern.”

His star power was already established among movement conservatives (most of all his students), but Bork’s fame—or infamy—only grew following his defeat. “I think the nomination itself gave him a forum where he wound up convincing a good many people,” Randolph told me; in other words, there’s no such thing as bad publicity. In his books, Bork

¹²⁹ Bork, *The Tempting of America*, 320.

would expand on his legal and cultural critiques, lambasting liberals with polemical force, eventually becoming—in the minds of some conservatives—a bit too curmudgeonly to be persuasive.

He has never lost his appeal to the Federalist faithful, though, and has been a constant presence at events over the twenty-five years since the group was founded. Grouchy or not, one of my teachers suggested provocatively that the worst mistake the modern American left had made was to prevent Bork from getting that seat on the Supreme Court, perhaps keeping him from advancing his cultural agenda, being turned not only into a verb but a symbol. Everyone I asked about this except Bork himself agreed.

“He has become an icon of the conservative legal movement,” Randolph said, but he was bound for other things. “He wanted to have the freedom to write. He didn’t want to have to keep deciding whether some county commissioner was acting ‘reasonably’ or not.” Bork maintains his impact would have been greater on the Court, where he believes he could have provided the crucial vote to overturn *Roe v. Wade* and flip the balance in several other key cases. We will never know what Justice Robert Bork’s America would have looked like. We do know what bestselling-author Robert Bork’s America looks like.

Building and Managing the Pipeline

In part because of their ability to draw speakers with the credentials and conservative star power of Bork, the Federalist Society has grown consistently over time to its current level of over 40,000 participants in the three divisions: student, lawyer, and faculty. The student division is the smallest of the three—at approximately 5,000, it includes chapters at all ABA-accredited law schools. These numbers are almost certainly conservative estimates of

actual numbers of lawyers, judges, and other professionals who participate in Society events. As with any membership organization, many members are lax in paying their dues; the Society's mailing list, from which these figures derive, is much longer than its dues-paying-members roster. Many of the judges and government officials I spoke with, for example, maintained very credibly that they had no idea whether they were members of the Federalist Society or not. Several of them started asking me questions about membership ("Are there dues? How much are they? Should I be paying dues if I get the magazine?") and eventually I became persuaded that membership per se did not matter as an indicator of the Society's development. It is a gauge, but it is not the key.

For practical purposes, it is the mailing list and donors list that matter for the Society's survival and growth. It is *audiences*, dues paying or not, who make its continual growth possible. Programming draws audiences, exposes them to varying conservative viewpoints and direct confrontation with liberals; "everyone loves blood," as one longtime Federalist told me. According to the Society's most recent annual report, student chapters hosted 581 events during the 2004-2005 academic year. Among these were three appearances by Justice Scalia, who has never abandoned the role he first assumed in 1981, when Lee Liberman called him up to ask if he'd be interested in serving as faculty advisor to their new club.

Since its inception, the Society has spent the overwhelming majority of its budget on programming. In fiscal 2005, 88% of its \$6.8 million revenues were spent on events, a percentage that has been relatively stable for most of the group's existence. Growth in recent years has boomed—revenues more than doubled between 2000 and 2005, as they had between 1995 and 2000. Federalist president Eugene Meyer estimates the 2007 budget to be

close to \$9 million, yet another increase from the previous year. Out of this vast sum almost nothing is spent on recruitment; in a sense, though, the events themselves serve as recruiting devices. Law students and faculty are naturally drawn to events where they can hear administration officials and judges speak or debate on contemporary issues and also have the opportunity to ask questions of their own.

The national office supports three staff members to coordinate with the student chapters—the entire Federalist Society workforce is only 21 people. Peter Redpath, the student division’s director since 2000, founded the Baylor University Law School chapter and arrived in Washington with aspirations to work for a member of Congress on Capitol Hill. He connected up with the Federalists, though, and quickly moved into his current role. Redpath interacts daily with students at the nearly 200 student chapters, and says that despite the workload he prefers working with students than with the other divisions. “When you’re dealing with the lawyers’ chapters, in large part, if you call them up during work hours you’re taking away from their billable hours. If you’re calling the students, they don’t actually mind the study break,” he says. “They might ask you for advice on anything from their law school classes to studying for the bar exam.”

Email is the communicative mode of choice, and Redpath says it literally never ends; this is understandable given the numbers of students involved (thousands) and the size of his staff (three). The endless email, he says, can pertain to anything from “can I get more money for pizza for this meeting” to “our speaker cancelled, what do we do,” or “we heard that judge so-and-so is going to be on town on this date, can you see if we can get him to come?” Drawing on the extensive Federalist network, he says, with a little nudging most of the pieces seem to fall into place. Redpath helps identify speakers, and the national organization will

fund one speaker per event, up to \$1,000. “We mention the 501(c)(3) status in our memos,” he told me, referring to the Society’s tax-exempt status. “We emphasize not inviting politicians to speak, particularly before an election; that they’re not to give stump speeches; that they should have a debate opponent.”

The national office does not coordinate campus events but it does offer vital financial and logistical assistance to the student chapters. The Society maintains a list of past speakers drawn from legal academics, policymakers, and practitioners—“It’s a quality control kind of thing,” Redpath says. A partial excerpt of student division speakers in the Society’s 2005 Annual Report reads like a who’s-who of conservatism, from talk radio host Michael Medved and John Fund of the *Wall Street Journal* to Justice Antonin Scalia and Bill Kristol and Phyllis Schlafly. There are neo-cons and paleo-cons, libertarians and social conservatives. The age of the speakers varies widely, from the older generation like Schlafly, whose credentials date back to the Goldwater days, and younger, less-known figures such as Solicitor General Paul Clement and Peter Kirsanow, a Bush appointee to the Civil Rights commission. There are representatives of the major Washington think tanks, AEI, The Heritage Foundation, and the Cato Institute, as well as a host of academics.

Part of what the Federalist Society has done is create a space—literally and figuratively—where this collection of leading conservative thinkers can come together, on campuses and elsewhere. Bork offered a similar analysis, thinking back to the earlier days of the movement. “There was a lot of generalized discontent with the Warren Court floating through the society, but there was no focus for it, no focal point.” The Society has become the focal point. While the Supreme Court has long been the subject of political critique, from both the left and the right, the Federalist Society represented a new step in focusing

conservative criticism. Moving away from the ad-hoc attacks of candidates or fringe groups like the Birchers, the Federalists have worked to provide intellectual coherence to their criticism. Grounded in a broader conservative worldview, it entails a view of Constitutional governance rooted in the idea of separation of powers, a preference for limited government, and dissemination of theories of interpretation such as originalism and textualism. There is disagreement over how these broad themes should translate into policy, but they provide the intellectual foundation for those debates to go forward among conservatives—and for conservatives to engage with their opponents of other political persuasions.

“They’ve been able to be a gathering point for intellectualism in law among conservatives,” Chemerinsky said, “and have been able to bridge the difference between, from the libertarians to the evangelicals, and the various stands that they all take.” Though the Federalists have faced bountiful logistical challenges, the project is, and always has been, intellectual. “It takes a theory to beat a theory,” as Epstein put it.

Sure, the John Birch Society put up billboards in California calling for the impeachment of Earl Warren, but if anything—as we have seen—this aggressive approach proved a liability rather than a boost for Buckley and the conservatives of that era. With Reagan’s election and the mainstreaming of the movement, though, it became possible to begin focusing the disparate strands of legal conservatism and critiques of New Deal-era jurisprudence and the Living Constitution of the Warren Court liberals. “The Federalist Society provided a focus point for people who were unhappy with the way things were going in the development of the law,” Bork says. It continues doing this today, and a good part of the “value added”—to use economics jargon—for Federalist Society participants today is

that they are able to network and strategize with like-minded individuals from other walks of life, many of whom are quite powerful.

Flipping through back issues of *The Federalist Paper* provides a kind of kinetiscope version of how the Society gathered momentum during the Reagan years, was propelled through the Clinton presidency by frustration and even anger, and then ultimately was vindicated and welcomed by a more conservative Bush administration in 2000. On the one hand, there is continuity: then-Judge Antonin Scalia is on the front cover of the Spring 1985 issue, which discusses the recent student symposium held at Georgetown University, themed around the question of equality—a dicey issue we will take up in a later chapter. Brad Reynolds, who was then very much in the heat of battle defending his opposition to affirmative action, also spoke at the 1985 equality conference. Interestingly and typically provocative was another guest, Ronald Krietmeyer of the U.S. Catholic Conference, who defended a statement by the national Bishops’ conference calling for greater equality in American society. “Comments from Judges Bork and Scalia suggested that much more remains for the bishops to consider,” the *Federalist Paper* concludes.

On the four-page newsletter’s back page one learns that then-Harvard professor Bill Kristol had recently appeared at the University of Buffalo to give remarks on the Supreme Court. Although not a lawyer, Kristol’s Ph.D. dissertation was a massive 500-page textual exegesis of the *Federalist Papers*, heavily influenced by conservative literary critic and philosopher Leo Strauss.¹³⁰ Kristol’s father, Irving, was one of the original neoconservatives, and his support helped secure some of the initial funding that got the Federalist Society off the ground; he would later say that the seed money given to the Society by the Institute for

¹³⁰ Nina Easton, *Gang of Five: Leaders at the Center of the Conservative Crusade* (New York: Simon and Schuster, 2000), 47.

Educational Affairs was “the best money we ever spent.”¹³¹ Among the Society’s other initial backers was the Olin foundation, which, it just so happened, also sponsored Kristol’s 1985 Buffalo talk. Kristol has remained a frequent Federalist panelist and guest speaker.

Scalia is back on the cover of the Summer 1986 *Federalist Paper*, which discusses that year’s student symposium, which focused on the First Amendment. Milton Friedman, one of the godfathers of conservative supply-side economics, was the keynote speaker, and his remarks echoed the theme of his book *Capitalism and Freedom*¹³²—the newsletter says he asked the audience a rhetorical question, ‘Do free men make markets, or do free markets make free men.’” For Friedman and many other conservatives, it is a matter of gospel truth that the second formulation is the right one.

The 1986 newsletter also includes an article announcing the establishment of the first four lawyers’ division chapters in Washington, D.C., Los Angeles, Chicago, and New York. By 1988 the New York chapter had grown to 500 members, and by the following year total membership passed 2,000—a figure that would nearly double in the following 12 months and, astoundingly, hit 6,000 by late 1991 and 10,000 by late 1995. The word was getting around.

Washington was the site of the first national lawyers’ convention and has remained so with one exception. The capital city has been home to the most active of all lawyers’ chapters—the reason isn’t hard to understand. “In some ways starting a lawyers chapter in Washington was easier than starting a lawyers’ chapter in other cities,” Calabresi said, mentioning some of the first luncheon discussions and debates. Some members I talked to

¹³¹ Miller, *How Two Foundations Reshaped America*, 29.

¹³² Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 2002 [1962]).

expressed a tinge of resentment about the Washington chapter's high profile. But there is a practical fit with the Society's project that is hard to ignore. "Compared to people doing corporate transactions in Manhattan," Calabresi said, "for lawyers in Washington, going to these events was often related to doing their jobs." Washington is, after all, where the action is—where laws are written, policy formulated, and Supreme Court decisions handed down.

A brief internal Federalist Society history describes the first meeting of the Washington chapter, in May 1984, as a "small pilot project," whose first meeting included a speaker from the Office of Management and Budget. "Membership in the group cost a meager five dollars," we are told. "A small band of about 30 attended." By 2005, there were 65 lawyers' division chapters, "the next step in the Society's pipeline for fueling a community committed to fostering the application of traditional legal principles." The lawyers' division hosted 230 events in 2005, with an average of 60 attendees per event.

As more and more Federalist law students graduated and the organization continued to prosper, it became clear that a stronger lawyers' division was needed. Part of the planning for the newly populated ranks of Federalist alumni included the fifteen "Practice Groups" that would cluster the lawyer membership by area of legal expertise. The groups were formalized in 1997 and have maintained the same groupings ever since: Administrative Law; Civil Rights; Corporations; Criminal Law and Procedure; Environmental Law and Property Rights; Federalism and Separation of Powers; Financial Services and E-commerce; Free Speech and Election Law; Intellectual Property; International and National Security Law; Labor and Employment Law; Litigation; Professional Responsibility; Religious Liberties;

and Telecommunications. The Practice Groups were jump started with a funding grant secured from the E.L. Wiegand Foundation, a Nevada-based trust.

Practice Groups each have an executive committee who on average talk once a month on a conference call with the national office. Dean Reuter has served as the Director of the Practice Groups since 2001, and as with Redpath and the Student Division, has one deputy and shared access to a small support staff. Like so many other Federalists, Reuter tells how feeling marginalized as a young conservative in law school eventually led him to the Society. At Northwestern University in the early 1980s he remembers taking Constitutional law with prominent scholar Michael Perry. “He started talking about the Living Constitution and why the Constitution needs to evolve, to change,” Reuter told me. “It was a seminar class of maybe a dozen people and I had arguments with him consistently: what are the standards there, what does it become? How do you know what the living Constitution is? Who gets to decide, and to whom are they accountable? And none of his answers were satisfactory.” For Reuter as for many other conservatives in the Society, this feeling of alienation led to a commitment to the organization that has put forth an alternative view—that has said “your view is not the only one.”

The Practice Groups take the intellectual mission of the Society in a more applied direction—but still hewing to the group’s academic, intellectual tone. Bringing together practitioners with policymakers in the specific areas of law and litigation does mean that there is greater possibility for practical application: Separation of powers exists as an abstract Constitutional idea, but it also affects the way the Federal Communications Commission regulates cable providers, or the way elections are conducted—though again the Washington divide affects the relevance of the intellectual project to the actual work Federalist lawyers do

on a daily basis. For the Washingtonians, there is often a clear “value added.” The groups sometimes hold their own conventions and meetings and may schedule other events with programs specifically related to their areas of legal practice.

These interactions are particularly valuable “for somebody in Washington, especially for someone who has an appellate practice,” said Jeffrey Clark, a former Justice Department official and now a partner at the prestigious firm of Kirkland and Ellis. “These issues that come up are issues I get to work on. So these conferences are not just, for me, wistfully looking at great things I might get to work on. These are actually things I can apply... These things keep the saw sharp, the saw that I use on a daily basis.” For those outside the Beltway and its rarified political air, though, the Federalist Society provides a link to the policy process—a connectivity that has civic if not career-advancing value. What members take away from events is often “much less nuts and bolts,” Reuter said.

As an example he points to the telecommunications practice group. “Rewriting the Telecommunications Act is something people are very interested in, if they are practicing in that area, and we’ll have 50 people show up. But it is still probably a higher level discussion than talking about whether, say, you want to go with Section 201(5.7)(b) then you take this form, and you flip it over because on the back... we don’t do that. But we do talk about the Telecommunications Act, the Bank Secrecy Act, or the Endangered Species Act. And people do find some practical application for that in their practice.”

A similar theme was echoed by Hans von Spakovsky, a recent Bush appointee to the Federal Elections Committee who had formerly served in a career position at Justice. Prior to coming to Washington, Spakovksy had been active with the Federalist chapter in Atlanta as well as nurturing an academic interest by writing papers for the Georgia Public Policy

Foundation. “By going to these Federalist Society lunches in Atlanta, I got to know a lot of other lawyers who weren’t just interested in representing their clients,” he told me, “but who were really interested in public policy, how and why laws are written and implemented and how to fix problems that are caused by bad laws.” The Federalist Society helped him bridge that gap between theory and practice and find a community of people who were interested in doing so.

By 1989 *The Federalist Paper* is informing its readers of ever-increasing numbers of events and new chapters across the country; Phoenix joined the Lawyers’ Division roster that March and kicked off by hosting a debate between the state Attorney General and an Arizona State law professor on *habeas corpus*. The article also mentions an appearance at the Chicago lawyers’ chapter by Congressman Henry Hyde, who would go on to chair the International Relations Committee in the House of Representatives, as well as Fifth Circuit Court of Appeals Judge Edith Jones’s talk with the Dallas chapter. Jones was widely discussed as having been on President Bush’s short-list of potential Supreme Court nominees in 2006.¹³³

The same 1989 issue also contains an important, though rather mundane development in the Society’s evolution: a change of address form for graduating law school students. The “pipeline” was hitting a snag around this time. For all of its rhetorical success in reaching—and creating—an audience, the logistical side was coming under stress. The number of graduating Federalists began to overwhelm the ability of the organizational structure to coordinate their continued participation, and many law school “Feddies” were getting lost in

¹³³ *The Washington Post*, “Possible Nominees to the Supreme Court,” Sept. 5, 2005.

the transition from the campus to legal practice. Several strategies were developed, including waiving the first year of membership fees in the Lawyers' Division.

Better programming would help make continued membership attractive, as would opportunities for networking through the Practice Groups—which were at this point still several years in the offing. Publications beyond the rather light fare of *The Federalist Paper* were added to increase the Society's profile and disseminate its members' writings. These would eventually include *Engage*, a biannual journal containing academic law review-styled articles (begun 1999); the *ABA Watch* newsletter, scrutinizing the activities of the Bar Association (begun 1996); as well as an increasing number of white papers and monographs prepared by members. With the advent of the Internet the availability of all of these publications was made exponentially easier. But in 1990, more traditional modes of organization-building were still important; the August issue of *The Federalist Paper* was the first to include a center-insert pre-addressed membership envelope. In a rather amusing economic commentary, membership rates were \$5 for students, \$25 for lawyers, \$10 for faculty, and \$25 for "other." The form also featured a write-in line for tax-deductible donations and a check-box for aspiring chapter founders. "I am interested in forming a chapter at/in _____."

In 1990 the Society's continued growth led to the creation of a Board of Trustees, in part to build development and increase funding—which would allow more publications, speakers' fees, and other programming. The trustees' first meeting took place on May 30th of 1990, and the *Federalist Paper* reported that they "formulated plans to secure both individual and corporate contributions." That initial board was made up of nine prominent conservatives including Meese, Bork, Reynolds, Holly Coors (wife of brewing magnate Joseph Coors), and

Senator Orrin Hatch. They fulfilled their fundraising mission well; programming—and perhaps as a result, membership—shot upward at a furious pace during the 1990s. In 1994, *The Federalist Paper* reports another significant effort aimed at expanding the Society’s connections to the broader conservative community. Former Bush I White House Counsel C. Boyden Gray organized the Society’s new Business Advisory Council, an “outreach group” including executives from Wachovia, Lowe’s, Media General, and others. The pipeline kept expanding into new territory.

Responding to the boom in Lawyers’ Division membership was among Leonard Leo’s initial tasks when he was hired in Fall 1991. Leo had founded the Cornell University student chapter in 1986 and worked to have the national Student Symposium hosted on his home turf two years later. He particularly caught the attention of Stephen Markman, head of the Washington lawyers’ chapter and now a justice on the Michigan Supreme Court. He also made a mark on Randall Rader, whom he invited to speak at Cornell. Rader would bring Leo to Washington as an intern with the Senate Judiciary Committee and then as newly appointed Judge Rader’s first law clerk. Thus functions the network; later, with the Federalist Society, Leo would work to make it possible for more and more young conservatives to be given the kinds of opportunities he had been afforded.

After his term with Rader finished Leo went on to clerk for Judge Randolph, who had been appointed to the bench by the first President Bush in 1990. Leo decided against the lucrative fast-track open to former clerks by many top law firms. “I was quite surprised when he left Ray Randolph,” Rader said. “Instead of going into practice he went to the Federalist Society. He called me and consulted with me about it, and I thought it was very good for

him. It was what he wanted to do...I've been very proud that he's developed into someone who has an impact."

Leo, the Society's Executive Vice President, joined Gene Meyer in shepherding the Society as it continued to grow. Gene had been brought on board in 1983 after the Society had officially incorporated and it became clear a national director was needed. Lee Liberman first approached her older friend from Yale to ask his advice on who might be up to the job. "He said, well—I might be interested!" The one other candidate under consideration for the position was rejected, and Meyer has remained in the post ever since.

Meyer and Leo are something of an odd couple, a yin-yang pair if ever there was one. Where Gene seems perpetually ruffled, laid-back and unimposing, Leonard is all business—as impeccably dressed as he is intense, not a word wasted or a hair out of place; the kind of person who, when seated, intuitively readjusts his tie to assure it properly covers the buttons of his Oxford shirt. Together they are joint yeomen of the guard, covering between them the full spectrum of political and interpersonal skills required to run a national organization. "The Federalist Society is the clearing house, the Grand Central Station for legal conservatives," John Fund told me. "Leonard and Eugene are the station masters."

Professor Epstein goes further. "Gene Meyer is a genius," he said. "He understands that if you wish to run an organization like this it has to be decentralized. And I've never seen him hog the spotlight; I've never seen him speak at the Federalist Society on any substantive issues. To this day I could not tell you how libertarian or how majoritarian he is. He has decided to put his own private views on hold for the good of an organization that he has run for twenty-five years." Leo, on the other hand, "is involved in every darn thing," Epstein says. "I first met him when he invited me to Cornell, and I said this is a man who's

going to go far...with most Federalist Society kids, they do it, they'll graduate and they'll do something else. As for Leonard—this man clearly has a commitment.” He certainly does have that, even his critics will concede.

Leo encountered major media attention in 2005 when he took a leave of absence from the Society to advise the White House on selection of a nominee to succeed retiring Supreme Court Justice Sandra Day O'Connor. The move was necessary for legal reasons—as a non-profit group, Federalist Society officers cannot endorse candidates or engage in directly political activity. But Leo was often identified in the media as “Leonard Leo of The Federalist Society.” Whether or not he was on the payroll at that given moment, it is clear that the reason Leo's opinions were considered was precisely because he was Leonard Leo of *the Federalist Society*. Having helped preside over the booming growth of the organization for 15 years, he has a finger on the pulse of conservatives in American legal practice. “It says a lot about the success of our movement that people with our ideas are no longer just talking about them, but are in a position to do something about them,” Leo said.

A phrase the Federalists like to use in this regard is “citizen lawyer,” and based on my several years of interaction with members at various levels, it's a good one. Even the rank and file Federalists tend to be someone who views himself or herself as part of a social and political project, always on the lookout for ways to put their ideas into practice. And given that the law tends to attract people who enjoy debate and activism, it often doesn't take much to spur them into action. “If you convince a lawyer of something, you've done more than convince one average member of the public,” Reuter said. “They're more likely to turn around and argue with people, to try to convince other people, to write letters to the editor, run for office.” The Federalist Society, in a sense, is a jump-starting device—or to use a

military metaphor, a base camp. As Bork suggested, it provides a focal point, a forum for provocative debate, networking and the development of personal, professional, and political ties. “Our members are armed with ideas and enthusiasm that I think they get by going to our programs,” Reuter adds. “Our people are the kind of people that will try to change the world, or to change their little part of it.”

Branching Out: The Role of Judges

The Society’s programming was expanded in 1992 to include continuing legal education workshops—accredited seminars required on an annual basis by most state bar associations. CLE events are often hosted by law schools or professional associations; they typically involve a couple days of intense instruction and discussion covering materials in some current area of law. The first Federalist Society CLE workshop dealt with the Takings Clause and environmental law—a hotly debated topic, regarding whether certain environmental regulations, which may result in landowners being unable to use their property for farming or other purposes, represent a “taking” under the Constitution, therefore require monetary compensation by the government. Lecturers at the CLE event included a federal judge and several government lawyers as well as Michael Greve of the American Enterprise Institute, who remains today one of the most outspoken opponents of government regulation in general.

The Society has continued sponsoring CLE events, one of which produced a boomlet of controversy in late 2005 when Justice Scalia co-taught a seminar held at the Ritz-Carlton in Vail, Colorado. Scalia had appeared several times before at Federalist CLE events, but this

was this first time a media dustup ensued.¹³⁴ The episode reflects deeper questions about the participation of judges in the Federalist Society, an issue often raised by critics and fodder for some of the more extreme, conspiratorial accounts of what goes on in the secret Federalist cabal. The pipeline sometimes delivers some very rich fuel to its members—though of course anyone can join. Inflation seems to have taken its toll since the 1990 mail-in envelope; or perhaps, as Epstein would say, the market price has adjusted to the value. Current rates are \$50 for lawyers as well as nonlawyer general members; \$25 for faculty, public sector, or nonprofit; and \$5 for students. There is no ideological questionnaire or political test involved—membership and its privileges are a point and a click away.

The Vail CLE event was attended by about 100 lawyers, including myself, and was closed to the press and public. ABC News' *Nightline* program had an undercover reporter and camera operator at the event and ran an exposé-style piece on the workshop in late January of 2006. "We've heard a lot about junkets for Congressmen, which they like to call fact finding missions," reporter Brian Ross said in the piece's opening. "The justices call them educational seminars. They are held at fancy resorts with someone else picking up the tab." As undercover video of Scalia playing tennis at the Ritz rolls, Ross intones that the Justice just happened to be absent from Washington on the day John Roberts was sworn in as the Supreme Court's new Chief—an "apparent snub."¹³⁵

The piece identifies the Federalists as "a conservative activist group," some of whose members practice law before the Supreme Court. It then features several law professors critiquing Scalia's involvement with the Society. "He's using the prestige of his office to

¹³⁴ According to Federalist Society President Eugene Meyer he is scheduled to appear again at a CLE course in 2007.

¹³⁵ *Nightline*, ABC, Jan. 23, 2006.

advance the interests of a group with a decided political-slash-judicial profile,” Stephen Gillers of New York University told Ross. “The issue,” Ross concluded in his report, was “not bribery or influence, but the appearance of lack of justice, of fair-mindedness, for people who can’t afford to fly a justice out for a fancy three-day trip.”

As one might imagine, the Federalist Society took sharp exception to this characterization of the CLE event, and a sharp series of accusatory letters changed hands. But as a former reporter myself—and as someone present at the Vail event—what stands out most in the ABC report is the decision to include nothing about the two full days of teaching that were the reason Scalia, the former professor, was there in the first place. The undercover cameramen weren’t in the closed-door teaching sessions (several U.S. Marshalls guards kept that from happening), and Ross must not have thought it important to speak with any of the 100 attendees who were. Although I was rather bowled over by the luxurious accommodations, what struck me most about the three days in Vail was the fact that this Justice of the Supreme Court was genuinely engaging with lawyers, almost all of whom he’d never met and would never see before his Court. The teaching sessions were intense and yes—as the RSVP cover letter had said—Justice Scalia did expect you to have done your readings (all 500 pages!).

Seated on the dais in a medium-size banquet room, Scalia and Professor John Baker of Louisiana State University alternated turns at a podium, reviewing the history of separation-of-powers cases dating back to *Marbury v. Madison*¹³⁶ in 1803, which established judicial review as we know it and also entailed a dispute between the executive and judicial branches. Throughout the workshop, attendees constantly raised their hands and even

¹³⁶ 5 U.S. 137 (1803).

interrupted Scalia, who responded to and engaged their questions. Particularly when we began examining more modern cases, including some written by Scalia, the “class” was hardly looking to brown-nose the professor.

There were some very intense back-and-forth exchanges between teachers and students. Both in the teaching sessions and the informal receptions, Scalia engaged in conversation as any teacher would. Sure, he has a rather elite position on the subject matter. But he did not attempt to use his authority to shut down discussion, belittle students, or, for that matter, to provide “tips” for winning Clarence Thomas’s vote. The one time he mentioned Thomas was in reference to a case where they disagreed. In short, Ross and ABC got the story almost completely wrong. The audience was members-only but anyone can be a member, and Scalia actually was there to teach law, not to play tennis.

While it is true, as ABC also reported, that Supreme Court justices are not bound by the official code of judicial ethics, even if they were, what Scalia was doing at that seminar would have passed muster. Ross didn’t look into this, apparently, or find it worthy of including in his report. Canon Four of the ethics code states, “A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.” It continues in commentary, “As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice...the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.”¹³⁷

¹³⁷ Code of Conduct for United States Judges, Canon Four, “A Judge May Engage in Extra-Judicial Activities To Improve the Law, the Legal System, and the Administration of Justice.” <http://www.uscourts.gov/guide/vol2/ch1.html#4> (accessed April 14, 2007).

Improvement of the law is, to be sure, seen differently by liberals and conservatives. A liberal would probably not view Scalia's take on separation of powers—well established in his opinions—as an “improvement.” The same goes for his view of the opposing position held by the more liberal members of the Court. But as Judge Randolph, who helped draft the ethics code, pointed out, Canon Four seems to clearly support the case for judges' participation in Federalist events.

Randolph, who has taught for the past eight years at George Mason University in Virginia, sees the Society as a kind of permanent CLE seminar—with a particular conservative bent, of course. And the intellectual aspect is what keeps him coming back. “I don't think I've ever been to a Federalist Society panel and not learned something,” Randolph told me. “It's almost like teaching...you get to delve deeply into something; we on the court here hit the top of the wave all the time,” he said. “We are generalists.” This intellectual theme is echoed again and again by attendees at Federalist events, many of which read like CLE-approved seminars, even if they're not (and most of them are not). A few examples from recent years: “Copyright, Creativity, and Commerce”; “Turning Private Property into Public Trusts”; “Race and the Individual”; “Is There Any Room Left for Federalism in Financial Services.” The judges I spoke with had much the same things to say about their reasons for participation in these conference panels: intellectual engagement is a good thing, whether you are a Manhattan lawyer doing mergers and acquisitions or a judge on the Ninth Circuit.

“Approaching it academically,” Judge Rader said, “there's a broad range of ways my colleagues on this court and throughout the judiciary approach legal debates. Some of them

say, ‘I must avoid any debate because I might disclose my thinking which would intimate how I might act in the future’.” To Rader this view is somewhat disingenuous, since “everybody knows what they think and how they’re going to act in the future, just from reading their opinions in the past.” He strongly defends his participation in Federalist events. “As long as we’re avoiding any particular case pending before us,” he says, “the debate broadens our minds and helps us be better informed as legal arbiters.” The arguments against engagement are, Rader suggests, motivated by political and intellectual animus—an end-run around actual debate. “I think there’s an agenda for those who are in the *Nightline* camp: They can create this sense of conflict of interest when I think one does not exist.”

For his part, Scalia is adamant in defending his extra-curricular appearances like the Federalist event in Vail. “The day that the judiciary ceases to be part of the intellectual ferment of the society, when we are drummed out of the intellectual life of the society—I get off the train,” he told me in an interview. “We’ve always been part of the intellectual life of the society, from Joseph Story on. He taught, he wrote the first commentaries on the Constitution and so forth. How can you possibly say this is an improper activity? It’s ridiculous.”

He even appears to have pulled at least one liberal on the Court along with him in his public opinionizing. Though they are often at odds in their judgments from the bench, Scalia and his fellow former professor Stephen Breyer have of late been appearing in a series of public discussions (it would be unseemly to call them “debates”), usually with the two adversaries seated in high-backed easy chairs on a dais before an audience of law students or lawyers, and moderated in their “discussion” by a news anchor or scholar. At one such event—co-sponsored by the Federalists and the American Constitution Society in 2006—an

emblematic and genuinely funny exchange occurred: Scalia responds to a questions from the moderator regarding his opinion in a recent Court opinion, and then looks to Breyer for his reply. Breyer politely suggests, in the traditional mold, that it would be “improper” to expand on his written opinion. A brief, awkward silence ensues. The audience—some 600 of the Washington, D.C. legal elite—shifts its eyes back to Scalia. “Try it,” he says, leaning forward toward Breyer and cracking a broad grin, “you’ll like it!” There is a ripple of laughter and then, somewhat to the surprise of many, Breyer takes the lead. One can only speculate that as a former teacher himself, the liberal Justice sees somewhat reluctantly eye-to-eye with his conservative colleague when it comes to the role of the judge as civic participant, as continuing educator.

Judge Kozinsky, who has written more than a few op-eds for the *Wall Street Journal*, echoed Scalia’s tone in telling me about his appearances at Federalist events over the years. “I think it would be pretty far-fetched for someone to say that I shouldn’t be present,” he said. “It’s almost an un-American point of view...I think it’s never wrong to go and express your view.” Like the professor cited by *Nightline*, there are those who would disagree with Kozinsky on ethical grounds, seemingly suggesting that in order to preserve his or her role as impartial arbiter, the judge must maintain no views of his own, or at least never talk about them anywhere except in published opinions. It’s ironic that this critique, often heard from liberals who don’t like Scalia’s speechifying, are often the same critics who accuse the right of espousing artificial notions of judicial “objectivity.” Kozinsky and other Federalists I spoke with were perfectly willing to admit they have a point of view, and are willing to share it with law students and other organizations, be it the conservative Federalists or the liberals in the more recently-established American Constitution Society, known in legal circles as the

ACS (to the Federalist Society's FedSoc, or, more familiarly, Feddies or Federalistas).

Kozinsky says he is just as willing to accept ACS invitations as ones from the Federalists; and in either case, the project is a good one. "I think that to discuss the law is what we want," he said. "We want engaged, thinking people in our judicial posts."

ACS president Lisa Brown, a former advisor to presidential candidate Al Gore, has no problem with this kind of analogy. The organization, she told me, "is in part a recognition of the effectiveness of the model they built, in terms of generating ideas and the means of implementing them."

Judge Diarmuid O'Scannlain, also of the Ninth Circuit, agreed, noting that the ACS events appeared to be following the same balanced-debate protocols as the Federalists. For O'Scannlain neutrality is the key, and that seems to put him in a somewhat different position than his colleague Kozinsky. "I will never put myself in a position where I'm taking a point of view," he told me. "I think people that aren't careful about that are fairly criticized."

National Conventions: The Pipeline's Central Pumping Station

Judges have served frequently as panel moderators at the national conventions—the value of which goes well beyond the celebrity factor. As anyone who has attended an academic conference knows, panelists rarely stick to their allotted time limitations. But when a federal judge starts to bring the gavel down, most speakers will wrap up pretty quickly. The 2005 conference featured a total of twenty panels each with four or five panelists, eleven of which had sitting or former federal judges, as moderators.

Panelists are drawn from academia, legal practice, and government, presenting different perspectives on the topic as well as different positions on the issue. At the 2005

panel on international law, for example, one finds Robert Bork facing off with prominent human rights lawyer Francisco Forrest Martin, president of the group Rights International; their moderator was Judge Edith Jones. A 2003 panel had conservative Professor John McGinnis seated alongside liberal Mark Tushnet debating “ideology and the legal academy,” two of the most prominent scholars in the field of Constitutional law, moderated by Judge Douglas Ginsburg of the D.C. Circuit Court of Appeals. A few years earlier, a panel on judicial nominations featured two former White House counsel, Republican Fred Fielding and Democrat Lloyd Cutler, as well as the heads of two prominent non-profit activist groups (one liberal, one conservative), with a *Wall Street Journal* editor moderating.

These are not exceptional examples. The list of interesting and impressive combinations of panelists could fill a whole chapter. Convention panelists over the past twenty years contain most of the nation’s leading scholars—liberal and conservative—and top political appointees from both parties. Since their inception, the conventions have been planned explicitly to secure top-tier panelists and to produce provocative debate.

For most of the years since the first convention in 1987, the gatherings have been held at the Mayflower Hotel, one of Washington’s more prestigious locations. The 2005 convention, centered around originalism as a textual and legal methodology, ran from a Thursday morning to Saturday evening. It followed what has become a fairly standard formula in recent years, similar to the way most academic conferences are organized. Gene Meyer opens the event on Thursday morning with short remarks and introduces the first “showcase panel” tied to the convention theme and featuring participants with broad name recognition.

The first of several speeches is then given by a prominent political or legal figure; in 2005 this was Massachusetts Governor Mitt Romney, a GOP presidential hopeful who used the occasion mainly to test-drive his stump-speech—rather outside the norm for Federalist speakers. Past speakers have included Attorney General John Ashcroft, John Fund of the *Wall Street Journal*, future U.N. ambassador John Bolton, and Labor Secretary Elaine Chao. Romney’s appearance in 2005 produced a minor controversy not because of anything the Governor said, but because Leonard Leo in his introduction referred to his home state of Massachusetts as being run by the “KKK...the Kerry Kennedy Klan.” News media ran the clips, and Romney disavowed any knowledge of the remarks, calling them inappropriate.¹³⁸ Before 2001 there was a keynoter on day two at the banquet dinner, but no headliner speech on day one—an indication of the Society’s increased ability in recent years to draw more and more prominent speakers.

After the first day’s headliner there is a buffet luncheon, the atmosphere of which has at times seemed somewhat akin to the awkward social hierarchy of a high school cafeteria. Attendees jump to grab seats next to federal judges or political figures, hoping to ask a question or make a career connection. The mood is excited not just because one might get to chat with high-profile Federalists, but because of the common bond and friendship a visitor comes to realize exists among the members, whether or not their names are familiar to readers of the *Washington Post*. “There’s a certain positive energy,” said Jan Berlage, a private practitioner who founded the Connecticut chapter in 1996. “It’s not about winning or

¹³⁸ *Associated Press*, “Romney Rips Quip Referring to KKK,” Nov. 12, 2005.

losing, it's about being part of a juggernaut organization. It builds confidence, it build success. It's positive energy."

Afternoon panels follow on day one, with attendees either choosing one or "panel-hopping." Topics are usually grouped by area of legal practice and coordinated with the Practice Group divisions. With judges keeping speakers on a fairly tight rhetorical leash, time is almost always left for questions, and the grilling can get fairly hot. It is worth noting that the questions at these conference events come almost exclusively from the conference-goers—that is to say, from conservatives. But as we will see more in the following chapters, there is plenty of friction to go around on the right, without even bringing in liberals' opposing views. That is to say, not every question is directed toward the panel's liberal representatives, accusing them of heresy, idiocy, or worse. I have seen fierce debates between libertarians and conservatives at conventions and other Federalist events on a wide array of topics from abortion to the war in Iraq to Bush's budget deficits and fiscal policy.

Indeed, Bush is hardly a unifying rallying figure the way Ronald Reagan once was. "The Bush administration has been a setback because it is bereft of ideas, even hostile to ideas unlike the Reagan administration when Washington was alive with intellectual ferment," said the Cato Institute's Pilon. On the other side of the libertarian-conservative divide one finds little more sympathy. "I don't think George Bush is much of a conservative," declared Robert Bork. "I'm disgusted with Republicans in Congress. They're off spending and boondoggling worse than the Democrats did." While he supported the war in Iraq, Bork says it has not been carried out well; while Bush's tax cuts fit with his social

conservative views, any benefit is undercut by his spending. “I think Bush is terrible,” he said, exasperated.

These kinds of internecine disagreements often come down to different readings of a text, be it the Constitution of the United States or the October 2002 resolution authorizing the use of force against Iraq—and there is plenty of disagreement about those two texts. “The practicing bar element of the Society is extraordinarily thoughtful about law,” one Constitutional law professor told me. “Even for the people who don’t have it as their job to teach students or write law review articles...people bring to these conferences the same kind of philosophical bent that we do.”

A banquet dinner is held on Friday night, consisting of the typical chicken-or-fish entrée and free-flowing mid-grade California wine. (A fine facilitator of good debate and conversation!) Keynote addresses have been delivered by a similar list of high-profile figures such as Vice Presidents Dan Quayle and Dick Cheney, Justice Clarence Thomas, and Senate Majority Leader Bill Frist. In 2005 the keynote speaker was Karl Rove, who at the time was under investigation by independent prosecutor Patrick Fitzgerald in connection with the leak of CIA operative Valerie Plame’s identity. While Rove drew sustained applause from the crowd, one longtime Federalist member I spoke to took issue with Rove’s presence. “I was disappointed to see Karl Rove as the keynote speaker,” she told me. “While I understand he plays a significant political role in the current administration, I would prefer to have the focus of the society remain on the open marketplace of ideas and the way in which the power of those ideas can influence thoughtful members of our profession.”

When at the conventions I often found myself thinking that for all the talk of the Federalists’ secrecy and cabalistic plotting, it would be easy enough to walk up Connecticut

Avenue, into the Mayflower and up to the microphone in one of the panel rooms. The conventions are not private or closed to the press, and particularly during panels such as the Bork-Martin face-off over international law and human rights, I found myself wondering why it was that no liberal-minded law students in Washington would avail themselves to ask questions (with CNN's cameras rolling) of the speakers—U.S. Solicitor General Paul Clement was also on the panel. Martin went after Bork aggressively on a variety of issues, making some very strong accusations about the consequences of U.S. foreign policy and the War on Terror. There were no boos or hisses from the standing-room only audience—but there were not even enough questions from the audience to fill up the allotted time.

Aside from panels, since 2001 the conventions have featured not only the first day headliner and second day banquet keynote, but a third formal speech, the Barbara Olson memorial lecture. The wife of Federalist stalwart Ted Olson, Barbara was a well-known conservative commentator and author before she perished aboard United Airlines flight 93 on September 11, 2001. Olson gave the inaugural address memorializing his wife: he has been followed by Kenneth Starr, Bork, Scalia, and Judge Randolph. Speaking to a packed house in the Mayflower's main lecture hall—a long, ornate, gilded chamber reminiscent of the Vienna Philharmonic's famously lavish concert hall—Scalia in 2004 used the occasion to reinforce the themes echoed in his opinions, particularly “judicial restraint.” A central theme of conservative legal theory and Federalist Society discourse, it argues against courts’ “encroachment” onto the legislature’s asserted Constitutional right to regulate society—hence the label “majoritarians” used by skeptical libertarians who argue against the absolute right of majorities to determine all rules for individual conduct and liberty.

Scalia urged judges to adhere strictly to legal texts, but to also consider the original meanings of those texts and their relation to society's traditions. A memorable moment of laughter came when he described the horror liberals would encounter should he be nominated to succeed Chief Justice William Rehnquist, who would in fact pass away within a year. Standing rigid, arms outstretched Frankenstein-style, the Associate Justice of the Supreme Court asked the Federalists to imagine the terror of...*Chieeeeef... Juuuuustice... Scaliiiiiii!* It brought the house down, of course.

In 2005 Randolph, Bork's friend and ally during the 1987 nomination, spoke on *Roe v. Wade*, challenging the legitimacy of the landmark decision and quoting from previously unreleased memorandums from the appellate judge who handled a similar case prior to *Roe*. Randolph was restrained but passionate; his criticism was less of abortion as a practice than of the legal reasoning in the opinion itself and the social divisiveness it has produced.

Strangers in a Strange Land?

The Society's smaller Faculty Division hosts its own events, which are even more intensely oriented toward academic issues in the law. While Judges have a very practical insulation from critique—lifetime appointments—many professors active in the Federalist Society face their own kind of professional dilemma, given perceptions of the group by their colleagues on the academic left. Scalia or any of his colleagues on the bench are essentially impervious to critique, save for the possibility of impeachment. The same goes, for the most part, for tenured faculty. Asked about this, one federal judge told me, “I got tenure the day I was confirmed by the Senate.”

As Chemerinsky pointed out, the narrative of conservatives as beleaguered minority serves a strategic function—“It’s always rhetorically advantageous to portray yourselves as the victim.” Chemerinsky, who supports the ACS, is skeptical of these types of claims made by conservative professors. “I’ve always been amused by their claim that there’s this liberal domination of academia,” he says—while also acknowledging, generally, that Federalist views of law are not widely held among law professors.

From my own experience and what I’ve gathered over the years, I would say it’s probably true that the average law *student* is further left of center than average. This varies by school, of course. My alma mater, The University of Virginia, was relatively more hospitable to conservatives and has had an active Federalist Society chapter since the very beginning. I was not a member when in law school there, but I was certainly aware of their presence and their ability to draw high-profile speakers. Law professors experience the same phenomena: some schools are friendlier than others, but on balance conservatives remain a sliver of the academic pie.

Depending on whom you ask, you will hear that conservatives in general and Federalists in particular are blackballed, discriminated against, marginalized, or...they are treated the same as anyone else. Situations differ from school to school, but based on the many conversations I’ve had with faculty members, there is much truth to the “beleaguered minority” version of events. Many of the untenured faculty I spoke with refused to go on the record with their comments, fearing consequences from their tenure committees. While some leading administrators, such as the Dean Elena Kagan of Harvard, Dean David Schizer of Columbia (a Federalist Society member and former Kozinsky law clerk), and Dean Rodney Smolla of the University of Richmond have made positive public statements about the role

the Society plays on their campus, a negative view of conservative legal theory still exists among many on the faculties themselves. “People will say things like ‘only idiots and Nazis would hang out with a group like that’,” one untenured law professor active with the Society told me. “Most law schools are like this; I don’t think mine is unique. This is real old-school McCarthyism.”

The McCarthy comparison was picked up on by Cato’s libertarian guru Pilon, during the dustup over whether Chief Justice nominee John Roberts was a Federalist member. “Are you now, or have you ever been, a member of the Federalist Society?”—a great pull quote if ever there was one; Pilon’s line was quickly picked up by the chattering class. Calabresi agrees with the analogy. “I think that the activist groups on the left decided that the best way to attack nominees was through guilt by association”—by which he meant association “with the writings of some of our more conservative members like Professor Epstein or Judge Bork.” This was both unfair and ironic, Calabresi said, because “people disagree with Professor Epstein and with Judge Bork on all kinds of things.”

On Capitol Hill, liberal firebrand Sen. Dick Durbin, a leading liberal critic of the Federalists, has similarly had to contend with the fallout from his conspiracy-talk. “Fewer than one percent of lawyers across America are members of this Federalist Society. Yet over one-third of President Bush’s circuit court nominees are members of the Federalist Society,” Durbin, the Senate Democratic whip, claimed during debate on the nomination of Priscilla Owen to the Federal bench in 2005. “If you do not have a Federalist Society secret handshake, then, frankly, you may not even have a chance to be considered seriously by the Bush White House.”¹³⁹ During the Judiciary Committee’s hearings to confirm Alito a year

¹³⁹ *Congressional Record*, May 18, 2005, Executive Session, S5422.

later, it was Durbin's turn to play the victim. "I won't get into the Federalist Society," he said, "because every time I say those words, they go into a rage that I'm somehow guilty of McCarthy-like tactics, asking, Who are these people in the Federalist Society? I won't touch it."¹⁴⁰

And so he didn't. Neither did anybody else.

A visit to any Federalist event would almost surely refute all of this talk of McCarthyism, intolerance, and lack of openness. The revered Judge Bork, for example, told me that he was literally booed down at a Federalist Society event—something I've never seen or heard of happening—because he had the audacity to declare that a return to the Federalist dream of a truly limited government restricted entirely to the enumerated powers in the Constitution was a pipe dream. "They might as well get over it, it's never coming back," he said to his audience's dismay. "The American people want a large government, a national government that can do all kinds of things for them. And they're not going to stand for some wacko judge trying to go back," he told me. "A judge who wants to destroy society in order to return to purity is a little bit fanatical." This sounds like a rather different Robert Bork from the public persona developed since the 1987 nomination: the eminence gris, the embodiment of uncompromising atavistic conservatism. Myth and reality do not always converge.

To be sure, not every conservative law professor's experience in "liberal academia" is a harsh, ostracizing ordeal. "I've never really felt beleaguered in the academy," Professor

¹⁴⁰ January 11, 2006; transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011001418.html> (accessed April 14, 2007).

Nicole Garnett, the Federalists' student advisor at Notre Dame, said. "I know others who do, but I've never had that experience." Judge Rader, who has taught seminars at several law schools, has seen a range of environments. "It varies by school," he said. "I'm very well accepted at George Washington University, though my Federalist Society connection is probably somewhat notorious."

"Most of the faculty doesn't agree with conservatives but like the idea that we're here, they like the intellectual diversity," said Michael Dimino, a law professor at Widener University and an active Federalist. "But there are others who feel that the only good conservative is a dead conservative—and even dead white male conservatives aren't good because they maintain an influence over the law."

Beleaguered minority though they may yet claim to be, the Federalists are asserting an influence over legal culture—on campuses, in courtrooms, and in Washington. Thanks to the enormous growth of the Society, the conservative voice at law schools is gaining legitimacy—a "seat at the table," as Meese put it. It's happened thanks to 25 years of intense organization building, paired with the serious intellectual engagement and practical career networking that goes on at Federalist events. The pipeline is up and running, and it continues to deliver fuel for the conservative movement in the form of ideas and of people who are in positions to advance those ideas as policy.

After my interview with Meese, an assistant of his entered the room and handed him a phone message. A high school textbook publisher had asked for copyright permission to reprint Meese's 1985 speech on originalism, which we'll be considering in the next chapter. Meese grinned and then looked in my direction. "Yes, of course—I'm happy to *give* it away!"

CHAPTER 4

EDWIN MEESE, THE FOUNDERS, AND THE CONSTITUTION

In the remaining chapters we move from consideration of the history and operation of the Federalist Society into examination of a series of theories and topics of particular importance to the Legal Right. In this chapter and the following two I consider two leading conservative methodologies, originalism and textualism. In each case I use the public statements, speeches, and opinions of leading Federalist conservatives as a way to open up the discussion. In considering former Attorney General Edwin Meese's arguments, I will be engaging in rhetorical criticism as a way of reading—a way of engaging his arguments, which are themselves arguments *about ways of reading*. Unlike later chapters that are more directly concerned with policy (Affirmative Action, international law) the matter of “originalism” and “textualism” explored in this and the next chapter are doubly rhetorical: interpretation of arguments about interpretation.

In this chapter our protagonist is a Reaganite of the first order and a longtime booster of the Federalist Society. After considering Meese's originalism in the context of Civil Rights and Affirmative Action in the next chapter, we move to a consideration of Justice Antonin Scalia's textualism and traditionalism. Along with Judge Bork and others, the personalities highlighted here are significant not only for their roles in shaping conservative legal culture, but for their direct involvement with the Federalist Society.

Edwin Meese III graduated from Yale in 1953, two years after Bill Buckley and 26 before Federalist founder Steve Calabresi. Like Calabresi, Meese cut his teeth as president of the Political Union. When the Attorney General hired the youthful Reaganite years later one has to imagine that this common experience was noticed. It couldn't have hurt.

Meese went to law school after two years in the Army and graduated from the University of California at Berkeley's Boalt Hall School of Law in 1958. He joined the administration of Governor Ronald Reagan not long after the former actor's election in 1966. In a variety of advisory positions and ultimately as Attorney General of the United States, Meese became known as a thoroughgoing social conservative and unwavering Reaganite. Even after the Iran-Contra meltdown threw the Reagan White House into chaos and resulted in more than a few kiss-and-tell memoirs by jilted staff members, Meese remained unwaveringly loyal. In the words of one prominent Reagan biographer, he was a cheerleader as much as a counselor—and was viewed skeptically by a press corps often severely allergic to sycophants.¹⁴¹

But Meese's adulation was, by all accounts, sincere. He was probably Reagan's most trusted aide, and when he launched his public campaign against "judicial activism" in the early 1980s he spoke with the full imprimatur of the White House. Although his name may today be more commonly linked with the Iran-Contra affair, his "tough on crime" attitude, or the crackdown on pornography, Meese's intellectual legacy lies with his nationalization of the debate over the role of judges. Working with his young allies in the Federalist Society, Meese popularized ideas and phrases which have become the common parlance of the national conversation on law and justice: "original intent"; "activist judges"; "legislating

¹⁴¹ Lou Cannon, *President Reagan: The Role of a Lifetime* (New York: Public Affairs, 2000 [Random House, 1991]), 131.

from the bench”; “strict constructionist.” Although he was certainly not the first person to use these terms, Meese made them meaningful to a broad national audience—and turned them into political weapons. Along with his aides Ken Cribb and Brad Reynolds, Meese also did everything he could to boost the stature and effectiveness of the Federalist Society.

“Reagan and Meese had a lot of these ideas in one form or another before we were even interested in looking at them,” Lee Otis told me. “In a way, we were helping develop ideas that they already had.” Otis points here to the problem faced, in a sense, by all chroniclers of history: did one of these things cause the other, or did they both simply happen at the same time? In the case of the Federalist Society, it certainly was fortuitous that the core founding members entered the workforce just as Ed Meese was assuming control of the Justice Department. (Just as it was fortuitous that Ken Cribb ran into soon-to-be Federalist National Director Gene Meyer at that cocktail party.) Lawyers talk about these things in terms of “but-for” causation, as in “but for that banana peel on the floor, I wouldn’t have slipped and broken my back.”

So, we might ask: But for Reagan and Meese, no Federalist Society? Or the other way ‘round—but for the Federalists and their farm-team of eager young legal talent, no Reagan Revolution? Or, at least, no lasting Reagan legal legacy 25 years later? “Would Meese have given some of the speeches,” Otis asked, “had he not had other people around, people interested in the same set of ideas? Maybe not.”

As a way of thinking these questions through, we will consider two of Meese’s most important speeches, encapsulating as they do many of the core ideas of legal conservatism and which remain central to the Federalist Society’s project. The first of these is his 1985 speech to the American Bar Association, where he gives substance to the idea of “original

intent” as a governing legal and political principle. Meese lays out a kind of schematic for all ensuing conservative arguments against “activist judges,” a rhetorical road map for the political debates to come.

Far more broad in its reach is his 1987 speech at Tulane University, which finds Meese addressing the foundational question of interpretation itself—a question with rhetorical implications. In reading and applying the Constitution, are judges engaged in “persuasion”? And how far may they be permitted to move us and their fellow judges, as their audiences, in their interpretation? What should we accept as “the law”—their interpretations of the foundational text (the Constitution) or only the foundational text itself? Meese also expands his argument, hinted at in the ABA address, that American law suffered a betrayal during the years of the Warren Court—and that the Reagan-conservative project was aimed at returning things to the way they used to be, the way they should be, with the courts performing their properly limited duties. Meese gets to the core of conservatism here in both its nostalgia and its idealism: we are not what we once were—that which we might become again. Although he speaks in a voice of staunch objectivity, his vision of the past, present, and future are all deeply rhetorical: he acts inventively to craft a narrative resonating with American idealism, patriotism, and common sense. He tells a story that works to persuade. As Professor Nunberg writes, the right’s effectiveness is telling these stories is in their *evocation*, their ability to symbolize our ideals and aspirations.¹⁴²

In a talk given between the ABA and Tulane speeches Meese framed his argument about original intention in striking terms, echoing what candidate Barry Goldwater had said 22 years before in his address to the GOP convention. “We must, and we shall, return to

¹⁴² Nunberg, *Talking Right*, 15, 34-35.

proven ways—not because they are old, but because they are true.” In 1986 Meese told his audience at the University of Dallas that “A jurisprudence of original intention seeks to explicate not simply what is old, but what is basic, what is true.”¹⁴³

“A Jurisprudence of Original Intention”

Meese’s speech to the American Bar Association marked the opening salvo in the Reagan administration’s battle over Constitutional interpretation—a debate that was to some extent already well under way in the law schools. But Meese’s talk turned an academic and methodological question into a political one. “It has been and will continue to be the policy of this administration to press for a *jurisprudence of original intention*,” he said. “In the cases we file and those we join...we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.”¹⁴⁴

This “resurrection” implies a fork in the road Meese explores further at Tulane—a point in history when the Court went wrong, departing from the original meaning, detouring in favor of a revisionist new path tainted with “ideological predilection.”¹⁴⁵ For Meese, as for Ken Cribb (and his teacher Russell Kirk), conservatism is a refutation of ideology. Rhetorically, conservatism is normalized; it becomes “principle”-driven rather than politically driven, the neutral position rather than an ideological derivation. Meese defines his jurisprudence of original intention in exactly these terms, claiming the high ground of principle and denying “politics.” “By seeking to judge politics in light of principles, rather

¹⁴³Edwin Meese III, “The Supreme Court of the United States: Bulwark of a Limited Constitution.” *Texas Law Review* 27 (1986), 466ff.

¹⁴⁴ Meese, “Bulwark of a Limited Constitution,” 465-466 (emphasis in original).

¹⁴⁵ Meese, “Bulwark of a Limited Constitution,” 464.

than remold principles in light of policies,” he said, “the Court could avoid...the charge of being either too conservative or too liberal.”¹⁴⁶ Thus are the figurative goalposts moved.

The key word in this broadside attack is “liberal.” As he works to normalize the conservative, intentionalist position, Meese implies that the liberal contextualist, “living constitution,” position is *political* and therefore a disgrace to the Court’s duty. The conservative is true to the authors’ intent, to what they proposed, what was voted upon and accepted in *their* context, not ours. To disregard this original context is to let loose the reckless judge’s imagination and to deny the very idea of what a Constitution is—at least as Meese sets up the argument. “A constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense of the term,” he told the ABA,¹⁴⁷ without further defining the “true sense of the term.”

It is arguable that Meese’s “true sense” departs substantially from what Chief Justice John Marshall laid out in his 1819 opinion that cemented the power of judicial review and elaborated on his conception of Constitutional law. Meese even quotes Marshall in that case, which finds the great Virginian admonishing Courts of posterity to “never forget that it is a *constitution* we are expounding.”¹⁴⁸ The italics are Marshall’s.

In that early case, Marshall in fact extrapolates a governmental power—the hotly contested power to incorporate a Bank of the United States—not enumerated in the Constitutional text. Under this reading, Marshall might even be seen here to be endorsing the reasoning utilized by later justices to uphold a right to privacy in the text’s “emanations and

¹⁴⁶ Meese, “Bulwark of a Limited Constitution,” 464.

¹⁴⁷ Meese, “Bulwark of a Limited Constitution,” 465.

¹⁴⁸ *McCulloch v. Maryland* 17 U.S. 316, 407 (1819).

penumbras.” “We do not find the word ‘bank’ or ‘incorporation’, we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies,” Marshall wrote.¹⁴⁹ Later in the opinion he goes on to reflect on the nature of language itself; he can be read to undermine the objectivist reading implied by Meese’s intentionalism. “Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea,” Marshall said. “Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning *different from that which is obviously intended*.”¹⁵⁰ For Marshall, the “Necessary and Proper” clause of the Constitution was a case in point of such language and legally justified Congress’ charter of a national bank.

Meese’s quotations and citations are selective—all quotations are—and his rhetoric is clearly arrayed with the goal of persuading his audience that he has the only defensible position. In an intriguing move, Meese seems to acknowledge the precariousness of his position even as he acts rhetorically to deny it: He introduces his argument by declaring that “the judicial process is, at its most fundamental level, a *political* process...in the truest sense of the word ...wherein public deliberations occur over what constitutes the common good under the terms of a written constitution.”¹⁵¹ But as soon as he grants this “public deliberation” he seems to take it away, denying the open, political nature of interpretation in favor of his Goldwaterite quest for getting back to the real capital-T Truth.

¹⁴⁹ 17 U.S. 316, 407.

¹⁵⁰ 17 U.S. 316, 414 (emphasis added).

¹⁵¹ Meese, “Bulwark of a Limited Constitution,” 457.

What I think Meese actually signals here—as do many thoughtful conservatives—is an awareness that their position is, in fact, not the only legitimate one. Meese simply believes that his position on Constitutional law is the right one. Public deliberation and politics are not to be shut down; Meese just thinks his views are correct and will win out. Thus all of his public speeches; thus his support for the Federalist Society. The ABA speech does at times smack of tautology and foregone-conclusionism, presented in the guise of objectivity (no taint of “ideological predilection,” no need for interpretation when the text is “plain and clear”). But such a narrow reading misses the most interesting point of the address: Meese, like his Federalist Society acolytes, believes in debate and the plurality of politics. But he also believes his ideas are the right ones.

The ABA speech is interesting for another seeming contradiction, also thematic in the broader rhetoric of conservatism. On the one hand Meese speaks in a voice of objectivity and neutrality, arguing for a jurisprudence that looks to the factual historical record when faced with questions of meaning—the complexities and gray areas of which he simply doesn’t get into. Alongside this ideal of a neutral, non-ideological Court, however, comes Meese’s pronouncement that the Court is “the primary moral force in American politics” and that the Court is “a political body.”¹⁵² But...how can the Court be both neutral *and* political?

Meese does not bridge these rhetorical gaps, but his conclusion makes the answer clear: Neutrality means neutrality on his terms, the terms of original intention. By implicitly connecting these two ideas, he works on a deeply rhetorical level, connecting concepts and ideas in a newly persuasive manner: originalism *becomes synonymous with* objectivity, it *becomes* a wholly naturalized anti-ideology. Even as he acknowledges the political nature of

¹⁵² Meese, “Bulwark of a Limited Constitution,” 457.

legal deliberation and interpretation, Meese artfully leads us to see his preferred method as the antithesis of interpretation. This theme is central to the Tulane speech, considered below. Audiences at the time drew different conclusions on how far this rhetorical turn moves away from a “meeting of the minds” toward mere deception, a legal cover for atavistic policy goals.

Meese’s critics were legion, led by a cadre of legal academics who decried originalism as one more example of the “dead hand of the past,” a futile and often pernicious way to cloak opposition to social progress in scholarly jargon. As Stanford Law dean Paul Brest wrote several years before Meese made headlines with his ABA talk, “the originalist Constitutional historian may be questing after a chimera.” Brest’s position remains the principal line of opposition to originalism and historicism: that judges should stick to law, not history. “The interpreter’s understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism.”¹⁵³

But when is law not historical, counters the originalist, in terms oddly similar to the leftists in Cultural Studies who view themselves as radical contextualists. When is any text *not* historical? When is it not produced by the meanings understood to attach to those words at those times they were uttered or written down? But... Brest quotes the philosopher Hans-Georg Gadamer for the proposition that “we can never understand the past in its own terms,” that “we are hopelessly imprisoned in our own world views.”¹⁵⁴ So much for objectivity. As Brest goes on to say, this view tends toward a solipsistic denial of the possibility of any historical understanding. And as legal historian H. Jefferson Powell has argued throughout

¹⁵³ Paul Brest, “The Misconceived Quest for Original Understanding,” in *Interpreting Law and Literature: A Hermeneutic Reader*, ed. Sanford Levinson and Steven Mailloux (Evanston, Illinois: Northwestern University Press), 84.

¹⁵⁴ Brest, “The Misconceived Quest for Original Understanding,” 83.

his career, conservatives do not “own” legal history; one can interpret history to support non-originalism—Powell even suggests that the Founders themselves would not have agreed with Meese’s ideas.¹⁵⁵

In place of originalism, Brest puts forth his own multi-part standard for Constitutional decision-making containing noble but vague provisions like “does the practice contribute to the well-being of our society” and does it “foster democratic government.”¹⁵⁶ For conservatives, these kind of vagaries are typical of the left’s habit of advancing aspirational ideals as legal standards. On the one hand, liberals like Brest debunk the legitimacy of originalism by pointing to the indeterminacy of history (if not all knowledge in general)—and on the other, assert freshly conceived judicial standards with no democratic provenance, no origin in laws adopted by a legislature of the peoples’ representatives. So—why does this matter?

It matters because a hypothetical Chief Justice Paul Brest and a hypothetical Chief Justice Robert Bork would almost certainly have drastically different notions of what laws “foster democratic government.” While all linguistic formulations are contextual, one might say that some linguistic formulations are more contextual than others. The conservative argument for “judicial restraint” is rooted in this idea: While Brest declares he is not out to set up judges as Platonic guardians, entrusting them to evaluate whether laws “contribute to the well-being of our society” sure seems like he would do exactly that. As one conservative

¹⁵⁵ H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* (Chicago: University of Chicago Press, 2002). See also Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Wichita: University Press of Kansas, 1999), 179-182, surveying responses to Powell, and John Harrison, “Words, Words, Words, All the Way Down?” review of *A Community Built on Words* by H. Jefferson Powell, *Green Bag* 7 (2003), arguing that Powell overstates his case for a “community built on words” and that the structural provisions of the Constitution have been and remain determinative in most cases.

¹⁵⁶ Brest, “The Misconceived Quest for Original Understanding,” 87.

judge told me, conservatives simply do not see these types of questions as “lawyers’ questions”: they are questions about social mores and priorities, about policy choices, not legal interpretation. Attorney General Meese, for example, attempted repeatedly to have the landmark *Miranda* decision overturned. While it may or may not be good *policy* to warn arrested suspects of their right to remain silent, there is no provision of U.S. law (Constitutional or otherwise) that can justify the judicial branch’s order to this effect. For Meese, *Miranda* was as good an example of judicial activism as any.¹⁵⁷

Another case-in-point for conservatives is the death penalty, which liberals continually oppose as unconstitutional under the Eighth Amendment’s prohibition against cruel and unusual punishments. The question presents a good example of how originalist reasoning operates: As originally intended, conservatives argue, the Constitution cannot conceivably have prohibited capital punishment—it is mentioned numerous times throughout the document and never described as illegal. Whether or not a majority of contemporary society opposes the death penalty, the text as enacted and voted upon by then-elected legislatures allows it. No law or constitutional amendment to the contrary has been adopted.

Republican Senator Jeff Sessions, a former judge and Alabama State’s Attorney who has been an active spokesman for the conservative position on legal issues, honed in on the death penalty as the high point of legal liberalism. “It peaked when Blackmun and Brennan and Marshall dissented on every death penalty case saying it violated cruel and unusual punishment, when the Constitution has half a dozen references to the death penalty,” he told me. “*That* is activism.” Sessions also recalled when Meese’s ABA speech reached his desk in 1985. “It blew up,” he said. “I couldn’t understand what this was all about.”

¹⁵⁷ Meese, “Bulwark of a Limited Constitution,” 461.

Meese's address was met with an aggressive response not from just academics and pundits but from justices of the Supreme Court. Justice William J. Brennan's reply was assertive and aggressive, a far cry from the lukewarm responses we hear today from the Supreme Court's liberals and their academic counterparts. Brennan's response to Meese served to open a nationwide discussion—"The Great Debate," as the Federalist Society titled its pamphlet republishing the Meese and Brennan speeches along with the subsequent speeches from Justice John Paul Stevens, Judge Robert Bork, and Ronald Reagan.

Addressing an audience at Georgetown University several months after Meese gave his ABA speech, Brennan was unabashed in dismissing originalism. Countering Meese's mantra of "the written Constitution" with all of its four-cornered textualist implications, Brennan refers repeatedly to the "*amended* Constitution," highlighting the changing nature of the fundamental law.¹⁵⁸ "Like every text worth reading," Brennan said, "it is not crystalline...Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls for interpretation."¹⁵⁹

Brennan goes on to dismiss Meese's originalism as misguided as "arrogance cloaked as humility," a "chorus of lamentations" from unqualified courtroom historians.¹⁶⁰ ("Law office history" is a phrase familiar to most lawyers—commonly manifested in the background statement-of-facts that makes it into legal briefs and usually unencumbered by actual engagement with historical literature.) Brennan accuses Meese of being not only a dead-hand conservative but a reactionary Luddite. "Those who would restrict claims of right

¹⁵⁸ William J. Brennan Jr., "The Constitution of the United States: Contemporary Ratification," in *Interpreting Law and Literature: A Hermeneutic Reader*, ed. Sanford Levinson and Steven Mailloux (Evanston, Illinois: Northwestern University Press), 13.

¹⁵⁹ Brennan, "Contemporary Ratification," 13.

¹⁶⁰ Brennan, "Contemporary Ratification," 15-16.

to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.”¹⁶¹ Context for Brennan is not merely textual, it is social.

In a manner far more articulate than the liberals of our time, Brennan boldly defies the central premise of conservatism’s backward-looking textualism, asserting that “the ultimate question must be, What do the words of the text mean in our time?”¹⁶² The focus on “principle” is well known to conservatives, who since Brennan’s time have largely silenced the broader political Left on this score; consider the weak response of democrats after the 2004 presidential election when “values voters” tipped the scales for George W. Bush. In its latest iteration George Lakoff’s rather formulaic attempt to “reframe” issues with a liberal slant reflects this same “We Have Values Too!” defensiveness. The book’s subtitle says it all: “Communicating Our American Values *and* Vision.”

Brennan’s principled response to Meese is of a different cast. He presents the Attorney General as the “reframer” and asserts the proven need for a Constitution that provides for the “adaptability of great principles to cope with current problems”¹⁶³ has given way to the desperate throes of liberal advocacy groups whose only reply is...*Roe v. Wade* and abortion. Much of the public advertising campaign mounted against nominees John Roberts Jr. and Samuel Alito Jr., was directly and exclusively related to *Roe* and the right to abortion.¹⁶⁴ And as if to play directly into these kind of fears, leading liberal spokespeople

¹⁶¹ Brennan, “Contemporary Ratification,” 16.

¹⁶² Brennan, “Contemporary Ratification,” 17.

¹⁶³ Brennan, “Contemporary Ratification,” 18.

¹⁶⁴ See, e.g., “NARAL Falsely Accuses Supreme Court Nominee Roberts,” a press release from the Annenberg Center available at <http://www.factcheck.org/article340.html>; four of the six ads run by the anti-

such as Professor Chemerinsky and Ralph Neas of People for the American Way do indeed retreat to abortion as a final argument.

Rather than defend the “modern activist state” in point-blank fashion as Brennan did,¹⁶⁵ contemporary liberals—when not resorting to scare tactics—too often find themselves flailing about when faced with the conservative dominance of popular discourse. “For fifty years, we had a set idea of what mainstream judges were, what kind of forward progress was necessary,” Hillary Clinton told me when I asked her about the predicament of the legal left. “The intellectual energy and the governmental, historical forces were all moving in the same direction,” the direction of the liberal consensus. For a generation or more, liberals hadn’t needed to organize, to mobilize in the legal world, “because there was an inside seat that many people had, on the courts, in the government, in law firms and elsewhere,” she told me. As we have seen, the right was organizing, mobilizing, laying the groundwork for its political revolution—rhetorical and electoral. As Clinton suggests, the left just plain got lazy, and Brennan’s fire has gone out. Conservatives have unmade the consensus. “They deliberately set out to do so,” Clinton said. “I think you have to respect that.”

What Exactly Is “The Law,” and Who Gets to Say So?

Meese’s 1987 Tulane speech is less well-known than the ABA speech or some of Meese’s public pronouncements on pornography. But here we find a richly developed explanation of the central tenets of legal conservatism: A skepticism about the act of

Alito coalition including groups like People for the American Way highlight abortion and privacy rights (a sixth implies abortion), ads are available at http://www.savethecourt.org/site/c.mwK0JbNTJrF/b.867163/k.C6BD/TV_Ads.htm

(accessed April 14, 2007).

¹⁶⁵ Brennan, “Contemporary Ratification,” 20.

interpretation itself and a view of Constitutional history deeply rooted in American Exceptionalism, which Meese as rhetor makes directly relevant to the contemporary conservative project. The Tulane speech tells us not only what Meese thinks about the role of the judge. It tells us what he believes conservatives should think about themselves.

It is also important to remember that as Attorney General, Meese was in a position to put his theories into practice—these speeches were not indulgences in a part-time academic hobby. His “practice” as Attorney General was intimately related to his theoretical beliefs about the nature of law, the act of judicial interpretation, and the constraints of a common law regime within a constitutional system of government. One contemporary account referred to Meese as “a synthesis of conservative thought and activism” who politicized his office to an extent not seen since Robert F. Kennedy mobilized the Justice Department behind the Civil Rights agenda.¹⁶⁶ What was true in the Civil Rights era was true for the Reaganites as well: The ways in which we perceive the law—our duty to obey its dictates, our arguments for its alteration, our challenges to its authority—all of these depend necessarily on our views of legal theory, on the place of the courts in society and in government.

The law is a force in both theory and practice—if one buys into that rather scholastic distinction at all. As professors Austin Sarat and Thomas Kearns have written, law is “the author of history, not just in the instrumental sense in which [it] can be said to make a difference in society, but in the ways that law constructs and uses history to authorize itself

¹⁶⁶ Debra Cassens Moss, “The Policy and the Rhetoric of Ed Meese.” *ABA Journal*, February 1, 1987, 64.

and justify its results.”¹⁶⁷ It was the judicial theory informing these results addressed by Meese at Tulane: the hierarchy of juridical authority and the processes of textual interpretation—a hermeneutic engine delineating the boundaries of the legal and illegal, the permissible and the impermissible, in our society.

But what caught reporters’ attention at Tulane was not so much Meese’s nuanced views on the interpretive process, but his apparent suggestion that Supreme Court rulings—particularly those which did not follow his jurisprudence of original intention—need not be considered “the law of the land.”¹⁶⁸

Meese opened his speech with a scene embodying the transformation of the Supreme Court, the swearing-in of William Rehnquist as Chief Justice and Antonin Scalia as Associate Justice. This was a moment of great hope and excitement for conservatives—hope that the liberal tide of the Warren Court and its lukewarm successor, the Court under Warren Burger, would finally be turned. Meese tells us that the scene was presided over by Ronald Reagan in the East Room of the White House and quotes Reagan, who had in turn invoked the authority of the Founding Fathers. He concludes with a fusillade of American exceptionalism which sets the tone for the remainder of Meese’s address: “If the American Constitution shall fall there will be anarchy throughout the world.”

What follows are two main sections. First, a section amplifying the exceptionalist theme and laying out a Constitutional narrative that informs his critique of contemporary

¹⁶⁷ Austin Sarat and Thomas R. Kearns, eds. *History, Memory, and the Law* (Ann Arbor: University of Michigan Press, 2002), 2-3.

¹⁶⁸ Edwin Meese III, “The Law of the Constitution.” *Tulane Law Review*, 61 (1986): 983.

judicial interpretation, and second, an argument about the place and authority of Constitutional law.

The Mythic Constitutional Narrative

“Mythic” in this sense need not have the immediately pejorative meaning probably assumed—“fictional.” All history is mythic, to some extent. History, like myth, teaches us who we are and where we have come from, necessarily omitting a large chunk of the world’s humdrum events in the process. (In this necessary selectivity it gives up much in the way of “objectivity.”) Even the postmodern “historians of everyday life” are in their own way mythologizers, choosing to focus on certain peoples’ experiences, inspiring or futile as they may be; they instruct us to pay attention to the marginalized member of society and apply the lessons of the past to the present. Like good history, myths are teaching stories: sometimes cautionary, sometimes heroic, sometimes tragic. The stories we tell about ourselves in both everyday life and in national political life are also political in the true meaning of the word: they define the *polis*, the body politic.¹⁶⁹ In this they are also acting rhetoric actors, offering arguments not just for how we should imagine our future. And history is hardly immune from politics; conservative disdain for leftist professor Howard Zinn’s (in)famous *Peoples’*

¹⁶⁹ Memory studies, and tradition in particular, are an increasingly prominent field within communication and rhetoric as well as fields including history and sociology. Memory studies draws on the French *Annales* school, particularly Pierre Nora and Maurice Halbwachs, but has expanded in a wide variety of interesting directions. See, e.g., Kendall R. Phillips, ed., *Framing Public Memory* (Tuscaloosa: University of Alabama Press, 2004); Eric Hobsbawm and Terence Ranger, eds., *The Invention of Tradition* (London: Cambridge University Press, 2003); Abhik Roy and Robert C. Rowland, “The Rhetoric of Hindu Nationalism: A Narrative of Mythic Redefinition,” *Western Journal of Communication* 67 (2003): 225-248; Carole Blair and Neil Michel, “The Rushmore Effect: *Ethos* and National Collective Identity,” in *The Ethos of Rhetoric*, ed. Michael J. Hyde (Columbia: University of South Carolina Press, 2004); John Bodnar, *Remaking America: Public Memory, Commemoration, and Patriotism in the Twentieth Century* (Princeton: Princeton University Press, 1992); Michael Kammen, *Mythic Chords of Memory: The Transformation of Tradition in American Culture* (New York: Vintage, 1993); David Lowenthal, *The Past is a Foreign Country* (Cambridge, U.K.: Cambridge University Press, 1985).

*History of the United States*¹⁷⁰ is matched tit-for-tat with liberal dismissal of Larry Schweikart and Micahel Allen's *Patriot's History of the United States*.¹⁷¹

Meese spends a good amount of time establishing historical context, which will serve to frame his reading of Constitutional law and the conservative project. After amplifying the exceptionalist mood by quoting William Gladstone, who called the Constitution “the most wonderful work ever struck off at a given time by the brain and purpose of man,” Meese launches into a narrative beginning with the 1787 convention where the document was drafted. He acknowledges the arguments and disagreements among the drafters. This gloss on the document's contentious creation, however, is immediately dispensed with: the focus is to be unity, not controversy. “No sooner was the Constitution adopted then it became an object of astonishing reverence.” Indeed, the Civil War—characterized by Meese as a contest over the idea of federalism—marked the end of “the almost giddy, almost unqualified adoration of the Constitution.”

The Civil War marks a break with the mythic past, when society (White society, at least) was full of “vast public enthusiasm” for, “reverence” and “adoration” of the Constitution. This historical context is so embedded in conservative ideology today, 20 years after the Tulane speech, it often goes unspoken. It is a typically mythic narrative of exile and return, often Biblical in its overtones: As Bork wrote in his memoir, the unfolding of

¹⁷⁰ Howard Zinn, *A People's History of the United States, 1492-Present* (New York: HarperCollins, 2005).

¹⁷¹ Larry Schweikart and Micahel Allen, *A Patriot's History of the United States* (New York: Sentinel/Penguin, 2004).

American law has been a case of “temptation” and “fall,” a morality play of “fallen” judges seduced by the forbidden fruits of political power.¹⁷²

At the time and for many years following, a strong response has been put forward by legal historian Powell, who argues that deep divisions in constitutional interpretation have persisted throughout the nation’s history—including its very first decades. Historian Jack Rakove has also argued against the conservatives’ “intentionalism”: “[T]he appeal to original intent cannot be justified on its own terms,” he has written. “There is no reason to believe that the framers thought their intentions should guide later interpretations of Constitution.”¹⁷³ In an article evaluating Rakove’s expanded argument in his Pulitzer Prize-winning book *Original Meanings*, conservative Judge Kozinski and his law clerk co-author look rather skeptically at “the historian who delights in ambiguity,” but do agree with him that assumptions of originalism are often undone by history. “Rakove’s ultimate point,” they conclude, “is to remind constitutional interpreters to appreciate the context in which they work and the degree to which that context may prevent a truly neutral inquiry.”¹⁷⁴ Many judges, particularly conservatives like Kozinsky, could do well to take note of this reminder.

¹⁷² Bork, *The Tempting of America*, 15, 19. For an elaboration of the critique of Bork’s religious rhetoric see Richard Posner, “Bork and Beethoven,” *Stanford Law Review* 42 (1990), 1368-1369, quoting Bork’s *Tempting* and asking “[h]ow else to explain the religious imagery that permeates his discussion of originalism and its enemies?...Bork’s opponents are guilty of ‘heresy,’...[s]ince it is heresy, ‘it is crucial...to root it out,’ and therefore ‘no person should be nominated or confirmed [for the Supreme Court] who does not display both a grasp of and a devotion to the philosophy of original understanding.’ Bork adjures the Supreme Court to ‘go and sin no more,’ [and] calls Cardinal Newman and Thomas More to his aid along with [Catholic apologist Hillaire] Belloc”; see also Marouf Hasian Jr., “The Public Addresses of Meese and Brennan: Voices in the American Legal Wilderness,” *Communication Studies* 44 (1993): 306-307.

¹⁷³ Jack Rakove, “Mr. Meese, Meet Mr. Madison,” *The New Republic*, December 1986, 79.

¹⁷⁴ Alex Kozinski and Harry Susman, “Original Mean[ander]ings,” review of *Original Meanings* by Jack Rakove, *Stanford Law Review* 49 (1997): 1604-1605.

The Constitution vs. Constitutional Law

Turning to the legally significant heart of his argument, Meese adopts a realist style similar to the naturalizing moves made in the ABA speech. Realism in law means something completely different from what is meant here as a term of rhetorical critique—the Legal Realists were a school of thought prevalent in American law during the first half of the twentieth century. Generally speaking, Legal Realists like Justice Oliver Wendell Holmes rejected idealism in the sense that they focused on what they saw as “actual experience” rather than aspirational forms and theories. In the caricatured description of their many detractors—including many conservatives and Federalists—Realists were cynics who gave up on ideals because of the difficulty of achieving them, and postmodernist critics are their contemporary successors.

But realism as a rhetorical style is another matter, one which has dominated Western politics for hundreds of years. Rhetorical scholar Robert Hariman makes a convincing case that the realist style was essentially invented by Niccolo Machiavelli, who really (pun intended) did write the book on the matter with *The Prince*. Hariman shows that Machiavelli inaugurated a “radically nonideological political vernacular,”¹⁷⁵ a style readily embraced by conservatives who (sometimes on the advice of Frank Luntz) talk readily and easily about their principles in terms of common sense and popular conservative sentiment. In claiming common sense the Prince implies that his opponents are dissemblers, out of touch with and contemptuous of the people. But the realist style is, Hariman stresses, just that—a *style*. It is no less “objective” or “real” than any dressed-up wonky academic critique. It just works better rhetorically; it is far more persuasive—as a Venetian consiglieri or a Presidential

¹⁷⁵ Hariman, *Political Style: The Artistry of Power*, 47.

aide—to describe oneself as cutting through nuance and ambiguity as opposed to heaping it on. The conservative argument on Constitutional law as laid out by Meese and others is steeped in this realist style. The text says what it says. Brennan and his liberals can have their luminous obscurities, emanations and penumbras, evolving standards, and totalities of circumstances. The rest of us will try to get on with the business of being lawyers.

Meese at Tulane is arch-realist in style. That the Constitution and Constitutional law are separate domains is a “simple” observation; the former “begins ‘We the People of the United States...’ and ends up, some 6,000 words later, with the 26th amendment.” The law—the literal words on the page—is different from what the Supreme Court *interprets* the law to mean. Constitution here, Supreme Court opinions there.

In drawing this distinction Meese extends Bork’s idea that some kind of falling from grace is implicit in all interpretation. The profligacy of Court interpretations, a kind of vulgar excess, is presented as *ipso facto* evidence. The Court, Meese tells us, “has had a great deal to say...produc[ing] nearly 500 volumes of reports of cases.” The contrast to this interpretive bulk is “the few, slim paragraphs that have been added to the original Constitution as amendments.” The “bulk” of interpretation “overwhelms” the Constitutional “substance” itself. To get at this idea, Meese invokes constitutional scholar Charles Warren, who wrote in 1923 that “however the court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court.” Meese slides from a normative position to a positivistic one: Interpretation *should* not be viewed as law and (under his interpretation!) *is* not legally enforceable in the way that Constitutional provisions are.

Meese's pumps are now primed and the central idea of his address emerges: that a Supreme Court decision "does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore... This point should seem so obvious as to not need elaboration."

Here Meese was wrong. Critics from both within and without the legal academic community pounced hard, demanding elaboration and pouring objection and critique into editorial pages, op-ed columns, as well as the more reserved discourse of the law reviews.¹⁷⁶ Generally, the political and academic left responded by arguing that in seeming to describe compliance with Supreme Court decisions as somehow optional, Meese was offering an "invitation to lawlessness"¹⁷⁷ and "inviting anarchy."¹⁷⁸

"Surely a sweeping pronouncement that segregated schools are unconstitutional is binding... on Little Rock as well as Topeka," was the *Washington Post* editorial board's contribution. Meese was forced to clarify his position, writing several weeks later in the *Post* that Supreme Court decisions "do indeed have general applicability and deserve the greatest respect from all Americans." Note the parsing here: general applicability is not the same as binding authority; many laws are applicable in a given situation, few are binding. The point about law vs. interpretation remains intact.

¹⁷⁶ *Washington Post*. "Why Give That Speech?" Editorial, October 29, 1986, A18; *New York Times*. "Mr. Meese's Contempt of Court." Editorial. October 26, 1986, Section 4, p. 22; Sanford Levinson, "Could Meese Be Right This Time?" *Tulane Law Review* 61 (1987): 1071-1078; Stuart Taylor Jr., "Meese Says Rulings by U.S. High Court Don't Establish Law," *The New York Times*, October 22, 1986, A1; John Stick, "He Doth Protest Too Much: Moderating Meese's Theory of Constitutional Interpretation." *Tulane Law Review*, 61 (1987): 1079-1091.

¹⁷⁷ Ira Glasser, quoted in Levinson, "Could Meese Be Right This Time," 1074.

¹⁷⁸ Laurence Tribe, quoted in Levinson, "Could Meese Be Right This Time," 1074.

Aspects of the logic at work in Meese's argument about this distinction do have an intuitive truth to them and are important to our broader understanding of how the Court fits into the broader governmental scheme. Like Congress, which can always undo one law by passing another, the Supreme Court can overrule itself. This is the fundamental distinguishing fact about our common-law system, a fact Meese does not focus on. The Anglo-American common-law system is grounded in *both* precedent and *stare decisis*—the notion that old rules govern new cases and must be respected. This tension lurks in the background of Meese's speech, and of conservative legal discourse in general.¹⁷⁹ The realist scowls and says “just read the text, it's that simple”...but it never is—not in a common-law system, anyway. Unlike the French and other European civil-law systems, common law nations require courts to respect both the foundational text and its interpretation by prior courts. This is where Burke meets Bork.

Conservatives' attitude toward *Roe v. Wade* exemplifies this tension: On one hand, it is argued that judges should refrain from “legislating,” respecting precedent and not deciding cases based on what their personal preferences would have been had *they* been on the Court when the case was decided. On the other, the originalist purist would argue that constitutional interpretations—upholding a right to privacy for example—should be overturned because of its essentially illegitimate nature as a political, not legal judgment. Scalia has conceded that respecting *stare decisis* is a “pragmatic exception” to his judicial philosophy.¹⁸⁰ Bork made a

¹⁷⁹ See Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1998), 82-83; 139-140; Whittington, *Constitutional Interpretation*, 168-174; David Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (New York: John Wiley, 1993), 38, 65, 191, 419.

¹⁸⁰ Scalia, *A Matter of Interpretation*, 140. The inevitable question, though, is whether this pragmatism and respect for “settled law” would exclude voting against overturning *Roe*. See also Powell, *A Community Built on Words*, 98, invoking no less of an authority than James Madison.

similar point in an important, wide-ranging 1971 essay discussed in more detail in Chapter Six. “Recognizing *stare decisis* is seemingly even more incompatible with nonoriginalist theory,” he argues, suggesting that under a “living Constitution” view focusing on the evolutionary meaning of the text in light of current values, there would be even *less* reason to bind courts to prior decisions from earlier eras. Precedent is a compromise Scalia says he is willing to make—as he says, in most cases.

For Meese—who approaches these questions as an advocate and not a judge—the bottom line is clear. “Correcting a wrongly decided decision is not activism,” he told me in a discussion about the Tulane speech. “Activism is when you depart from the Constitution and substitute your own policy preferences, your own agenda, your own political biases, for what the Constitution says.”

In the Tulane speech, Meese makes prominent reference to the Court’s most egregious failure, *Dred Scott v. Sanford*,¹⁸¹ which held slavery to be Constitutional—aligning, conservatives are quick to say, with the personal preferences of slave-holding Chief Justice Roger B. Taney. The case unarguably demonstrates the Court’s ability to “get it wrong,” and is for Meese also proof positive that The Constitution (fixed, stable, obvious of meaning) is fundamentally different from Constitutional law (manipulable, suspect, a creation of interpretation). That is to say, despite its notorious 3/5 Clause, which treats Blacks as less than human, the principles embedded in *The Constitution* rightly understood do not legitimate slavery—the *interpretation* offered in *Dred Scott* does. As Meese said in a later speech to the Federalist Society, *Dred Scott* shows that “there is danger in seeing the

¹⁸¹ 60 U.S. 393 (1856).

Constitution as an empty vessel into which each generation may pour its passion and prejudice.”¹⁸²

In making the case against the Supreme Court’s supremacy Meese quotes Abraham Lincoln’s longtime adversary Stephen Douglas, who justified slavery in part by portraying *Dred Scott* as the law of the land. “It plainly was Douglas’ view that Constitutional decisions by the court were authoritative, controlling, and final,” Meese says, “binding on all persons and parts of government the instant they are made—from then on.” Implying a parallel with controversial modern cases—most notably *Roe*—Meese cites Lincoln for the proposition that Supreme Court cases may in fact only be binding on “the actual parties in the case.” Hence the furor over whether Meese felt the Court’s decision in *Brown* was applicable anywhere other than Topeka. We’ll explore the deeply racial implications of this argument in the next chapter, which considers how originalist conservatives have tackled the problem of race, and how Meese’s Civil Rights Deputy Brad Reynolds made the conservative case against Affirmative Actions and “quotas.”

The Historical Stage

For Meese and other conservatives the Reagan Revolution was not so much about undoing settled legal practices as it was righting wrongs that had crept into our system of jurisprudence since the Civil War. It is vitally important to understand this point, which positions the conservative project as “correctional” more than “revolutionary.” As we will see in a later chapter, it is the New Sovereigntist faction, including the so-called

¹⁸² Edwin Meese III, Address before the Federalist Society Lawyers’ Division, Nov. 15, 1985. *The Great Debate: Interpreting Our Written Constitution* (Washington, D.C.: The Federalist Society, 2005 [1986]), 37.

neoconservatives, who are truly pushing for revolutionary interpretations of the law—particularly when it comes to foreign policy.

As one rhetorical critic has written, the Biblical parallel with legal interpretation can be extended to include this point about context. “Like the ancient prophets of the Bible, Meese finds himself surrounded by false prophets living in the sanctuary of the law.”¹⁸³ The Reaganite project was to cast them out. This held for the young Reaganites like Steven Calabresi, who drew an analogy to Reagan’s Cold War foreign policy. “Part of Reagan’s policy was to build up forces to topple enemy regimes,” he told me. “I thought of us as kind of the same equivalent in law schools.” Long after Meese left office this project would continue in both the academic and courtroom setting.

Meese’s linguistic choices exemplify the realist style favored by conservatives and demonstrate a directness increasingly foreign to liberals—exemplified by Justice Breyer’s on-the-one-hand, on-the-other-hand approach in *Active Liberty* or Professor Sunstein’s mistrust of conviction in *Radicals In Robes*. Meese has no trouble with vagaries; he is sure of himself—to a fault, perhaps. This shines through at Tulane. “Once we understand” what Lincoln *really* meant; “once we see”; “once we comprehend”; “once we see” (again)—once we stop bothering with all this *interpretation*, “we can grasp a correlative point: Constitutional interpretation is *not the business of the court only, but also the business of all branches of government*” (my emphasis). And here the plot thickens.

To set up our later discussion of international law and the theory of the “unitary executive,” we pause here briefly to flag the implications of this idea. To the layperson, the idea of having “all branches of government” involved in legal interpretation might seem to

¹⁸³ Hasian, “The Public Addresses of Meese and Brennan,” 309.

run against the basic concept of the separation of powers—surely Constitutional interpretation is the Court’s business. Administrations and legislators work to overturn Supreme Court rulings by statute all the time—from the Lincoln administration’s efforts to reverse *Dred Scott* to the Bush administration’s support for Congress’ ban on “partial-birth” abortions. These efforts are politically charged, but not unconstitutional.¹⁸⁴

The Line Between Law and Politics

The mantra “Legislating from the Bench” sees a distinction between the judge’s job and the politician’s. The distinction runs both ways, and conservatives since Meese have been asserting the Executive’s right to interpret the Constitution alongside the Courts’.¹⁸⁵ Start asking whether this position politicizes law, or turns politicians into judges—and the conversation gets pretty tricky.

¹⁸⁴ See John Harrison, “The Role of the Legislative and Executive Branches in Interpreting the Constitution,” *Cornell Law Review* 73 (1988): 372-373 (“The argument that the Constitution allocates the interpretive power to the courts is wrong. The Constitution allocates to the courts the case deciding power, the power to issue judgments...the power to interpret the Constitution, however, comes from the case-deciding power. To suggest that the power to interpret is primary and the case deciding power secondary, is to misinterpret the Constitution and to confuse cause and effect.”); Steven Calabresi, “The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Lawyers in the Development of Constitutional law,” *Law and Contemporary Problems* 61 (1998): 66ff 29 (“I have long believed that Presidents are obligated to interpret the Constitution independently of the Supreme Court, and I assisted in the development and editing of General Meese’s Tulane speech when I served as his Special Assistant”); Whittington, *Constitutional Interpretation*, 1 (“The Supreme Court represents an important requirement of American government, the need to interpret the Constitution. It is not alone in that task. Other courts interpret. More important, other government officials, and ultimately engaged citizens, share the responsibility for interpreting the text.”).

¹⁸⁵ The law/politics divide is explored by Marouf Hasian, Jr., Celeste Condit, and John Lucaites in “The Rhetorical Boundaries of ‘The Law’: A Consideration of the Rhetorical Culture of Legal Practice and the Case of the Separate but Equal Doctrine,” *Quarterly Journal of Speech* 82 (1996): 324-325 and 337 (“We believe...the judiciary would be served better if it gave up the attempt to present the courts as outside of time and ‘above politics’...we believe that the judiciary should promote itself as an institution that attempts to generate reasonable decisions, often entailing reasonable compromises, about important political issues. It is a further a body charged with estimating when old principles must be supplanted or supplemented with new”). One can imagine Meese and other conservatives chafing at this boldfaced assertion of the judicial branch’s right to establish, on its own “estimation,” the proper rules of social and political life. Shall we establish our judges as sociologists as well as jurists?

Meese, like Bork and other legal conservatives, views law and politics as inherently separate domains—with law usually portrayed as the victim of a manipulative, murky, polluting political process. In Bork’s overtly religious terms, the law has been “tempted” and “seduced” by politics—by which he means liberal politics. Responding to the critical legal studies movement, Constitutional law professor Owen Fiss sounded a similar note in a seminal 1982 article, “Objectivity and Interpretation.”¹⁸⁶ The young turks of postmodernism, whom Fiss accuses of intellectual nihilism, “have turned their backs on adjudication and have begun a romance with politics.”¹⁸⁷ Fiss argues persuasively, I believe, that the bugbear of “legal objectivity” is not nearly as impossible as the crits would sometimes have us believe. Objectivity rightly understood does not—indeed, cannot—rule out the inevitable differences in interpretation. Adjudication *is* interpretation, Fiss writes.¹⁸⁸ But accepting this attitude toward objectivity need not send one skating down the slippery slope to relativism and the impossibility of any “right” reading. Fiss is right, I would argue, to stress that we should not lose sight of the “analytic distinction between objectivity and *correctness*.”¹⁸⁹ “The question,” he writes, “is whether we can insist that adjudication is an interpretive activity and still find that it possesses an objective character...I think we can.”¹⁹⁰ One need not begin a “romance with politics.”

¹⁸⁶ Owen Fiss, “Objectivity and Interpretation,” in *Interpreting Law and Literature: A Hermeneutic Reader*, ed. Sanford Levinson and Steven Mailloux (Evanston, Illinois: Northwestern University Press): 229-249.

¹⁸⁷ Fiss, “Objectivity and Interpretation,” 230.

¹⁸⁸ Fiss, “Objectivity and Interpretation,” 229.

¹⁸⁹ Fiss, “Objectivity and Interpretation,” 236.

¹⁹⁰ Fiss, “Objectivity and Interpretation,” 238.

Meese takes the same view, arguing that since the 1960s, the political left has “captured” the federal courts and gone on to use them for political (not legal) purposes, advancing their agenda against what would otherwise be the will of the American people.¹⁹¹ “Lawsuits in federal courts had become a method of conducting an end run around legislators,” Meese writes.¹⁹²

Echoing Stephen Douglas’ pro-slavery “popular sovereignty” argument from a century before,¹⁹³ Meese notes that “the policies mandated by the courts were frequently opposed by vast majorities of the public—up to 80 percent and many more in some cases.”¹⁹⁴ For Meese, the issue is not slavery, of course, but abortion. Lincoln’s response to Douglas, which might similarly be applied to Meese’s version, involves a direct undoing of his populist/majoritarian argument. What matters is not the abstracted right to popular sovereignty and self-determination, Lincoln argued, but the morality and constitutionality of *the ends toward which that popular sovereignty is exercised*. For Douglas, the legal

¹⁹¹ Edwin Meese III, *With Reagan: The Inside Story* (Washington: Regnery, 1992), 314-317. Keith Whittington offers a less rhetorically charged version of this argument. “The originalist effort to ‘depoliticize the law’ by ensuring ‘fidelity to the Constitution’ depends on a limited conception of the constitutional authorization of the judiciary to incorporate extraconstitutional and political considerations into Constitutional law.” *Constitutional Construction*, 40. He also acknowledges that this necessarily begs the question of what is and what is not extraconstitutional, “defining what ‘the Constitution’ is.” *Constitutional Interpretation*, 165. As he sees it, the intent of the framers is “embedded” in the text itself and is not an extraconstitutional factor. Political “construction” of constitutional meaning is not something to be eliminated altogether under Whittington’s conception of “originalism”—it is simply not within the purview of the judicial branch. *Constitutional Interpretation*, 171-174, 204-208.

¹⁹² Meese, *With Reagan*, 316.

¹⁹³ Douglas used the term in the specific context of the debate over whether new territories, such as Kansas and Nebraska, should be permitted to hold referendum votes on allowing slavery within their borders.

¹⁹⁴ Meese, *With Reagan*, 316.

ownership of slaves;¹⁹⁵ for Meese, “abortion,...busing and ‘affirmative action’[,]... school prayer, crime, and other matters.”¹⁹⁶

The blurring of the law/politics line has not been lost on critics. Noting particularly Meese’s expansive—and extra-textual—reading of the Fourth Amendment to allow searches and seizures, Constitutional law professor Peter Shotten has written, “The flaw of Meese’s constitutional interpretation...is not that he cannot conceive of the Constitution in principled terms, it is that he cannot apply his understanding neutrally when the Constitution’s principles contradict his policy preferences.”¹⁹⁷

The Law of the Land?

At the heart of Meese’s argument is a very specific villain—the Supreme Court. Specifically, Meese attacks the 1958 case *Cooper v. Aaron* where the Court under Chief Justice Warren “appeared to arrive at conclusions about its own power that would have

¹⁹⁵ William Lee Miller, *Lincoln’s Virtues: An Ethical Biography* (New York: Knopf, 2002), 256-263. Miller’s examination indicates that Lincoln was so flabbergasted by Douglas’ attempt to cloak the moral evil of slavery behind a *process* argument about the “sacred right” of “popular sovereignty” that he was prompted to uncharacteristic bursts of bitter sarcasm. Yet the argument also led Lincoln to some of his most direct statements about the wrongness of the “3/5 clause” of the Constitution, for in the pre-Civil War context, “popular sovereignty” runs into a problem if it is to be administered as policy. “If the negro is a man,” Lincoln said in 1854, “is it not to that extent, the total destruction of self-government, to say that he too should not govern himself?” (p. 261).

¹⁹⁶ Meese, *With Reagan*, 316. Supreme Court historian Kenneth Jost wrote at the time, “Meese and other pseudo-conservatives in and out of the Reagan administration have become advocates of what [James] Madison would have called radical majoritarianism”—a distortion of history, Jost argues. “False Students of History.” *New Jersey Law Journal*, 120 (1986), 513.

¹⁹⁷ Peter Schotten, “Is the Constitution Still Meaningful? Public Reflections Upon the Fundamental Law of the Land.” *South Dakota Law Review* 33 (1988): 46. See also Mark Tushnet, “The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment,” *Tulane Law Review* 61 (1987): 1025 (“[T]he problem is not so much that Meese is wrong or lawless; it is that he is hypocritical.”) On the general issue of conservative hypocrisy when it comes to “judicial activism” see William P. Marshall, “Conservatives and the Seven Sins of Judicial Activism,” *University of Colorado Law Review* 73 (2002): 1217-1255.

shocked men like John Marshall.” And why? Because it was *Cooper* where the Court set forth the view that its decisions were “the supreme law of the land.”

The Warren Court, in Meese’s view, was therefore “at war” with Marshall and with the Constitution itself. Meese drastically extends the metaphor, launching into hyperbole: The Warren Court’s declaration places it “at war with the basic principles of democratic government, and at war with the very meaning of the rule of law.” This is not a new theme for conservatives, and a softer line had been advanced earlier at a Federalist Society conference by Frank Easterbrook, a professor soon to be named judge on the Seventh Circuit Court of Appeals by Ronald Reagan. “The statement in *Cooper* was dictum,” Easterbrook said, using the technical term for statements in Court opinions that do not function as precedent to bind future Courts. “The power of judges to have the last word on the meaning of statutes and constitutions has carried the day only in the courts of history, not in the court of logic.”¹⁹⁸ In asserting that the Supreme Court’s opinions do not function as binding in the same manner as a statute, Meese is to the right of many conservatives both then and now.¹⁹⁹

In a footnote, Meese indicates he has no quarrel with the holding in *Cooper*—a successor to *Brown* aimed at enforcing compliance—but rather only with the perceived conflict between the Court’s “supreme law” pronouncement and the supremacy clause of the Constitution, which establishes the Constitution as superior to state and local law. Here, again, Meese’s argument provides insight into his view of interpretation as a suspect or

¹⁹⁸ Frank H. Easterbrook, “Legal Interpretations and the Power of the Judiciary,” *Harvard Journal of Law and Public Policy*, 7 (1984): 96-97.

¹⁹⁹ Whittington, *Constitutional Interpretation*, 88 (“In a regime characterized by institutionally diverse interpretive standards...judicial pronouncements need not be ‘supreme’ in the ultimate and final sense assumed by aspirationalist arguments and occasionally by the Court itself.” In a footnote he cites *Cooper* and several other later cases.)

illegitimate process. Surely, one must agree with John Stick's view that, "If officials are bound to obey the law, then they are bound to obey under someone's interpretation."²⁰⁰

From a rhetorical perspective, this conclusion may seem obvious—one need not go over to the far left critics' camp to acknowledge that *all* readings are interpretive, that all texts exist in and derive meaning from their context. But the law's hyper-rationalistic norms and ideals, particularly among idealistic originalists and strict constructionists, make such a conclusion rather less intuitive. Conservatives are by no means of one mind on this important issue. In fact, the back issues of Federalist Society conference transcripts reveal some intriguing exchanges between conservatives like Prof. Epstein and Judge Easterbrook. "All interpretation involves meaning added by the reader," the Judge said at a 1984 Federalist conference.²⁰¹ Epstein disagrees with his otherwise similarly minded University of Chicago colleague. "The entire pattern of social and historical discourse takes place not because of the occasional unreliability of language, but because of its magnificent reliability."²⁰² While there are disagreements on such question, they do not prevent the right's organization and cooperation on political and intellectual projects; though as Bork told me, it is likely that if the right ever does fully capture the legal culture—and the Supreme Court—the various factions may well turn on each other. For the time being, though, the factions of the right perceive more in common with each other than with the left and its Living Constitution.

In Meese's view, the crisis of the "politicized" Court should be countermanded by a response from the political branches. Again invoking Lincoln—this time putting words into

²⁰⁰ Stick, "He Doth Protest Too Much," 1090.

²⁰¹ Easterbrook, "Legal Interpretations and the Power of the Judiciary," 97.

²⁰² Richard A. Epstein, "The Pitfalls of Interpretation," *Harvard Journal of Law and Public Policy* 7 (1984): 103.

his mouth rather than quoting him—Meese ratchets up the stakes in the metaphorical “war.” Lincoln, Meese tells us, fought to “keep the lamp of freedom burning bright in the dark moral shadows cast by the court in the *Dred Scott* case.” For the political branches to forgo opposition to the judgment would be—this time quoting accurately—“to submit to government by Judiciary.”²⁰³

The Attorney General comes perilously close to painting himself into a corner with this argument. On one hand, he and his fellow Federalist conservatives like Bork decry the politicization of the courts; on the other, they call for judicial interpretation by the two political branches as a remedy. “The issues raised by Meese are troubling,” writes Mark Tushnet, “because, on analysis, they seem to imply that politics determines the line between politics and law.”²⁰⁴ This is a legitimate if not definitive critique, to which majoritarian conservatives like Meese would likely reply that the Constitution—not politics—sets those boundaries. But that is not a sufficient response either. Indeed, as all good Federalists know, the Constitution is full of divided duties, separated powers, checks and balances; it is Madison in the Federalist Papers who over and over again argues for the importance of faction: the importance of...politics.

²⁰³ Meese’s imprecise footnote cites the entire first Inaugural. Lincoln says nothing about a lamp of freedom illuminating moral darkness, but does state, “[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.” Abraham Lincoln, 1861 Inaugural Address, <http://www.yale.edu/lawweb/avalon/presiden/inaug/lincoln1.htm> (accessed April 15, 2007).

²⁰⁴ Tushnet, “The Supreme Court, The Supreme Law of the Land,” 1018. See also Harrison, “The Role of the Legislative and Executive Branches,” 373, arguing effectively that there is an important difference between “the *commands* of the Constitution [and] what we might call its expectations.” Expectations, incentivized through formal structures of *political power* established by the Constitution, are, of course, necessarily political.

Derelicts and Power

Meese concluded at Tulane by dreading the addition of more *Dred Scotts* and *Plessy v. Fergusons*—the “derelicts” of Constitutional law, opinions whose legal and moral reasoning is flawed enough to have earned them universal dismissal as both intellectual and ethical embarrassments. It is worth noting that Meese’s emphasis on *Dred Scott* has special significance to movement conservatives who view *Roe v. Wade* as its modern-day equivalent—a case with no credible textual underpinning and even less moral force.²⁰⁵ As he said in his ABA speech, the Supreme Court is for Meese “the primary moral force in American politics”²⁰⁶—but this moral force is to be exercised in protection of the status quo, not a means to social change. When one hears conservatives invoke the importance of “separation of powers,” this is usually what they mean.

“Proper change, and the place for change, is through the peoples’ representatives and not through the courts,” he told me. “Change in the sense of new ideas, new laws, new practices, within the context of what is permitted by the Constitution, is the role of the peoples’ elected representatives...the court is there to interpret and not to change things.” As we will see in examining Justice Antonin Scalia’s views on tradition, this attitude toward change is central to the conservative project—though by no means the unanimous view within the Federalist Society, where libertarians vigorously dispute the Meese/Scalia social-conservative view. Meese and the more libertarian conservatives do agree on the concept of limited government, though, as Schotten writes, “Like [John Stuart] Mill and [Henry David] Thoreau before him, Meese believes that political power is dangerous, and additionally

²⁰⁵ See, e.g., Peter Wallsten, “Abortion Foes Call Bush’s Dred Scott Reference Perfectly Clear,” *Los Angeles Times*, October 13, 2004.

²⁰⁶ Meese, “Bulwark of a Limited Constitution,” 457.

thinks that there exists something like an inverse relationship between the government, the government's power, and individual liberty.”²⁰⁷ The primacy of liberty—as viewed against the concept of equality—is something we will take up in the next chapter.

Conservative leaders continue advancing the argument laid out by Meese at Tulane, and one might even argue it has become more “mainstream.” “[T]he justices (and their apologists) now believe that the authority of the Court’s decisions are more important than the authority of our fundamental law,” writes Constitutional scholar Robert F. Nagel in a recent article in the conservative magazine *The Weekly Standard*.²⁰⁸ And in a 2005 interview on the MSNBC program *Hardball with Chris Matthews*, the Rev. Pat Robertson (a lawyer as well as a minister) reiterated Meese’s suggestions about the limited nature of Supreme Court jurisdiction and the inherently illegitimate nature of its Constitutional interpretations.

“You know,” Robertson said, “it used to be, I have a case against you and we’re fighting about something, whatever it is, and a court decides, OK, Chris wins. All right, you win. Cool. But now we’re saying that decision binds the whole nation.” Robertson even repeats Meese’s Lincoln reference, somewhat mangling the quotation from the first inaugural: “Abraham Lincoln said this is not something we shall do and we would have surrendered our liberties to that eminent body. And that’s the thing that worries me, is that—the overreach of cases.” Robertson and Matthews proceed to consider nothing less than the elimination of judicial review. “That would be a feast day,” Matthews joked; “I can hardly wait,” replied Robertson.

²⁰⁷ Schotten, “Is the Constitution Still Meaningful,” 39.

²⁰⁸ See also Robert F. Nagel, “Bowing to Precedent: A Decent Respect for the Constitution Should Cause the Supreme Court to Reconsider Some Past Decisions.” *The Weekly Standard*, April 17, 2006, 28.

It may yet be upon us. As even a Meese skeptic from the libertarian Cato Institute acknowledged, the conservative revolution is the “triumph of the Meese justice department.” And in turn, much of the triumph of the Meese justice department was thanks to the Federalist Society and its emerging pipeline of talented young conservative lawyers.

CHAPTER 5
THE PROBLEM OF RACE:
ORIGINALISM, *BROWN v. BOARD OF EDUCATION*,
AND THE RHETORIC OF EQUALITY

The conservative case for originalism is hardly airtight, as thoughtful originalists like Scalia are quick to admit. And as we will see in the next chapter, Scalia justifies his appeal to the extralegal practices of tradition as a kind of stopgap measure when originalism fails—when we either don’t know or can’t figure out some law’s original meaning or its drafters’ intention. For many on the left, though, originalism never makes it out of the gates.

Recall Justice Brennan’s response to Meese, arguing that originalism rejects the very possibility of progress, the idea that standards of justice might evolve to include more rights for more people—minorities, women, and others whose equality was not contemplated by the Founders and the Constitution they produced. The first place many of originalism’s critics usually point is race—as Senator Ted Kennedy so vociferously—if unfairly—argued that “Robert Bork’s America” was frozen in time before the Civil Rights movement. Kennedy argued then, as do his successors today, that conservatives like Bork wanted to “wind back the clock” to the days before the Warren Court issued opinions like *Roe v. Wade* and *Brown v. Board*. As Congressman Bobby Scott, an African-American and a ranking Democratic member on the House Judiciary Committee told me, “As one who would have been three-

fifths of a person under the original understanding, you'll excuse me if I don't sign up for the originalism caucus.”

This is a problem for conservatives. How can one subscribe to originalism and not justify the racism of the Constitution?¹⁸¹ How can one decry the “activism” of the Warren Court and still support the outcome in *Brown v. Board of Education*, probably the most important case of the 20th Century? Conservatives have answers to both questions, some more satisfactory than others—answers we will consider here. The conservative position on Affirmative Action, in particular, reveals the continuing difficulties posed by the problem of racial equality and racial history in this country. More so in this chapter than in previous sections, we'll take a close look at the way legal arguments and precedents have evolved over the years and evaluate the success conservatives have had in moving the law closer to their position.¹⁸² Rhetoric serves us here as a way of reading and evaluating, but with more policy results coming into consideration here than in the last chapter—taking up Meese's specific concerns with the mode of interpretation.

My analysis in this chapter reflects the depth as well as the breadth of conservative thinking about equality; to understand the legal and policy positions held by the legal right it is important to explore deeper questions of theory and even philosophy. My specific focus on Affirmative Action law is contextualized by these larger concerns. Intellectual aspects of the debate over equality in conservative thought run back hundreds of years, predating Civil

¹⁸¹ Federalist founder Steven Calabresi deals with this in a typical way in a recent article defending traditional American exceptionalism, which, he writes, “at least since the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the Civil Rights laws of the 1960s, is explicitly non-racist.” The crucial phrase here being “at least.” Steven Calabresi, “A Shining City on a Hill,” *Boston University Law Review* 86 (2006): 1414.

¹⁸² See Raymond Wolters, *Right Turn: William Bradford Reynolds, The Reagan Administration, and Black Civil Rights* (New Brunswick, NJ: Transaction, 1996), 307-362.

Rights, Affirmative Action, and the accompanying metaphors of the “level playing field.” Equality before the law is a procedural and legal matter, but equality as a philosophical concept is another. What I will do here is place a legal question (Affirmative Action) in a cultural context. Law does not exist in a vacuum, and I conclude that conservatives understand this: they have tailored both their legal and political strategies accordingly.

Race has always played an important role in American politics, right from the very beginning when the compromise was made over that embarrassing 3/5 Clause. In contemporary times, the Civil Rights movement was opposed by many conservatives, leading many pro-segregation Democrats to switch parties—a “Southern Strategy” exploited by savvy Republican strategists to bring the old Democratic Solid South into the GOP column. But party politics don’t always track racial politics; it was Republican votes in the Congress that finally passed President Lyndon Johnson’s landmark Civil Rights Act of 1964 after the bill had been held up for months by obstructionist Southern democrats. Republican Majority Leader Everett Dirksen led the charge to break the standoff, famously quoting Victor Hugo on the Senate floor: “Stronger than all the armies in the world is an idea whose time has come.” Among Dirksen’s opponents were not only the Dixiecrat Southerners but also Barry Goldwater, who opposed the bill because of what he saw as its violation of individual property rights.¹⁸³

During the Civil Rights era, as we will consider below, the broad debate over Black equality morphed into a panoply of specific problems and solutions—some legal, some cultural, some political, some all of the above. By the time Ronald Reagan was elected in

¹⁸³ Paul Gilroy, *Against Race* (Cambridge, Massachusetts: Harvard/Belknap, 2000), 6; Part 1 *passim*.

1980—when the Federalist Society founders were coming of age—perhaps the most debated Civil Rights issue was Affirmative Action, decried by conservatives as a quota system that legitimized reverse-discrimination and fostered a culture of dependency and entitlement among minorities. This debate played out with two Federalist Society boosters at the helm of the Reagan Justice Department, Ed Meese and William Bradford Reynolds, chief of the Civil Rights division. Today, Meese remains active with the Heritage Foundation and Reynolds is in private practice. Both serve on the Federalist Society’s Board of Visitors.

“When we came in, in the Reagan era, quotas and busing were sacred terms; that was the definition of race,” Reynolds told me. “Now you have a much different discourse,” he said. “The biggest challenge we had was to move that discourse to ‘equal opportunity’ from ‘equal numbers’. If there was anything we accomplished in eight years, it was that.”

As Reynolds and many of his adversaries understand, race is itself a rhetorical matter. To the dismay of many in the Civil Rights establishment, liberal cultural theorist Paul Gilroy has repeatedly argued that “race”—the term always appears in quotation marks in his writings—is just one more social construct, no more (or less) absolutely real than any other, a cultural construct with “no ethically defensible place.” Identity, including racial identity, is incredibly important as a rhetorical tool, though, allowing leaders to form common bonds with their audiences based on shared self-perception. “Revitalizing ethical sensibilities in this area,” Gilroy writes, “requires moving away from antiracism’s tarnished vocabulary while retaining many of the hopes to which it was tied.”¹⁸⁴ As Gilroy all too well understands, identity is the currency of cultural politics, in academia and often in the voting booth.

¹⁸⁴ Gilroy, *Against Race*, 6.

“Equality” was, and is, an incredibly important legal word. And like most legally important words it has commonly understood meanings which do not always correspond to its formal legal meanings—when, as legal critic James Boyd White would say, it is “translated” into law.¹⁸⁵ Equality as understood by the drafters of the Constitution meant something quite different than it means today; as Justice John Paul Stevens has also pointed out in a response to Meese, there was diversity of opinion just *among* the founders.¹⁸⁶

Aside from its legal significance in texts like the Constitution, equality is also an idea, a concept with social implications for human relations and governance. It is an idea that has been a driving force in modern history, sparking wars and overturning cultures. For modern American conservatives as for their British progenitors over 200 years ago, “equality” is a revolutionary spur, the sign of unnatural attempts to remake human society. For movement conservatives, including many Federalists, the judicial activism of the Supreme Court’s civil rights cases reflects a clear, but misguided quest for judicially engineered egalitarianism. As Ronald Reagan said in a 1984 campaign speech, school busing for racial balance as ordered by the courts “takes innocent children...and makes them pawns in a social experiment nobody wants.”¹⁸⁷

To understand how American conservatives have talked about equality in the context of civil rights—both in and out of the courtroom—we need to understand the meaning of

¹⁸⁵ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University Of Chicago Press, 1990).

¹⁸⁶ John Paul Stevens, Remarks before the Federal Bar Association in Chicago, Feb. 23, 1985. *The Great Debate: Interpreting Our Written Constitution* (Washington, D.C.: The Federalist Society, 1986), 29-30.

¹⁸⁷ Wolters, *Right Turn*, 345.

equality in the conservative mind. This means we go all the way back to Edmund Burke and his reaction to the revolution in France.¹⁸⁸

“Equality is the product of art, not of nature,” is how conservative intellectual historian Russell Kirk interpreted Burke’s key insight.¹⁸⁹ “If social leveling is carried so far as to obliterate order and class,” he wrote in *The Conservative Mind*, “art will have been employed to deface God’s design...[Burke] predicted that such societies must presently sink into a fresh condition of inequality—that of one master, or a handful of masters, and a people of slaves.”¹⁹⁰ Egalitarianism, in other words, puts us on what conservative economist Friedrich von Hayek would famously call the “road to serfdom.”¹⁹¹ In its socialist guise, state-enforced egalitarianism is “the death of progress,” stifling innovation, competition, and creativity.¹⁹² It is destructive of civilization, of the heritage and traditions which hold society together. As Richard Weaver wrote, “Where equality obtains, no one knows where he belongs.”¹⁹³

Kirk, Hayek, and Weaver were all enormously influential with modern American conservative leaders¹⁹⁴ such as William F. Buckley Jr.,¹⁹⁵ who in turn influenced Reagan and

¹⁸⁸ Political critic Tomislav Sunic addresses the parallel roots of European conservatives’ skepticism of egalitarianism in Part II of his book *Against Democracy and Equality: The European New Right* (Newport Beach, Calif.: Noontide, 2004), 109-197 [originally New York: Peter Lang, 1990]).

¹⁸⁹ Russell Kirk, *The Conservative Mind from Burke to Eliot* (Washington, D.C.: Regnery, 1995 [1953]), 58.

¹⁹⁰ Kirk, *The Conservative Mind*, 58-59.

¹⁹¹ Cf. Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994 [1944]), 117-124.

¹⁹² Kirk, *The Conservative Mind*, 403; 403-407; Hayek, *The Road to Serfdom*, 63-79; Sunic, *Against Democracy and Equality*, 163-197.

¹⁹³ Richard M. Weaver, *Ideas Have Consequences* (Chicago: University Of Chicago Press, 1984 [1948]), 43.

¹⁹⁴ Hodgson, *The World Turned Right Side Up*, 35-45, 83-84.

his acolytes like Meese, Cribb, and Reynolds. The philosophically anti-egalitarian roots of first-generation conservative leaders informed their political project from the outset. The conservatives' response to Civil Rights jurisprudence from *Brown v. Board*¹⁹⁶ onward sprouted from fertile ground, with roots reaching back to Edmund Burke's reaction to the revolutionaries of the First Republic.

What follows is a narrative of legal and rhetorical evolution, tracking court decisions as well as political developments—including the rise of the modern Washington think tanks, which, unlike the Federalist Society, actively lobby Congress and advocate policy positions.

Interpreting *Brown v. Board*: The Debate Begins

As Harvard Law School professor Randall Kennedy has written, among the frustrations of Chief Justice Earl Warren's opinion for the Court in *Brown*—despite its civic virtue and inspiring prose—is that it “invited a rather narrow reading.”¹⁹⁷ Warren's goal of a unanimous vote led him to make numerous compromises within the text of the opinion, thus opening the door to varying interpretations by lower courts.¹⁹⁸ Among these was the “*Briggs* doctrine,” a nickname derived from the decision of an appellate court holding that the vaguely worded *Brown* required no active efforts at school desegregation—no “affirmative” action. Chief Justice Warren's vague opinion, concerned more with lofty pronouncements of

¹⁹⁵ William F. Buckley Jr., “The Courage of Friedrich Hayek,” in *Let Us Talk of Many Things: The Collected Speeches with New Commentary by the Author* (New York: Prima/Lifestyles, 2000), 223-234. (Speech given at Hillsdale College, 1975.)

¹⁹⁶ 347 U.S. 483 (1954).

¹⁹⁷ Randall Kennedy, “Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott,” *Yale Law Journal* 98 (1989): 1051.

¹⁹⁸ David Droge, “From Natural to Cultural Inferiority: The Symbolic Reconstruction of White Supremacy in *Brown v. Board of Education*,” in *Brown v. Board of Education at Fifty: A Rhetorical Perspective*, ed. Clarke Rountree (Lanham, Md.: Lexington Books, 2005), 107-111.

national virtue than legal brass tacks, left enough wiggle room for this reading to pass muster. It was a classic rhetorical and political compromise, sacrificing precision for unanimity.

Not surprisingly, *Briggs* became the touchstone for many Southern courts.¹⁹⁹ Because *Brown* did not explicitly overrule the 1896 case *Plessy v. Ferguson*,²⁰⁰ it was unclear whether the notorious “separate but equal” doctrine established in that ruling still applied in non-public education settings. *Plessy*, as it turns out, was overruled only indirectly in *Gayle v. Browder*,²⁰¹ the Alabama District Court case which upheld the constitutionality of the Montgomery Bus Boycott led by Martin Luther King, Jr.²⁰²

According to political scientist Thomas Keck, the turning point in the shift of the conservative segregationist South from the democrats to the GOP was when the discourse over equality changed, “when affirmative action started to displace school desegregation as the key constitutional debate in the area of racial equality.”²⁰³ Affirmative Action fit easily into conservatism’s longstanding, Burkean anti-egalitarianism—one more example of a bloated state led by socialist-leaning liberals who thought they could remake society, casting

¹⁹⁹ *Briggs v. Elliott*, 132 F.Supp. 776, 777 (E.D.S.C. 1955), holding that that the Constitution “does not require integration” but “merely forbids discrimination.” The “Briggs doctrine” or “dictum” was finally eliminated in *Green v. School Board of New Kent County*, 391 U.S. 430 (1968).

²⁰⁰ 163 U.S. 537 (1896).

²⁰¹ 352 U.S. 903 (1956).

²⁰² 142 F.Supp. 707, 717 (M.D. Ala.) (1956). In a highly unorthodox move, Judge Frank M. Johnson Jr. ruled for the boycotters and held that *Plessy* had been “impliedly” overruled. The Supreme Court then affirmed this judgment in an unsigned, one-sentence *per curiam* opinion—a move typical of its somewhat cryptic post-*Brown* desegregation cases.

²⁰³ Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004), 6.

aside tradition and culture when it didn't conform to their idea of the way things ought to be.²⁰⁴

It would be a mistake, however, to focus only on the negative aspects of the conservative opposition to Affirmative Action. In the years since the demise of the explicit racism that was obvious among many opposed to the Civil Rights Movement, the principled conservative case against racial preferences has become more clear. One neat way to sum it up is to go back to the terms the Founders themselves knew to be in tension; the ideals of the French Revolution so loathed by Burke. Rather than the revolutionary ideal of *égalité*, conservatives favored *liberté*. Particularly for the libertarian wing of the conservative movement, liberty would be understood as the freedom of the individual.²⁰⁵ As Clarence Thomas said in a 1989 address to the Federalist Society, conservatism's appeal is grounded in its belief in "freedom as the main source of all that is good politically."²⁰⁶ And legal historian James Staab has written bluntly of Thomas's senior colleague, "Scalia's jurisprudence in no way resembles the political principles of the Sage from Monticello, an egalitarians if ever there was one—of those inalienable truths, of course, is the business of all being created equal. In contrast to Jefferson, Scalia has a strong distrust of popular

²⁰⁴ "Conservatives had been emphasizing an individualistic, meritocratic conception of equality of opportunity, which they saw as threatened by liberal egalitarian policies." Keck, *The Most Activist Supreme Court*, 143.

²⁰⁵ M. Stanton Evans, one of the original *National Review* conservatives, titled his memoir *The Theme Is Freedom*. Washington: Regnery, 1996.

²⁰⁶ Clarence Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," *Harvard Journal of Law and Public Policy* 12 (1989), 69. Geoffrey Nunberg has written that "along with the trashing of the liberal label, the modern right can count the capture of the language of freedom as one its signal linguistic triumphs" Nunberg, *Talking Right*, 130.

democracy and is less enamored with states' rights...he believes in a strong executive with numerous implied and inherent powers," a subject we will revisit later.²⁰⁷

Another example can be found in a George F. Will column from 2005. "The unending argument in political philosophy concerns constantly adjusting society's balance between freedom and equality," he writes. "The primary goal of collectivism—of socialism in Europe and contemporary liberalism in America—is to enlarge governmental supervision of individuals' lives. This is done in the name of equality" In a recent law review article on American exceptionalism Steven Calabresi notes that the "golden door" of Ellis Island is home to a statue of liberty, "and not a statue of 'equality' or 'fraternity'." That is he writes, "after all, what this country stands for."²⁰⁸

The ideal of equality announced in *Brown* was grounded not only in freedom but in racial integration, of "non-separateness" and antisubordination as a principle of human decency and American democracy. The student plaintiffs in *Brown* were held to have been denied the equal protection of the laws under the Fourteenth Amendment, but this specific issue of Constitutional law was not elaborated upon in the lofty civic prose of Chief Justice Warren's opinion. In the ensuing desegregation decisions issued by the Warren Court²⁰⁹ this Equal Protection rationale continued to go unexplained; the doctrinal, textual rationale for the

²⁰⁷ James B. Staab, *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court* (Lanham, Maryland: Roman and Littlefield, 2006), xxx.

²⁰⁸ Calabresi, "A Shining City on a Hill," 1365.

²⁰⁹ *Mayor & City Council of Baltimore v. Dawson* 350 U.S. 877 (1955) (public beaches and bathhouses); *Holmes v. City of Atlanta* 350 U.S. 879 (1955) (municipal golf courses); *Muir v. Louisville Park Theatrical Association* 347 U.S. 971 (1954) (city lease of park facilities); *New Orleans City Park Improvement Association v. Detiege* 358 U.S. 54 (1958) (public parks and golf courses); *State Athletic Commission v. Dorsey* 359 U.S. 533 (1959) (athletic contests); *Turner v. City of Memphis* 369 U.S. 350 (1962) (airport restaurants); *Schiro v. Bynum* 375 U.S. 395 (1964) (municipal auditoriums).

decision was simply disregarded. As one scholar has written, the Warren Court “left *Brown* relatively devoid of interpretation for at least ten years” during which conservatives on and off the bench moved to fill the void, redefining *Brown*’s meaning and “canonizing” it—neutering its doctrinal force as a matter of law.²¹⁰

In the post-*Brown* era some otherwise liberal legal academics began turning their critiques against the Court’s Equal Protection jurisprudence.²¹¹ By 1970 Philip Kurland of the University of Chicago was sounding very much like Friedrich von Hayek: “Those too young to remember what happened to Europe immediately prior to World War II, as country after country fell under the thrall of equality, may yet find the allegory in George Orwell’s *Animal Farm* instructive.”²¹² In that same year Alexander Bickel, a mainstream liberal who had taught Constitutional law at Yale with Robert Bork, was denouncing the Warren Court’s “egalitarian revolution.”²¹³

Bork’s own career was taking off at this point, his 1971 essay on “neutral principles” gaining increased attention.²¹⁴ Bork specifically speaks to the question of equality, writing that “the bare concept of equality provides no guide for courts. All law discriminates,” he argues, “and thereby creates inequality.”²¹⁵ He moves from here to his justification for

²¹⁰ Brad Snyder, “How the Conservatives Canonized *Brown v. Board of Education*,” *Rutgers Law Review* 52 (2000): 390-392.

²¹¹ Keck, *The Most Activist Supreme Court in History*, 77-79.

²¹² Keck, *The Most Activist Supreme Court in History*, 79.

²¹³ Keck, *The Most Activist Supreme Court in History*, 79.

²¹⁴ Robert Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47 (1971): 1-35.

²¹⁵ Bork, “Neutral Principles,” 11.

Brown, a position he has maintained consistently throughout his career.²¹⁶ His harmonizing of Warren’s conclusion with an avowedly conservative methodology has had lasting influence among scholars on the right who have also tackled this knotty problem; Congressman Scott’s charge about the Three-fifths Clause echoes loudly.²¹⁷ Bork’s argument that the result in *Brown* was justifiable under a textualist consideration of the Fourteenth Amendment is tendentious, and other conservatives have posed other alternatives. Michael McConnell, for example, offers a more nuanced argument. He argues that votes on the 1875 Civil Rights Act, which in certain proposed versions would have outlawed segregated schools, show that strong Congressional majorities felt they were acting within the meaning of the Fourteenth Amendment, which many of them had voted on several years before.²¹⁸ But Bork’s more direct argument has had the most traction: *Plessy* was wrong precisely because the Court tried to indulge in sociology and not just stick to the text. The Warren Court in *Brown* committed the same error, though the outcome in that case was the right one.

By rearticulating *Brown* as part of a different narrative—the historical project of understanding the original intent of the framers, Bork achieved what we might call a rhetorical “inoculation.” As one legal critic has persuasively argued, Bork helped to “eliminat[e] opposition from the decision’s most likely detractors.” He reframed and rearticulated it as an extension of the first Justice John Harlan’s dissent in *Plessy* which declared, “Our constitution is color-blind, and neither knows nor tolerates classes among

²¹⁶ Bork, “Neutral Principles,” 12-15; Bork, *The Tempting of America*, 74-84. Bork’s reading is not without critics. See Ronald Turner, “Was ‘Separate but Equal’ Constitutional?: Borkian Originalism and *Brown*,” *Temple Political and Civil Rights Law Review* 4 (1995): 229-262.

²¹⁷ Snyder, “How the Conservatives Canonized *Brown*” 470.

²¹⁸ Michael McConnell, “The Originalist Case for *Brown v. Board of Education*,” *Harvard Journal of Law and Public Policy* 19 (1996): 457–464. See also Edward Whelan’s May 19, 2005 *National Review* column “An Unoriginal Argument,” <http://www.nationalreview.com/comment/whelan200505190812.asp>.

citizens. In respect of civil rights, all citizens are equal before the law.”²¹⁹ Conservatives would go on to “canonize” *Brown* and convert it into an argument for Harlan’s “colorblindness.”²²⁰

Bork’s support for the outcome in *Brown* is about the extent of his sympathy with the Warren Court. In his memoir he writes that the Court’s “catalogue of...legislative alterations of the Constitution is a thick one and is organized by the theme of egalitarianism.”²²¹ The first generation of neoconservatives also joined this anti-egalitarian discourse, which reached fever pitch during the 1970s. Nathan Glazer, editor of *The Public Interest*, wrote in 1971 that he rejected “the revolution of equality [which] not only expresses a demand for equality in political rights and political power, [but] also...in economic power, in social status, in authority in every sphere”—specifically citing affirmative action programs in college admission which he saw as counter to the traditional American notion of meritocracy.²²² Daniel Bell, the liberal author of *The Radical Right*,²²³ similarly denounced “racial quotas” as a move toward the “socialist ethic” and away from classical liberal individualism.²²⁴ The conservative case against Affirmative Action was gaining ground.

²¹⁹ 163 U.S. 537, 553.

²²⁰ 163 U.S. 537, 559 (“Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”) What Snyder terms “canonization” has much in common with Jack Balkin’s evaluation of “*Brown* as Icon,” in Jack Balkin, ed., *What Brown v. Board of Education Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision* (New York: NYU Press, 2001).

²²¹ Bork, *The Tempting of America*, 72.

²²² Keck, *The Most Activist Supreme Court in History*, 139.

²²³ Daniel Bell, *The Radical Right*, New York: Doubleday, 2001 [1964].

²²⁴ Keck, *The Most Activist Supreme Court in History*, 139.

Nixon, Nixon's Court, and the Emergence of the Think Tanks

Richard Nixon campaigned against the “activism” of the Supreme Court under his old political foe Earl Warren²²⁵ but was seen by conservatives at the time, as he still is now, as an unreliable ally in the fight against “racial quotas.” Mark Levin, Ed Meese’s former Chief of Staff and author of the 2005 bestseller *Men In Black*, argues that Nixon was essentially no better than the architect of the Great Society, Lyndon Johnson, for setting up the Minority Business Enterprise contracting program—also known as The Philadelphia Plan, the first set-aside plan for government contractors.²²⁶

Nixon’s election and arrival in Washington marks an important moment in the history of contemporary conservatism, which already by 1968 had a long-established love-hate relationship with the former Vice President. Nixon was a bundle of contradictions and represented the kind of pragmatic pol for whom the hard core Goldwaterites had little sympathy.²²⁷ By 1968, there were already two conservative “think tanks” in Washington—though neither had achieved anything close to the eventual prominence such institutions would take on. The American Conservative Union, founded by Goldwaterites just days after the 1964 defeat, was the prototype, and the American Enterprise Institute, founded in New York in 1943 as a business-policy research forum,²²⁸ would take decades to emerge as a real force.

²²⁵ Jonathan Aitken, *Richard Nixon: A Life* (Washington: Regnery, 1993), 201-203.

²²⁶ Levin, *Men In Black*, 89; Hoff, *Nixon Reconsidered*, 90-92. Christine Todd Whitman, the liberal Republican and former governor of New Jersey, cites the same Nixon program favorably in her memoir, *It's My Party, Too: The Battle for the Heart of the GOP and the Future of America* (New York: Penguin, 2005).

²²⁷ Rusher, *The Rise of the right*, 62-29, 153-161.

²²⁸ “AEI’s Diamond Jubilee, 1943-2003,” <http://www.aei.org/about/contentID.20031212154735838/default.asp> (accessed April 15, 2007).

As we have seen, the ACU launched its “first authentic lobbying program”²²⁹ against Nixon’s “Family Assistance Plan,” a controversial revision of the nation’s welfare system. The ACU’s model set the standard for the think tanks, which pioneered a blend of academic policy research, persuasive political advocacy, and media savvy. Today, the major conservative think tanks feature dozens of in-house experts and visiting scholars—much like any liberal arts college campus.

On the Internet one finds these experts presented on think tank home pages in media-friendly category menus along with contact information and publication lists.²³⁰ Conspicuously absent from website menus of AEI²³¹ and The Heritage Foundation²³² is—civil rights; the libertarians at the CATO Institute buck the trend and do include it as a subject heading. The omission is itself a rhetorical act, a denial of the category’s basic legitimacy. While materials on Affirmative Action and Equal Protection are available from Heritage and AEI, these policy areas are not presented as legitimate in their own right, alongside foreign policy, taxation, or property rights.²³³ The think tanks, unlike the Federalist Society, function as advocates for specific policies—and draw on their experts to make these arguments to the public and to lawmakers.

²²⁹ American Conservative Union, “A History.”

²³⁰ Having served some time as a political reporter on Capitol Hill, I can attest to the ready availability of conservative think-tank experts and commentators. Getting someone from Brookings to call you back was invariably a task, but the folks at AEI seemed always to be waiting by the phone.

²³¹ <http://www.aei.org/research/filter.all/default.asp> (accessed April 15, 2007).

²³² <http://www.heritage.org/research/> (accessed April 15, 2007).

²³³ Interestingly, CATO includes property rights under the civil rights heading (<http://www.cato.org/research/civilrights/index.html>); cf. Albion Tourgee’s property-based argument in *Plessy v. Ferguson*. J. Allen Douglas, “‘The Most Valuable Sort of Property’: Constructing White Identity in American Law, 1880-1940,” *San Diego Law Review* 40 (2003): 881–946.

“The think tanks are permanent institutions, very much inside the Beltway,” Congressman Dan Lungren, a Federalist Society supporter and former California Attorney General, told me. The Federalist Society, he said, isn’t a “think-tank bureaucracy”; “by its very nature cannot be just ‘inside the Beltway’.” Lungren is right to point out the Federalists’ decentralized structure has served it well in ways quite different from the think tanks—which is not to de-emphasize the importance these conservative groups play or the influence they have. Their role is quite different from the Federalists’, though. “We are in a somewhat similar work in terms of purpose, but I think the way in which we go about it is different,” said Meese. “Heritage is in the policy information business,” he told me. “It’s our job to develop the policy documents that are useful to policymakers, to the news media, to other people that either make policy or influence policy.”

“We have direct contact on a regular basis with Members of Congress, we have much greater direct contact with members of the news media,” Meese added. The Federalist Society is not a competitor, but is rather the common territory Heritage shares with the other conservative think tanks and with allies in academia and government, a forum for intra-conservative dialog and idea-testing. The Society provides “the intellectual backdrop, the legal policy backdrop, for a lot of the things we do here,” Meese said. As John Fund put it, they are the intellectual “clearing house,” the Grand Central Station for ideas. Those ideas then percolate through the more instrumentally focused mechanisms of the think tanks, who lobby Congress and try to get them written into policy.

The think tanks do more than lobby, though. Writes liberal critic Nunberg: “Those groups have been enormously successful in shaping the issues and terms of political debate

and disseminating conservative views in the media.”²³⁴ They also help build the conservative movement from the ground up, as does the Federalist Society.²³⁵ “We believe ideas have consequences,” declares the Heritage homepage, “but that those ideas must be promoted aggressively.”²³⁶ The idea echoes the gauntlet thrown down by the youthful William F. Buckley in *God and Man at Yale*. “Truth does *not* necessarily vanquish,” he wrote, “truth can *never* win unless it is promulgated...The cause of truth must be championed, and it must be championed dynamically.”²³⁷ The conservative think tanks have done this with vigor and efficiency. And whether or not their websites include parallel subject headings, ideas about equality and civil rights are featured prominently. For decades, conservatives have been railing against Affirmative Action—the stigma of a racist opposition to Civil Rights fading as the years go by, and as more Black conservatives come to the fore as spokespeople for the right. With their contrarian views these speakers often attract news coverage and attention;

²³⁴ Nunberg, *Talking Right*, 36.

²³⁵ Heritage, for example, co-sponsors an annual “Resource Bank” conference which “gathers more than 500 think-tank executives, public interest lawyers, policy experts, elected officials, and activists.” Aside from their intellectual value, these conferences include numerous training sessions in media strategy, “marketing our ideas,” “building constituencies,” and fundraising plans to support these communication strategies.²³⁵ Heritage also operates a free, confidential job-placement service for conservatives, whether they are clerical support staff or Ph.D.’s in economics. The program is truly amazing. (<http://www.heritage.org/About/JobBank.index.cfm>) Conservatives’ ability to get their message out is facilitated directly by this kind of practical organizing, which provides the infrastructure and manpower for communicating their ideas.

²³⁶ <http://heritage.org/About/aboutHeritage.cfm>.

²³⁷ Buckley, *God and Man at Yale*, 140-141.

they include the likes of former Secretary of Education Rodney Paige,²³⁸ economics professor Glenn Loury,²³⁹ and Civil Rights Commissioner Peter Kirsanow.²⁴⁰

Reshaping Civil Rights and the Discourse of “Equality”

Conservatives moved to reshape the legal discourse of equality during the Nixon presidency.²⁴¹ In particular, Supreme Court nominee William Rehnquist used his acceptance of *Brown* as a way to inoculate himself against racially tinged accusations deriving from a memorandum he wrote while clerking for Justice Robert Jackson.²⁴² Support for *Brown*—with its vague, though inspirational language and ambiguous holding—became a trump-card defense and an opportunity for conservatives to redefine its meaning.

²³⁸ “There are some who think that African American children can’t learn as well as white children...or that poor children are poor students. Such attitudes are self-fulfilling.” “*Brown v. Board of Education: Fifty Years Later*,” Remarks before the American Enterprise Institute, Jan. 7, 2004. <http://www.aei.org/events/filter.all,eventID.709/transcript.asp> (accessed April 15, 2007).

²³⁹ “The liberal exchange, in which the victimized blacks insist upon relief from guilt-ridden whites, often points away from this necessity to be engaged in our own improvement. It leads to a perverse “exhibitionism of non-achievement” by blacks (e.g., the remorseful rectification of statistics showing that more black men are in prison than in colleges.) It is as if the fact of our failure to meet certain standards or to surmount a certain obstacle must of necessity constitute evidence of a social or political failing by the larger society.” “Two Paths to Black Power: *The Conflicting Visions of Booker T. Washington and W. E. B. du Bois*,” AEI Bradley Lecture, Nov. 13, 1991. http://www.aei.org/publications/pubID.17938,filter.all/pub_detail.asp (accessed April 15, 2007).

²⁴⁰ “[D]iscussions concerning civil rights still largely revolve around a grievance-legislative model. And one is effectively excluded from such discussion unless you continue to address it in those terms. The same three-prong test is always applied... A commitment to what has euphemistically been called affirmative action; a view of civil rights as group rights, not individual rights; and entitlement and reparations as global remedies for past wrongs. Failure to pass at least one prong of this test is cause for banishment from the discussion.” To a liberal, a clearer example of a straw-man argument would be hard to find. Kirsanow defines civil rights wholly in terms of its conservative rearticulation, and then said that he is “banished from the discussion” because he rejects that definition. “Civil Rights and Wrongs: A New Agenda for a New Era,” Heritage Lecture No. 731, Jan. 17, 2002, 3. <http://www.heritage.org/Research/LegalIssues/HL731.cfm> (accessed April 15, 2007).

²⁴¹ Keck, *The Most Activist Supreme Court in History*, 414-431. Nixon’s nominees included Warren Burger (1968), Harry Blackmun (1970), Lewis Powell (1971), William Rehnquist (1971); also failed nominees Clement Haynsworth (1969) and Harold Carswell (1970).

²⁴² Keck, *The Most Activist Supreme Court in History*, 431-467.

Shortly before Rehnquist joined the court, Chief Justice Burger—Nixon’s first nominee—authored the opinion for the Court in the racial discrimination case *Griggs v. Duke Power*.²⁴³ The case marked an important point of doctrinal departure, holding that discriminatory intent was unnecessary for there to be liability under the 1964 Civil Rights Act.²⁴⁴ Five years later, this appeared to change. The Nixon appointees were joined by John Paul Stevens and Byron White in *Washington v. Davis*,²⁴⁵ an Equal Protection ruling that raises the burden on a plaintiff, requiring that discriminatory *intent* be shown, not just discriminatory results. The opinion also explicitly rejects “strict scrutiny”²⁴⁶—a nearly impossible interpretive standard of judicial review—as the proper standard for anything except “facially” discriminatory rules.²⁴⁷ Conservatives, as the saying goes, kept on working to move the goalposts.

An argument can be made that the conservative Court’s opinion in *Davis* mirrors the effects of the Supreme Court’s first review of Civil Rights law in the *Slaughter House Cases*²⁴⁸ a century before: Validity was conceded so that meaning might be controlled.²⁴⁹ In

²⁴³ 401 U.S. 424 (1971).

²⁴⁴ 401 U.S. 424, 432, 433.

²⁴⁵ 426 U.S. 229 (1976).

²⁴⁶ Justice Scalia, true to form, has pointed out that there is nothing in the Constitution authorizing “strict scrutiny” or any other such standard of judgment. In the VMI case he wrote, in dissent, that “[t]hese tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. Strict scrutiny, we have said, is reserved for state ‘classifications based on race or national origin and classifications affecting fundamental rights’.” (*United States v. Virginia* 518 U.S. 515, 567-568). Whether a right is “fundamental” or not, Scalia goes on to suggest, is also a matter of judicial artifice and not Constitutional interpretation.

²⁴⁷ 426 U.S. 229, 247-248. A similar results was reached regarding redistricting in *Mobile v. Bolden* 446 U.S. 55 (1980). See Jamin B. Raskin, *Overruling Democracy: The Supreme Court vs. The American People* (New York: Routledge, 2003), 70-71, 79-85.

²⁴⁸ 83 U.S. 36 (1873). The libertarians at the nonprofit Institute for Justice are hardly satisfied, arguing that *Slaughter-House* must be overturned. At a speech to the CATO Institute, IJ President William “Chip” Mellor described its “legacy of...total evisceration of constitutional protection for economic liberty.” Mellor, “The Tragic Legacy of the *Slaughter House Cases*,” April 13, 1998.

Davis, the Nixon Court essentially read Harlan's *Plessy* dissent and its "colorblind" ideal into the common law, creating what liberal Yale Law School Professor Reva Siegel describes as a tense relationship between the core principles of anticlassification and antisubordination.²⁵⁰

"Talking about the wrongs of classification was not merely a cooler way of justifying *Brown*, it was simultaneously an effective way of limiting *Brown*," she concludes.²⁵¹ As a frustrated Justice William Brennan wrote in his dissent in *University Of California Board of Regents v. Bakke*,²⁵² "[C]laims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality."²⁵³

David Frum, President George W. Bush's former speechwriter and a keen cultural critic, writes in his recent study of the 1970s of how the Court's decisions in *Griggs* and *Bakke* prompted a widespread defensive response in the business and educational community. "The white resentment provoked by quotas may explain the strong mood of racial pessimism that gripped Blacks in the 1970s," Frum writes.²⁵⁴ *Bakke* upheld a minority preference system in college admissions, attacked relentlessly by critics as an explicitly race-based quota plan. Frum also draws attention to many white communities' resistance to court-

<http://www.ij.org/publications/other/slaughterhouse/legacy.html> (accessed April 15, 2007). IJ founder Bolick figures in the larger development of the story I am telling here. Though IJ is not a think tank, it has partnered extensively with the conservative think tanks and Bolick is a major player.

²⁴⁹ Snyder, "How the Conservatives Canonized *Brown v. Board*," 480.

²⁵⁰ Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles," *Harvard Law Review* 117 (2004): 1500, 1536-37.

²⁵¹ Siegel, "Equality Talk," 1477.

²⁵² 438 U.S. 265 (1978).

²⁵³ 438 U.S. 265, 327.

²⁵⁴ David Frum, *How We Got Here: The 70's: The Decade That Brought You Modern Life—For Better or Worse* (New York: Basic Books, 2000), 244; see also Robert Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York: Regan/HarperCollins, 2003), 231-235.

ordered busing schemes aimed at achieving racial balance. “The Supreme Court disregarded the promises by the authors of the 1964 [Civil Rights] Act,” in Frum’s view, and

...gave the federal government permission to proceed with virtually any busing scheme it liked. The government liked them all. The public did not...Busing was truly a revolution imposed from above, and as expected, it met with violent resistance from below.²⁵⁵

“Busing” as used by Frum in this passage is indicative of the conceptual power this word took on. In the context of court-ordered integration, “busing” came to function as a super-significant word, a part that stood in for the whole—the broader conservative themes of “big government” and judicial overreach. “Busing to achieve racial balance” was reduced to *busing*, a “revolution imposed from above.”²⁵⁶ In his comprehensive study of the Reagan administration’s Civil Rights policies, Raymond Wolters astutely observes that Reagan “knew that the yellow school bus had become a symbol of intrusive social engineering and sensed that, for many people, the buses might have been emblazoned with words like *liberal* or *Democrat*.”²⁵⁷ By the end of the ‘70s, statistics do show that white public opinion had turned decisively against busing.²⁵⁸

²⁵⁵ Frum, *How We Got Here*, 253.

²⁵⁶ There is no better study of the way court-ordered-busing-to-achieve-racial-balance enflamed an otherwise liberal community than J. Anthony Lukas’ *Common Ground* (New York: Random House, 1986).

²⁵⁷ Wolters, *Right Turn*, 343. On the redefinition of the adjective “liberal,” see Nunberg, *Talking Right*, Chap. 3, “Trashing the L-word.”

²⁵⁸ Frum, *How We Got Here*, 262. Frum also draws a pertinent connection between liberals’ Equal Protection Clause interpretation in the Affirmative Action cases such as *Bakke* and women’s rights arguments regarding gender-based 14th Amendment discrimination claims. “The attempt to eradicate male-female differences was not going to be quite so morally straightforward as the elimination of Jim Crow,” he writes. The legal meaning of equality under the Fourteenth Amendment was expanding beyond race in the public discourse, to include women’s liberation and gay rights. Conservatives such as Phyllis Schlafly would seize the rhetorical moment, turning issues such as the Equal Rights Amendment against liberals by linking the idea up with the racial struggles over affirmative action and “quotas.”

The Court's rulings aligned with the conservatives' long-held beliefs about the tensions between equality and freedom. "Most Americans, though they are thoroughly in favor of civil rights, are opposed to quotas," Bork writes. "When non-whites who have not suffered discrimination are preferred to whites who have not inflicted discrimination, racial resentments are sure to be aroused."²⁵⁹ The conservative narrative functions here to explain as well as to define. The Civil Rights Movement was about "equality," but at some point in the late 1960s, "the civil rights organizations changed direction," Bork writes in a later book. "They insisted over and over again they wanted no special status for minorities. Now they sought special status and preferential treatment."²⁶⁰ State protected equality as an ideal has been abandoned—at least social equality.²⁶¹

Conservative Senator Jeff Sessions agrees that the Civil Rights era was pivotal in the shift in popular opinion supporting the Warren Court's decisions. "The Civil Rights Movement gave momentum to what was perceived as legitimacy for activist judges," Sessions told me, "so that great judges were perceived as the judges who were *acting*, and who challenged the status quo, who broke new ground and defended rights." The complications brought on by what Professor Wolters calls "second-generation Civil Rights problems" would serve to advance the conservative call against Warren Court-styled "activism."²⁶² Harvard Federalist and GOP chairman Ken Mehlman eagerly explained his own reading of *Brown* and its legacy. "The legislative reforms made in the sixties under the

²⁵⁹ Bork, *The Tempting of America*, 109.

²⁶⁰ Bork, *Slouching Towards Gomorrah*, 231.

²⁶¹ Steven F. Hayward, *The Age of Reagan: The Fall of the Old Liberal Order, 1964-1980* (New York: Prima/Forum, 2001), 86-87.

²⁶² Wolters, *Right Turn*, 1

rubric of Civil Rights were among the most important and good and overdue in American history,” he said, “and they were necessary because of an enormous act of judicial activism in *Plessy*.” *Brown*, he joins Bork in arguing, was correctly decided in light of the Civil War Amendments.

Mehlman carried Sessions’ point about the “activism” of the Supreme Court during the Civil Rights era a step further. “Because of the nature of *Brown*,” he told me, “what most people would think of as anti-democratic became seen as the ultimate guarantor of democracy.” That is to say, judicial activism.

The Reagan Era and Colorblindness

A key linkage emerged in the 1970s in legal and political conservative discourse, as opinion leaders like Jeane Kirkpatrick began describing Affirmative Action as just one more example of “big government” and “planning” in the socialist, Hayekian road-to-serfdom sense.²⁶³ As David Frum writes, “Busing triggered a whole new perception among ordinary middle-class people of the malignity of public authority.”²⁶⁴

This theme continues down to the present day, which finds popular press conservatives writing that “‘diversity’ is just the clever label the Court gives to reverse discrimination. Besides, Americans don’t need “*government-orchestrated* discrimination,” as Mark Levin writes.²⁶⁵ The notion that there can be no Constitutionally enforced racial “equality” without fundamental, illegal unfairness represents a full-tilt rejection of the

²⁶³ Keck, *The Most Activist Supreme Court in History*, 140.

²⁶⁴ Frum, *How We Got Here*, 263.

²⁶⁵ Levin, *Men in Black*, 96 (my emphasis).

principle articulated by Judge John Minor Wisdom in the heat of the Civil Rights era: that the “Constitution is both color blind and color conscious.”²⁶⁶

The conservative interpretation of equality moved further away from *Brown*’s famous footnote eleven—wherein sociologist Kenneth Clarke detailed his research on the psychological damage inflicted by segregation—with *McKleskey v. Kemp*,²⁶⁷ a Supreme Court ruling rejecting the use of aggregated data to prove discrimination under the Equal Protection Clause. The holding comports generally with conservative textualist and originalist interpretations of the “actual harm” standard for causes of action, under the Equal Protection Clause or otherwise: membership in an afflicted or harmed groups is not enough—specific harm in a specific instance must be proven.²⁶⁸ As Levin argues in a more populist vein, specificity should seem an obvious requirement. “The Fourteenth Amendment is not about charts and indexes and statistics.”²⁶⁹ Professor Horwitz puts this kind of argument into historical perspective, noting that hostility toward a sociological approach was a hallmark of legal orthodoxy generations before the Federalist Society existed. Progressives in the late 19th and early 20th century, he writes, “treated social science research as providing a necessary demystifying first step toward the goal of social reform...another way of undermining disembodied formalism.”²⁷⁰

We can have little doubt about which side of this debate Mark Levin and his mentor Edwin Meese would have come down on. Under Levin’s reading, the Fourteenth

²⁶⁶ 372 F.2d 836, 876.

²⁶⁷ 481 U.S. 278 (1987).

²⁶⁸ For example, *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992), requiring actual harm to state a claim under the Endangered Species Act.

²⁶⁹ Levin, *Men in Black*, 98.

²⁷⁰ Horwitz, *The Transformation of American Law*, 189.

Amendment is not about race at all—it is, in fact, anti-race. And this appears to be the view of the Court’s two most conservative justices, Scalia and Thomas, in such important Civil Rights cases as *City of Richmond v. Croson* (rejecting rules that required hiring of minority-owned contracting firms)²⁷¹, *Missouri v. Jenkins*, (rejecting a salary equity plan based on public school disparities)²⁷² and *Adarand v. Peña* (requiring an extremely high standard for any governmental consideration of race in public policy).²⁷³ Here we find continual argument that *any* consideration of race is pernicious, threatening “to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred.”²⁷⁴ As one observer writes, “*Adarand* basically overruled the race-consciousness of *Swann*,”²⁷⁵ the 1971 case that was one of the most important busing-plan desegregation decisions. *Jenkins* included an opinion by Justice Thomas notable for its implicit reliance upon Harlan’s *Plessy* dissent. “Segregation was not unconstitutional because it might have caused psychological feelings of inferiority,” Thomas wrote, implicating Clarke’s sociological research and Warren’s footnote eleven. “Public school systems that separated blacks and provided them with superior educational resources—making blacks ‘feel’ superior to whites sent to lesser schools—would violate the Fourteenth Amendment, whether or not the white students felt stigmatized.”²⁷⁶ This is Bork’s argument, as we have seen.

²⁷¹ 488 U.S. 469 (1989).

²⁷² 495 U.S. 33 (1990).

²⁷³ 515 U.S. 200 (1995).

²⁷⁴ 515 U.S. 200, 239.

²⁷⁵ Snyder, “How the Conservatives Canonized *Brown*,” 486, citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

²⁷⁶ 495 U.S. 33, 121.

As liberal law professor—and not infrequent Federalist Society panelist—Jamin Raskin writes, “conservatives gathered excitedly around the mantra of ‘color blindness’, a magical turn of phrase that justified not only the dismantling of affirmative action programs...but judicial disengagement from the project of active school desegregation.”²⁷⁷ Another magical turn of phrase comes, of course, from Martin Luther King Jr.’s famed “I Have a Dream” speech, which has similarly entered the canon of Civil Rights discourse. King’s vision of an America where people are not “judged by the color of their skin but by the content of their character”²⁷⁸ has been smoothly integrated into the conservative rhetoric of colorblindness. The leading proponents of this reading of King make their arguments from the podium of the conservative think tanks, none more so than former Secretary of Education William J. Bennett. Bennett’s co-opting of King’s rhetoric must be regarded as masterful, whether or not one agrees with liberals who see it as illegitimate.

“Well, Dr. King, we’re not going to make it with your children, maybe your grandchildren maybe your great-grandchildren,” he said at a 1993 Heritage Foundation panel discussion on “The Conservative Virtues of Dr. Martin Luther King.”²⁷⁹ “We are further away from being colorblind today than we were when Dr. King [gave his “I Have a Dream” speech], because race-norming, counting by race, reverse discrimination, racial identification,

²⁷⁷ Raskin, *Overruling Democracy*, 86.

²⁷⁸ The text of the speech is available at <http://www.americanrhetoric.com/speeches/Ihaveadream.htm> (accessed April 15, 2007).

²⁷⁹ William J. Bennett, “The Conservative Virtues of Dr. Martin Luther King,” Heritage Foundation Lecture #481 (Washington, D.C., Nov. 5, 1993), <http://www.heritage.org/Research/AmericanFoundingandHistory/HL481.cfm> (accessed April 15, 2007).

talking about oneself and one identity in terms of race is much more popular and much more a part of the intellectual and political mainstream than it ever was.”²⁸⁰

Some liberal Republicans feel that conservatives on and off the bench have taken this argument too far; it is worth pointing out that the recent chairman of the Senate Judiciary Committee, Arlen Specter of Pennsylvania, voted against both Robert Bork in 1986 and William Bradford Reynolds the year before, in his nomination for a higher post in the Department of Justice. “Not every decision influenced by race is equally objectionable,” Justice Sandra Day O’Connor wrote in one of the recent college admission Affirmative Action cases.²⁸¹ Another prominent Republican woman, former New Jersey Governor Christine Todd Whitman, is more direct. “Republicans do not know how to think racially,” she wrote in her memoir.²⁸² In Whitman’s analysis, the conservatives’ “Southern Strategy” of appealing to anti-Civil Rights constituencies is directly to blame. “As the Republicans have solidified their base in the South, they have also solidified the resentment of African Americans nationwide.”²⁸³

But Christy Whitman is not to be found on the rosters of the Heritage Foundation’s policy fellows, and hers is a distinctly minority position in the conservative Civil Rights discourse. The more common refrain is that “The Fourteenth Amendment prohibits all state discrimination on race, without exception”; Alan Bakke lost his case “because over the years the Supreme Court has taken the clear language of the Fourteenth Amendment and twisted it

²⁸⁰ Another consistent advocate for the conservative reading of King is Matthew Spalding, Director of the Heritage Foundation’s Simon Center for America Studies. A good example of his argument is his Jan. 20, 2003 *National Review* column, “Kings Conservative Mind.” <http://www.nationalreview.com/comment/comment-spalding012102.shtml> (accessed April 15, 2007).

²⁸¹ *Grutter v. Bollinger* 539 U.S. 306, 327 (2003).

²⁸² Whitman, *It’s My Party Too*, 115-118.

²⁸³ Whitman, *It’s My Party Too*, 109.

into a pretzel.”²⁸⁴ This conservative attack is shared not only by legal observers but by literary critics as well, sometimes connecting up Stanley Fish and critical theory with what they believe to be unjustifiable readings of Constitutional text. Writing for a different audience with much the same theme, English professor R.V. Young declares that “the postmodernist has abandoned even the pretense of straightening things out and is committed to nothing but twistedness.”²⁸⁵ He then immediately shifts into a discussion of *Roe*. “The factor linking *Roe v. Wade* to contemporary literary theory is that the actual words of a text, *as well as the truth represented by the text*, are simply irrelevant in the face of political zealotry.”²⁸⁶ The emphasis is mine here, meant to highlight the importance, in the conservative mind, of the linkage between texts and truth, and interpretation and politics (and zeal). While privacy and *Roe* are another matter altogether, I think it is important to respond to these conservative critics that “colorblind” is not a term one can find in the text of the Constitution.²⁸⁷ It is a term drawn from Constitutional *interpretation*, and from a dissent, at that. On this matter the conservative argument is wide open to critique.

It bears noting at the conclusion of this discussion that another historical narrative is always possible; such is the nature of history—there’s a lot of it to go around. Just as Jefferson Powell has shown that Meese’s account of the Founding period is fraught with

²⁸⁴ Levin, *Men in Black*, 91.

²⁸⁵ Young, *At War with the Word*, 119.

²⁸⁶ Young, *At War with the Word*, 133.

²⁸⁷ The Heritage Foundation’s *Guide to the Constitution* legitimates an unusually expansive originalist reading of Equal Protection “under the broader principle enacted by the framers—their jurisprudence of equality linking the Declaration of Independence to the Constitution.” Edwin Meese III, David Forte, and Matthew Spalding, eds., *The Heritage Guide to the Constitution* (Washington: Regnery, 2005), 400-401. Legal Scholar Ralph A. Rossum offers a relevant comment in *Antonin Scalia’s Jurisprudence: Text and Tradition* (Lawrence, Kansas: University of Kansas, 2006), 37: “Scalia’s critics also wonder how someone who argues, as he does, that ‘[i]n textual interpretation, context is everything’ could fail to consider the Declaration of Independence and its theory of democracy in constitutional context” (quoting Scalia, *A Matter of Interpretation*).

historical flaws, Cass Sunstein argues that it is possible to understand the creation of the post-Civil War Freedmen's Bureau as direct evidence against the conservative anti-Affirmative Action argument. Although "forty acres and a mule" has become a cliché, the point is a clear one: Following the Civil War, it sure seemed as though Congress intended to provide direct and *affirmative* support to the formerly enslaved population.²⁸⁸ Sunstein's history may indeed be a better one, but it has not been effectively articulated.

The End of Civil Rights?

The conservative narrative of equality and the Civil Rights movement is one of fulfillment by Meese and his cavaliers—and a tale of elitist exploitation by unscrupulous liberals. The end product for the law and for the broader public dialog is ambiguous and confusing, and likely to be complicated by future rulings by the Roberts Court on Affirmative Action related issues.

But in one sense, we have seen a full-fledged return to *Plessy*—not, I would argue, in some cheap racist sense, but in terms of the colorblind standard of Harlan's dissent and the "self-inflicted psychology" rationale nested deep in the majority opinion. In 1896 the Court held that any harms produced by segregation were the result of a willful self-perception, a "construction" that "the colored race chooses."²⁸⁹ This is the second half of the modern conservative view, holding that the Civil Rights era is *over*. The perpetuation of Civil Rights litigation and political contestation is at best misguided, at worst a fraud. "Memories of aggressive discrimination and oppression do not fade so quickly," writes Robert Bork. "But

²⁸⁸ Cass Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (New York: Basic Books, 2005), 131-142.

²⁸⁹ 163 U.S. 537, 551.

in another way, the intensely unsatisfactory state of race relations is a mystery. The opportunities for blacks to advance in the United States have never been greater.”²⁹⁰

And what is to blame for this mysterious disquiet, this continued agitation? Liberalism, of course, and its faith in the possibility of absolute equality. And so at AEI we find anti-egalitarian messenger par excellence, Charles Murray, co-author of the much-maligned *Bell Curve*.²⁹¹ In an AEI speech in 1994, he could not have been more clear: “That people *are* unequal is not in doubt, now as ever before...but we have been deeply indoctrinated throughout the twentieth century that they shouldn’t be.” Ultimately, ideology is to blame, and equality is just one more ideological formation. “The perversions of the egalitarian ideal.” Murray reminds us, “began with the French Revolution.”²⁹² Revolution and ideology. As with Meese, Murray plays the realist card: we’re not trying to promote some ideology, those other folks are. We’re not ideologues, we’re telling you the way it *really* is. Just the facts.

When it comes to current legal doctrine we are left with the complexity of *Grutter*, the Michigan University Affirmative Action case: It “transforms the diversity rationale in the course of adopting it, expanding the concept of diversity so that it explicitly embraces antisubordination values,” but is in the final analysis contradictory.²⁹³ “*Grutter* fervently warns against interpreting the Equal Protection Clause in terms of the very values the decision in fact vindicates,” writes Reva Siegel. “Protestations to the contrary

²⁹⁰ Bork, *Slouching Towards Gomorrah*, 228-229.

²⁹¹ Charles Murray and Richard Herrnstein, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: Free Press, 1994).

²⁹² Charles Murray, “The Ideal of Equality, the Reality of Difference” (AEI Bradley Lecture, Washington, D.C., April 11, 1994). http://www.aei.org/publications/filter.all.pubID.18987/pub_detail.asp (accessed April 15, 2007).

²⁹³ Siegel, “Equality Talk,” 1538.

notwithstanding, *Grutter* embodies an antistatutory understanding.”²⁹⁴ All this may change before this book goes to press, of course. The wheels of justice may or may not turn so slowly.

As the law moves further away from *Brown*’s ideals of antistatutory, conservative think tanks marshal their research and media power to push the public discourse further away from racism as a cause of social ills. Witness Heritage’s 2002 project countering a high-profile report on racial disparities in health care, “Is Racism the Real Culprit?”²⁹⁵ The final report concludes that “race *per se* is not a factor in producing child poverty,” and that “the major underlying factors producing child poverty in the United States are welfare dependence and single parenthood.”²⁹⁶ Thus is equality deracialized, the social problem at issue wholly reframed in terms of a favored conservative narrative, the breakdown of the nuclear family.

Through the arguments of conservatives in courtrooms, think tanks, and in the media, *Brown* has become a trope, its ideal of equality through racial integration rearticulated both legally and culturally through the lens of *Plessy*—both Harlan’s dissent and the majority opinion. “Thirty years ago, affirmative action may have been a necessary step,” writes Dana White, a syndicated columnist and Heritage Foundation associate. But today, “It’s a new day

²⁹⁴ Siegel, “Equality Talk,” 1540.

²⁹⁵ <http://www.heritage.org/Press/Events/ev092402b.cfm> (accessed April 15, 2007).

²⁹⁶ Robert Rector, Kirk A. Johnson, and Patrick F. Fagan, “Understanding Differences in Black and White Child Poverty Rates: A Report of the Heritage Center for Data Analysis” (Washington: Heritage Foundation, 2001), 1.

in America.”²⁹⁷ “Too many blacks do remain oppressed,” she writes, “but not by white Americans. Rather, it is by blacks who relish a perverse sub-culture of low standards and perpetual victimization. No longer do white racists tell black children books are for white people. *Today, black people do this.*”

In other words, the majority opinion in *Plessy* might have been wrong in 1896, but—at least in this sense, and to this conservative—it is right today. “Black leaders have done in 40 years what white people could not do in 400,” she concludes, “they’ve made us accept inferior status.” Or as Civil Rights Commissioner Peter Kirsanow said in a Heritage Foundation lecture in 2002, “the continued advancement of the condition of minorities in this country no longer has much to do with traditional civil rights,” it has to do with “individual responsibility—and that is a function of attitude.”²⁹⁸ For hard-core activists like Kirsanow and White, the path from a Burkean, philosophical rejection of equality leads to a staunch anti-Affirmative Action position. The ambiguity of the concept, for them, produces a wholly unambiguous policy result.

In the next chapter we consider how Justice Antonin Scalia, a tough opponent of Affirmative Action, has laid out a judicial method grounded in text but also cognizant of intention (like Meese) and tradition.

²⁹⁷ Dana White, “Who Says I’m Inferior?” (Washington, D.C.: Heritage Foundation, June 27, 2003). <http://www.heritage.org/Press/Commentary/ed062703d.cfm> (accessed April 15, 2007). White is Director of Heritage’s Washington Roundtable for the Asia-Pacific Press, “the largest organization of Asian journalists outside of Asia.” Her positioning at Heritage is exemplary of my thesis in this paper. According to her Heritage biography, she has Capitol Hill experience, and, “in addition to her regular appearances on PBS’ *To the Contrary*, she has appeared on BET’s *Nightly News* and NPR’s *Tavis Smiley Show* and been quoted by *The Washington Post*, *The Washington Times*, *Gannett News* and the *Detroit News*. White joined Heritage after working at the Fox News Channel, where she served as publicist for *Fox News*.”

²⁹⁸ Peter Kirsanow, “Civil Rights and Wrongs: A New Agenda for a New Era” (Washington, D.C.: Heritage Foundation, Feb. 7, 2002), 5. <http://www.heritage.org/Research/LegalIssues/HL731.cfm> (accessed April 15, 2007).

CHAPTER 6

ANTONIN SCALIA'S TEXTS AND TRADITIONS

Textualism and Originalism: The Problem of Intent

The originalist views laid out by Meese in the early 1980s found their first major proponent on the Supreme Court in Antonin Scalia, nominated by President Ronald Reagan in 1986. The first faculty sponsor of the Federalist Society had come a long way since his days as a young faculty member at the University of Chicago. He would be the first serious legal conservative to put his ideas into action on the high court—the ultimate arbiter of Constitutional law in the United States.

Meese's cultural conservatism and American exceptionalism were tied to his ideas about judicial interpretation, his veneration for the Founders informing his emphasis on their intent as authors of the Constitution. As a practical tool for lawyering work, asking what was on the minds of 18th century politicians is of rather limited value; most law is far more mundane—reviewing intricate statutory schemes; evaluating compliance with federal regulations; deciding on the enforceability of contracts, wills, deeds, trademarks, and so on. It is the odd case that presents a truly meaningful question of Constitutional law. But it is the odd case that affects us all, because the Constitution affects us all.

As expressed by Meese and others, originalism as a mode of interpretation had as one of its core tenets the notion of the bounded text, the “four corners” approach which limited the judge's field of vision. Meese's rhetoric focused less on this idea, though, than it did on

the importance of remaining true to the Framers' original intentions and what he viewed as the timeless principles they wrote into law. Meese, and Scalia, are engaged in deeply rhetorical arguments about ways of reading and interpreting—less attached to policy results like Affirmative Action as considered in the previous chapter. This is not to say that the theories of Meese or Scalia do not implicate social outcomes. Surely they do. But in this chapter, again, I will be reading and interpreting arguments about ways of reading and interpreting.

As we have seen, Meese framed his “originalism” in terms of not allowing “judge-made law” to trump the “fundamental law” of the Constitution—a heretical act and an affront to those timeless principles. Meese’s public arguments, and the responses they drew from people like Justice Brennan, were focused on a truly conservative view: we need to get back to the ways things were meant to be before the metaphorical fall from grace, before the Warren Court began fundamentally altering the ways judges perform their jobs and usurping the legislative power. As we will see in the next chapter, Professor Richard Epstein pushes this golden yardstick another generation backwards, to the New Deal court under Franklin Roosevelt, which upheld his revolutionary programs like Social Security by offering expansive readings of certain key segments of Constitutional text.

In the originalist worldview, part of the danger in allowing judges to “go outside” of the text is that context is by its nature boundless. This is why rhetoric matters for the judge, as it matters for any plaintiff and any defendant: no one arrives before a court *unless they disagree about what really happened*. Every single court proceeding involves at least two versions of a story—whether it is a story of a broken contract, an abusive spouse, an illegal FBI wiretap, or a president encroaching upon the powers of Congress. The judge (or jury)

must weigh these competing versions of what happened against some legal standard, usually taking the form of a text. For conservatives, the murky world of advocacy and litigation, with all of its doubt and indeterminacy must remain separate from the objective process of legal judgment. To let the judge depart from the four corners of the text and its (original) meaning is to unleash another unreliable, subjective participant into the melee. This is why a specific legal formulation, known as the “totality of the circumstances test,”³²⁷ strikes horror into the hearts of conservatives—it seems to *require* judges to go outside of the “four corners.” Textualism keeps the judge in his place, or so the theory goes, protecting the fairness of the adversarial system and maintaining the balance of power between the three branches of government.

Textualism emerged during the 1980s as an outgrowth of Meese’s originalism and Bork’s earlier writings on the role of the courts, which centered on the need for judicial “objectivity” in the face of Warren Court-style “activism.” In constructing this opposition, Bork established the dominant frame in the modern debate over Constitutional law and judicial interpretation.³²⁸ As these ideas evolved—and it should be stressed much of the evolution unfolded within the forum of the Federalist Society—textualism moved beyond originalism’s concern with history and began focusing specifically on the importance of the separation of powers. To keep judges from “legislating from the bench,” as the now-commonplace phrase goes, they should be strictly required to work only with the text. After all, that’s all the legislative branch has given them to work with, and it is the legislative branch’s task to...legislate. The conservatives’ answer to the obvious next question—“what

³²⁷ *United States v. Cortez* 449 U.S. 411, 417 (1981).

³²⁸ See generally Ernest A. Young, “Judicial Activism and Conservative Politics,” *University of Colorado Law Review* 73 (2002): 1139-1216.

do you mean by ‘don’t legislate?’” is relentlessly formalist. The text, “the narrow, deadening text,” as Scalia has written.³²⁹ As Meese said of the Constitution: It starts with “We the People” and ends a fixed number of words later.

In a speech delivered a couple of years into his tenure on the Supreme Court, Scalia described originalism as “the lesser evil,” an alternative to the dreaded “subjectivism” that results when judges substituting their own purposes for those of the Constitution’s authors.³³⁰ Still—and Scalia acknowledges this—even if we stay “inside” the text we have to figure out what the text means. Just saying “start with We the People...” does not produce meaning. And while contemporary originalists and textualists, Scalia included, seek solace in the pages of Merriam-Webster, even then we find multiple definitions; the dictionary does not always make the judges’ job a matter of rote comparison. In a dissent that wonderfully illustrates the invariable contextualism of language, Scalia wrote, “When you ask someone if they ‘use a cane’, you are not inquiring whether he has hung his grandfather’s antique cane in the hallway as a decoration.”³³¹ The language itself (“to use,” a verb) does not alone tell us everything. We need context. As Scalia would say, we need to know the intent motivating the use.

Scalia chose this example because it parallels an actual case that came before the high court in 1993, involving a law making it a crime to “use a gun” in conjunction with an illegal drug transaction. In the case before the court, a man had handed over his semiautomatic weapon in exchange for drugs and was nabbed by undercover FBI agents. He did not shoot

³²⁹ Scalia, *A Matter of Interpretation*, 21.

³³⁰ Antonin Scalia, “Originalism: The Lesser Evil,” *University of Cincinnati Law Review* 57 (1989): 849-865.

³³¹ Scalia, *A Matter of Interpretation*, 24, citing *Smith v. United States* 508 U.S. 223 (1993).

anyone. He was bartering with a valuable firearm, and a majority on the Supreme Court said he was “using” a gun. Scalia dissented. For him, the defendant’s use of the gun (barter) was obviously not the meaning intended by the law’s authors, or the meaning an average person would understand the law to suggest (shooting at someone). The fact that the penalty was a provision of a law regulating drug trafficking provided all the context he needed. Textualism to the rescue.

As Constitutional law professor John Harrison has argued, originalism has evolved into textualism—intent still matters, but the primary focus of conservative theories of interpretation have moved away from *intent* as a motivating theme.³³² Looking at the scholarly literature and the titles of debates held by the Federalist Society one sees the “intent” in “original intent” replaced with “understanding” as in “original understanding.” Thus a judge considering whether a prisoner’s claim of torture violating his Eighth Amendment right against cruel and unusual punishment would inquire into the original *understanding* of that phrase was when adopted, not the original intent of its authors. Critics point out that while attractive on a superficial level, there’s nothing that necessarily makes the search for understanding easier than the search for intention. After all, what makes ordinary meaning ordinary other than some judge-as-linguist saying so?³³³

Intent has always been a problem in the world of rhetoric and criticism whether in the consideration of legal texts, works of literature and art (does it matter what Picasso *thought* he was painting?) and even music (what did Beethoven, or the Sex Pistols, *want* us to hear

³³² John Harrison, “Forms of Originalism and the Study of History,” *Harvard Journal of Law and Public Policy* 26 (2003): 83-94.

³³³ Lawrence Solan, “The New Textualists New Text,” *Loyola of Los Angeles Law Review* 38 (2005), 2027-2062.

and feel?)³³⁴ Rhetorical critics W.K. Wimsatt and Monroe Beardsley coined the term “intentional fallacy” in a seminal 1954 article that dealt mostly with the interpretation of poetry—though it is entirely relevant to Scalia’s legal textualism.³³⁵ For Wimsatt and Beardsley, trying to get at intent was flawed in both theory and practice, requiring critics—or readers or listeners or judges, for that matter—to “consult the oracle” and divine something essentially unknowable: the contents of someone else’s mind. As we have seen, Meese ran into exactly these same kinds of criticisms during the 1980s; not only was he trying to look into somebody’s mind—he was trying to look into the minds of people who had been dead for 200 years.

The move toward textualism as the dominant conservative legal methodology has decidedly tackled the problem of the intentional fallacy, but it has by no means eliminated originalism and the historical/mythical veneration of the Founders. Contemporary conservative talk is, by all means, still replete with talk of original intent and The Founders—very much a reflection of Meese’s success in penetrating the popular discourse.

But compared to Meese’s keen formulation, linking national pride and judicial integrity, “textualism” just doesn’t have quite the same ring to it. Its overtones are decidedly more academic and it may never become catchphrase like strict constructionism or original intent. Conservative scholars, often operating within the forum of the Federalist Society, have been working to harmonize the competing versions of interpretive theories—as has

³³⁴ For a wonderfully creative take on the problem of intentionality and textualism in music see Daniel Barenboim and Edward M. Said, *Parallels and Paradoxes: Explorations in Music and Society* (New York: Pantheon, 2002). Barenboim argues that a musical text (e.g. the score of Beethoven’s Fifth Symphony) should not be considered the measure of fidelity in performance; the Fifth Symphony *is not* the score—the Fifth Symphony *is* the sound produced in performance. The example might get even more complicated in considering a later symphony composed when the author was deaf; his ability to hear performance was eliminated, and the score becomes then even less of an embodiment of his intended sonic experience.

³³⁵ In W.K. Wimsatt, Jr., and Monroe C. Beardsley, *The Verbal Icon: Studies in the Meaning of Poetry* (Lexington: University of Kentucky Press, 1954).

Justice Scalia on the Court. One noteworthy figure in this intellectual movement is conservative political scientist Keith Whittington, who advances a theory oddly similar to liberal Stanley Fish's ideas introduced in Chapter One: that intent is *embedded* in texts; that the distinction between text and intent is an artificial one.³³⁶ In other words: no intent, no text. Someone, at some point in time, intended to write something—a law, a poem, a symphony. Discerning textual meaning always already implicates a search for intent—as Fish said, “If you are not trying to determine intention, you are not interpreting.”³³⁷

Scalia's Textualism

Judge Rader of the D.C. Circuit told me about a conversation he had with Scalia in 2006. ““So, it's been twenty years. How do you feel?”” Rader asked. “He said, with some chagrin, ‘Disappointed. I had hoped to preside over a great revolution in legal philosophy and thought, and it hasn't happened. And I can now see that it's not likely to happen in my tenure. So I'm disappointed’.” Rader quickly suggested this might be a rather modest assessment. “That the great revolution of Meese and Reagan and Scalia and Rehnquist and others—that these thinkers had hoped to bring to pass, really hasn't,” he said. “So that's one angle on it...Nonetheless, every single one of my colleagues will tell you that they are more influenced by statutory language and less enamored of legislative history and the like than they were in the past. And so yes, I think it's had a bigger effect that Nino perceives.”

Though he may not feel he helped to accomplish the great revolution in jurisprudence that seemed possible when he was appointed to the Court in 1986, Scalia and his acolytes

³³⁶ Whittington, *Constitutional Interpretation*, 6, 59 (the text as itself a “symbol of intent” where “meaning” is “embedded in the language itself”), 99-102.

³³⁷ Fish, “There Is No Textualist Position,” 643.

have made a mark when it comes to textualism.³³⁸ In particular, legal terms, this has meant the exclusion of extratextual materials from legal argument—in particular, the “legislative histories” of laws passed by Congress and the state legislatures. At times, Scalia’s textualist influence has also meant that consideration of social context was excluded—or at least had to be justified by reference to the text itself.

In the glory days of the Warren Court, social context seemed at times to be the starting point and the ending point for legal analysis—think of *Brown v. Board* with its discussion of the socializing effects on Black children in segregated schools. Things have changed. Following Scalia, the norm in legal reasoning and analysis is increasingly to *start* with the text and to move from there to context—whether that means, for a conservative, consulting sources related to original meanings; or as a liberal, bringing in data on the social effects of one reading of a law versus another. “We differ in the degrees in which we depart from the text—some people go to intent—but nobody skips over it,” said Judge Alex Kozinsky of the Ninth Circuit. “There is a discipline that’s been imposed by originalist and textualist thinkers.”

In the continuing debates over affirmative action, for example, one finds both conservatives and liberals beginning their arguments with the texts of the Fourteenth Amendment, which prohibits discrimination on the basis of race. Conservatives argue that this prohibition is textually clear on its face—equal protection means equal protection, regardless of whether the person being discriminated against is Black or not. Although liberals appealed to contextual arguments about the value of diversity as such (drawing on the 1978 *Bakke* decision) they also countered by appealing to original intent, attempting to

³³⁸ See, e.g., Solan, “The New Textualists New Text.”

show that the drafters of the Civil War amendments clearly intended the antidiscrimination provisions to apply to Blacks only. The arguments made by the two sides in the 2004 cases challenging the University of Michigan’s admissions policy find the liberal defenders of affirmative action talking and arguing very much on textualist and originalist terms. Social context no longer means as much in the courtroom—but at least Scalian textualism doesn’t ignore the relationality of one part of text to another, and the relation of the various clauses of the Fourteenth Amendment have become so important to modern Constitutional law that the precedent cases usually take up several chapters in most law school textbooks.

Lawrence Solan, director of Brooklyn Law School’s Center for the Study of Law, Language, and Cognition, notes that Scalia’s approach “incorporates a context-sensitive perspective on word meaning that helps blunt the bite of reducing the universe of evidence permitted in the interpretive process.”³³⁹ Context matters, but only within the world of the text itself, “embedded” there. Even if one wants to consider such immaterial concepts as ideology, under the textualist method one must seek it *in the text*. Within the confines of the judicial opinion, text and context are irrevocably intertwined, the product of an author’s readings of other texts—including precedents and the controversy before his or her court. As we will see, for Scalia, tradition comes into play here as well.

“Textualism seems to have been so successful—indeed, far more successful than its defenders or detractors care to admit” writes Constitutional law professor Jonathan Molot, “that we are all textualists in an important sense.” Molot cites a body of empirical research

³³⁹ Solan, “The New Textualists New Text,” 2030.

that has shown the shift toward textualism, measuring references in court opinions.³⁴⁰ For conservatives, one might say that this is a victory as big as the defeat decades earlier when Republican president Richard Nixon declared “we’re all Keynesians now.” Movement conservatives reacted with outrage at hearing one of their own seemingly capitulate to Keynesian economics, given their view that its theories ultimately stood for socialistic, completely planned societies where wealth was redistributed and individualism was lost.³⁴¹ But whereas Nixon’s position spurred the Reaganite conservatives to action (and victory), contemporary liberals have accepted the dawn of the textualist era with little or no resistance to speak of. We’re all textualists now, it seems.

Jeffrey Clark, the longtime Federalist and partner at Kirkland and Ellis, also teaches at George Mason University—a law school building its reputation by attracting top-shelf conservative scholars and teachers. When discussing the textualist shift with his students Clark uses two examples drawn from the opinions of the great liberal jurist Thurgood Marshall. In a 1971 opinion for the Court, Marshall essentially took the point of view that legislative history is the starting point for determining meaning, with the text itself an outcome of this process and therefore secondary. In this particular case legislative history was ambiguous, and Marshall reasoned that “because of this ambiguity it is clear that we must look primarily to the statutes themselves.”³⁴² “Fast-forward to the mid-eighties, when Scalia’s influence on the Court has begun to take hold,” Clark says, and we find Marshall singing a different tune. “It is well settled that the starting point for interpreting a statute is the language of the statute itself,” Marshall wrote in a 1987 majority opinion for the Court.

³⁴⁰ Jonathan Molot, “The Rise and Fall of Textualism” *Columbia Law Review* 106 (2006): 32-33, 43.

³⁴¹ Hayward, *The Age of Reagan*, 258, 261-262.

³⁴² *Citizens to Preserve Overton Park v. Volpe* 401 U.S. 402, 412 n29 (1971).

Scalia signed on.³⁴³ Constitutional scholar Ralph Rossum agrees, and has presented extensive statistical and qualitative evidence³⁴⁴ to show that in his two decades on the bench, Scalia's rejection of legislative history has not been comprehensively revolutionary – but it has “produced dramatic results,”³⁴⁵ and “major change.”³⁴⁶

“There's a common understanding that you have to acknowledge a text, though you might depart from it,” Judge Kozinsky told me. “There's been a huge change, a fundamental change in the way people view the process of interpretation.” Solan argues that Scalia's textualism, “so influential in American jurisprudence, is a departure from the legal tradition”—and thus provides us with a segue to our next topic, Scalia's simultaneous effort to read a thoroughly contextual factor into the law: tradition.

Tradition and Text

Over the past 15 years Scalia has advanced a new reading of “tradition” as a definitive factor in the adjudication of Constitutional law claims in a wide range of areas. Aside from the potentially vast implications this practice holds for the Court's jurisprudence, tradition-as-precedent represents a significant effort on the part of conservatives to declaim a particular vision of American identity and history. It also exists in dramatic tension with the notion of a bounded text, whose meaning is to be found only within its “four corners.” It is a theoretical jump to assert, as some thoughtful conservatives (and liberals) do, that intent is

³⁴³ *Gwaltney of Smithfield v. Chesapeake Bay Foundation* 484 U.S. 49, 56 (1987). Scalia also wrote a concurring opinion treating some issues beyond those considered by Marshall.

³⁴⁴ Rossum, *Antonin Scalia's Jurisprudence*, 198-208.

³⁴⁵ Rossum, *Antonin Scalia's Jurisprudence*, 43.

³⁴⁶ Rossum, *Antonin Scalia's Jurisprudence*, 198.

“embedded” in a text, but traditions certainly are not. Texts may refer to traditions, but for the textualist this is a jump into social context he is usually not prepared to make.

What could be more social than a tradition? What, indeed, could be *less* textual in its nature? (Or legal?) Traditions tend to be grounded in practice and ritual, are often untraceable in their origins and incomprehensible to those not in the know. They may be widely shared and semi-official (turkey on Thanksgiving) or obscure and limited to a tiny community (gags left over from your college days). As Tevye tells us in one of the many memorable lines from *Fiddler on the Roof*, asking (rhetorically) where the Jewish tradition of wearing prayer shawls comes from: “I can tell you. I don’t know.”³⁴⁷

As we will see, however, Scalia’s textualism leaves ample room for tradition to enter into his deliberative process and his method of interpretation. While claiming to remain rooted in the ideal of judicial objectivity that has been at the core of legal conservatism since Bork’s seminal article on the topic in 1971, Scalia sees no problem in setting up the judge as social critic and protector of tradition. As we shall see, he makes this move by claiming that a static, unchanging Constitution must refer to a changing body of law—for example, he says, the Constitution protects property rights, but does not define them; modern property laws complete the legal picture.³⁴⁸ Tradition is also one of the other things the unchanging Constitution can point to. And the judge, apparently, is entrusted with safeguarding tradition.

By invoking tradition, conservatives also define it—they perform a rhetorical function. We mean rhetorical here in an important sense: the judge as guardian-of-tradition selects *which* traditions are relevant to a given case, and attempts to *persuade* us (and his

³⁴⁷ Opened on Broadway September 22, 1964. Libretto by Joseph Stein, lyrics by Sheldon Harnick.

³⁴⁸ *Georgia v. Randolph* 547 U.S. ____ (2006) (slip opinion), Scalia, J., dissenting.

fellow judges) of that tradition's relevance. This is in a sense no different than the process judges face when deciding which precedent cases apply to a new situation; while their choices at times may seem clearer than at others, a certain amount of creativity is always involved—the same case never appears twice. In the judge's construction of opinions, as with lawyers in the construction of their arguments, the entire enterprise of law is deeply rhetorical, grounded in argument and persuasion—as much as the culture of legal “objectivity” would seem to the contrary. Recall Chief Justice-nominee John Roberts analogizing himself to a referee. “Judges are like umpires,” he told the Senate Judiciary Committee in his confirmation hearing. “Umpires don't make the rules; they apply them.”³⁴⁹ But hang on a second...show me a sports fan, or an athlete, and I'll show you someone who thinks a referee's “objectivity” is a myth (to put it politely). Any baseball player knows that different umpires have different ideas of where the strike zone is—for some it starts at the knees; for some it goes up to the letters; for some it depends on the score of the game or (it often seems) what side of bed they got out of that morning...regardless of what the rulebook says. In a sense probably quite divorced from what he intended, Roberts' analogy was a very good one.

At least with strike zones and legal precedent there are rules, in theory—even if in practice they wind up morphing into a range of variations on a theme. But there is not any unifying theme to a concept as enormously diverse and subjective as “tradition.” There is no guarantee judges will agree about what the relevant tradition is—indeed, the same arguments textualists usually make about allowing judges “free rein” to write their own opinions and

³⁴⁹ Roberts confirmation hearing, Senate Judiciary Committee, September 12, 2005. Transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html> (accessed April 15, 2007).

values into law would seem to apply here; you've got your tradition, I've got mine. And besides that, one can certainly think of more than a few despicable social practices once defended as "traditional."

As we will see later, these very problems were borne out in the extremely controversial 2003 case striking down a Texas law banning homosexual sodomy. The case became a flashpoint for conservatives, who were also engaged in a battle to enact a Constitutional amendment defining marriage as existing exclusively between a man and a woman. Scalia dissented, saying he would have followed an earlier 1986 case upholding bans on homosexual sodomy because of the long tradition of such laws and their relationship to traditional marriage structures. The majority opinion by Justice Kennedy (a Catholic Republican, it's worth noting) essentially said to Scalia and the conservative dissenters: You've got your tradition (bans on homosexual activity) and we've got ours (a tradition of expanding freedoms and liberties). Kennedy just moved the level of generality up a couple of notches and presto, his tradition becomes the deciding factor. The problems with doing law this way are daunting, and should be instantly clear to any conservative: there's nothing to stop a court from hunting around for some tradition to fit its preconceived ideas, or even inventing one—there's no appendix of recognized traditions at the end of the Constitution. This should be a problem for textualists.

It is worth pausing here to point to the work of two scholars, Sanford Levinson and Thomas Grey, who have made some perceptive and provocative connections between textualism and religious textual interpretation. In his book *Constitutional Faith*, Levinson makes the interesting analogy between conservative textualists and Lutheran Protestants who

made *sola scriptura* their motto—only scripture.³⁵⁰ Rejecting the traditions of the Roman church, which he saw as corrupt in both a worldly and spiritual sense, Luther made the text alone the arbiter of all spiritual inquiry.

Catholics, on the other hand, have always viewed the institutions of the church as part of its doctrine. “Over time,” Grey writes, “this hardened into a firm insistence that tradition did not merely interpret revelation but constituted part of it—the doctrine of ‘the material insufficiency of scripture’.”³⁵¹ Levinson quotes 16th Century Jesuit Cardinal St. Robert Bellarmine, who wrote that “Because scripture is often ‘ambiguous and perplexing’, there are ‘many places in which we shall be unable to reach certainty’ unless the text is supplemented ‘by accepting the traditions of the Church’.”³⁵²

The two most vocal conservatives on the Court, Scalia and Thomas, are both Catholic—and for Scalia, traditionalism seems all the more oddly paired with a *sola scriptura* attitude toward texts. Religion may or may not have anything to do with the Justices’ behavior; Kennedy is a Catholic too, and as we will see, it is he who meets Scalia on the battlefield of tradition and carries the day for what would otherwise be seen as a progressive liberal conception of individual rights.

To some extent, courts have always made reference to tradition, grappling with the balance between text and context in the process of judicial judgment. The bellwether was the 1798 case *Calder v. Bull*, which found two of the era’s most prominent jurists, Samuel Chase and James Iredell facing off on exactly this issue—Iredell’s “marked and settled boundaries”

³⁵⁰ Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1989), 9-53.

³⁵¹ Thomas C. Grey, “The Constitution as Scripture” *Stanford Law Review* 37 (1984): 6.

³⁵² Levinson, *Constitutional Faith*, 19.

of textual interpretation against with Chase’s “natural law” principles that exist independent of the text.³⁵³ The debate has popped and fizzled throughout the nation’s history, with duels emerging in the New Deal era (more on that in the next chapter) and then somewhat later between the thoroughly “Protestant”—maybe even textualist—Hugo Black and the progressive but restrained Felix Frankfurter. Black, for example, famously declared himself a First Amendment fundamentalist because, following the text, “no law” abridging speech means...no law. Period.³⁵⁴ Frankfurter, on the other hand, wrote with words that would surely make Scalia wince that the Constitution is the “most significantly not a document but a stream of history.”³⁵⁵ For our purposes here, though, it is most important to draw attention to the shift in the debate during the post-World War II period with the Warren Court’s expansive reading of a “living” Constitution.³⁵⁶

From *Brown v. Board of Education* to *Roe v. Wade* and, most recently the Texas sodomy case, *Lawrence v. Texas*,³⁵⁷ the opinions of the Supreme Court take on a social meaning far beyond their specifically legal holdings, functioning as touchstones for quintessentially American ideals of freedom, equality, and justice.³⁵⁸ For many social

³⁵³ *Calder v. Bull* 3 U.S. 385, 398 (1798).

³⁵⁴ *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) (“I read ‘no law...abridging’ to mean no law abridging”).

³⁵⁵ Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (Chapel Hill: University of North Carolina Press, 1937), 2.

³⁵⁶ See, e.g., Rebecca Brown, “Tradition and Insight,” *Yale Law Journal* 103 (1993): 211ff, 185, citing several dozen examples dating back to the early 19th century.

³⁵⁷ 539 U.S. 558 (2003).

³⁵⁸ Other scholars have similarly described the process by which U.S. presidents have become, “in a powerful sense, the chief interpreters of collective memory.” The Supreme Court, the nation’s ultimate interpreter of the Constitution, stands in a similar position of “authority and legitimacy”—a key player in the discourse of national social and political identity. Shawn J. Parry-Giles and Trevor Parry-Giles, “Collective Memory, Political Nostalgia, and the Rhetorical Presidency: Bill Clinton’s Commemoration of the March on Washington, August 28, 1998,” *Quarterly Journal of Speech* 86, 4 (2000): 420.

conservatives, though, these decisions are perceived as something else altogether: a betrayal of fundamental jurisprudential principles, “wrongly decided cases” and errors of Constitutional interpretation—but also, importantly, an attempt by “activist judges” to remake society, steering it away from its roots in traditional morality. As Bork has written, this betrayal is about much more than misguided legal theory; it is a specifically moral failure, a giving in to the “temptation” of politics, a realm reserved for the legislatures, not the Courts.

Looking to Tradition

Scalia’s textualist traditionalism first attracted widespread attention in 1990 with his opinion in the child custody case *Michael H. v. Gerald D.*³⁵⁹—declaring that any Constitutional claim grounded in personal liberty *must* be “rooted” in “traditionally protected” “values.”³⁶⁰ The liberal response came most strongly from Harvard Professor Laurence Tribe, who sounded the alarm that “Scalia’s method is designed to overrule virtually all of the Court’s decisions protecting individual rights.”³⁶¹ A debate over the significance of tradition-as-precedent has proceeded apace in the pages of the law reviews, marked by lively and, at times, partisan exchange.³⁶²

³⁵⁹ 491 U.S. 110 (1989).

³⁶⁰ 491 U.S. 110, 122-123. It is important to note that Scalia arrives at this formulation by cobbling together bits and pieces of earlier opinions, in which discussions of “tradition” and “values” appeared in dicta. *Snyder v. Massachusetts* 291 U.S. 97 105 (1934); *Griswold v. Connecticut* 381 U.S. 479, 501 (1965).

³⁶¹ Laurence H. Tribe and Michael Dorf, *On Reading the Constitution* (Cambridge: Harvard University Press, 1991), 109.

³⁶² See, e.g., The Jurisprudence of Justice Antonin Scalia (symposium). *Cardozo Law Review* 12 (June 1991); David Luban, “Legal Traditionalism,” *Stanford Law Review* 43 (1991): 1035-1060; Michael W. McConnell, “The right to Die and the Jurisprudence of Tradition,” *Utah Law Review* 1997 (1997): 665-708; David M. Ziotnick, “Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to his Constitutional

Michael H. was a convoluted case that pitted the ex-husband of a fashion model against her male companion, with both men claiming custody rights to the child fathered by the first husband but cared for by the second. Despite a state law that seemed to apply directly to the matter as well as a seemingly contradictory line of Supreme Court precedent cases, Scalia's opinion denied the claim of the stepfather.³⁶³ He justifies this move because of the "fundamental liberty interest" at stake in the case—the ability of a (biological) father to claim custody of his child. Although "liberty interests" are derived from the Court's enormously expansive Fourteenth Amendment cases, including the 1934 case that provided Scalia the rhetorical opening onto which he would graft his tradition-based textualism: that the Due Process clause of that amendment provides protection only when the matter at stake is "so rooted in tradition and conscience of our people as to be ranked as fundamental."³⁶⁴ The open, indefinite nature of Due Process claims in general—the 1934 precedent sets out only one of many avenues—has (usually) made them a Conservative whipping boy, but for Scalia in this case, it provides a perfect opening. Scalia's argument, which takes off from this case law, is decidedly not grounded in the Constitution, the California Code (which seems to say otherwise), or any other legal text. It is grounded in tradition.³⁶⁵ Here is how Scalia describes the burden on Michael, the stepfather:

Methodology," *Emory Law Journal* 48 (1999):1377-1429. A Lexis-Nexis search for "Scalia <and> traditionalism" returns 240 hits, and that's just within law reviews.

³⁶³ Edward Gary Spitko, "A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication," *Duke Law Journal* 1990 (1990): 1340, 1354-1355. It should be noted that the California law did require paperwork to be filed prior to contesting parentage claims. It was not, thus making evidence such as blood tests technically irrelevant.

³⁶⁴ 291 U.S. 97.

³⁶⁵ See generally Charles E. Browne, "The Ninth Amendment and Fundamental Liberty Interests," *Perspectives on Law and Contemporary Culture* 1 (2005): 1-70. Scalia's own professed "originalism" would seem to mitigate against his writing "tradition" into the text of the Fourteenth Amendment. As one critic has also argued, "we do not know what the 17th century English jurists who enforced the common law would have

What Michael asserts here is a right to have himself declared the natural father and thereby to obtain parental prerogatives. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them.³⁶⁶

For a textualist this seems an odd way to approach the situation. But no matter. To his credit, Scalia does make two important observations about the invocation of tradition-as-precedent: first, some clarifying methodology is needed if this new test is to be applied, and second, his new tradition-test was hardly the first time history had been invoked by members of the Court.

On the methodological issue, Scalia tells us that when invoking tradition—here, the “deeply rooted” “traditional” right of biological fathers to claim custody of their children, regardless of whether another man has been cohabiting with the biological mother and holding himself out as the child’s father—a judge must focus on “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”³⁶⁷ And under Scalia’s view, a tradition pertaining to fathers in general is less specific to a tradition pertaining to fathers of bastard children,³⁶⁸ why this should be so is never explained—why, for example, a tradition of protecting families, regardless of bloodlines, should be trumped by a more “specific” tradition regarding out-of-wedlock

done if confronted with a blood test showing a 98.07% probability that Michael H. was the father of Victoria.” Spitko, “A Critique of Justice Antonin Scalia’s Approach,” 1352.

³⁶⁶ 491 U.S. 110, 126.

³⁶⁷ 491 U.S. 110, 127 n. 6.

³⁶⁸ 491 U.S. 110, 127 n. 6.

births. To accept Scalia's view is to see the problem as one of the level of generality, a problematic decision left up to the judge.³⁶⁹ And furthermore, why, as Justice William Brennan wrote in dissent, should we be considering traditions—of whatever “level of generality”—rather than the traditional source of precedent, prior court decisions?³⁷⁰ Why should we trust Scalia's pronouncements on tradition? He is not a historian or sociologist; his evidence is scanty and old. “Given the radical changes that have occurred in the law of domestic relations during the last two and a half decades,” wrote one legal scholar, “reference to sources as old as the ones upon which Justice Scalia relies can only be termed specious.”³⁷¹

Some have defended Scalia's traditionalism on (Edmund) Burkean grounds, arguing that we should revere the past for its own sake; honoring traditional practices because we owe a debt to the past.³⁷² Others have suggested simply that the Justice harbors an antipathy toward change: “This is the voice of conservative traditionalism protesting contemporary Enlightenment's penchant for moral revision,” wrote one critic.³⁷³ James Staab, a more sympathetic scholar, wrote a deeply researched book arguing comprehensively that Scalia is neither a Burkean, nor a Madisonian, but a Hamiltonian.³⁷⁴ Staab properly, if rather

³⁶⁹ See Laurence H. Tribe and Michael Dorf, “Levels of Generality in the Definition of Rights,” *University of Chicago Law Review* 57 (1990): 1057-1108; Ronald Turner, “Were Separate-But-Equal and Antimiscegenation Laws Constitutional? Applying Scalian Traditionalism to *Brown* and *Loving*,” *San Diego Law Review* 40 (2003): 331-332; Spitko, “A Critique of Justice Antonin Scalia's Approach,” 1338-1340.

³⁷⁰ 491 U.S. 110, 142.

³⁷¹ L. Benjamin Young, “Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet,” *Virginia Law Review* 78 (1992): 590.

³⁷² See Anthony Kronman, “Precedent and Tradition,” *Yale Law Journal* 99 (1990): 1029-1086.

³⁷³ Luban, “Legal Traditionalism,” 1039.

³⁷⁴ Staab, *The Political Thought of Justice Antonin Scalia*, xxi (Calling Scalia and Burke “fundamentally different thinkers”).

inauspiciously, explains Scalia's assertion of authority on grounds of tradition as a logical methodological move—a way to fill in the blanks when the text is unclear “on its face.”³⁷⁵

I would argue there is something else more sophisticated at work in this move as a matter of rhetorical invention and a mode of persuasion. As Scalia and his allies hoist the banner of tradition they deeply betray their claims to “textualism” or, as Meese would have said, the intent of the Framers. Scalia has always defended his appeals to tradition as a deferential move, a signification of his modest view of the judge's role. Under this view, however, Scalia (or any traditionalist judge) gets to decide not only when the text is “not clear” but also what traditions apply, and what they are.

In *Michael H.* the case revolved around the family structure and its “traditional” definition—and while the opinion does not cite precedent for its conclusion, it *does* cite precedent for its methodology: namely, *Roe v. Wade*, which established a woman's right to abortion, and *Bowers v. Hardwick*,³⁷⁶ which upheld a state law against homosexual sodomy. In justifying his new “deeply rooted tradition” test, Scalia points directly to Blackmun's own opinion for the Court in *Roe*, where “we spent about a fifth of our opinion negating the proposition that there was a longstanding tradition of laws proscribing abortion,”³⁷⁷ as well as the majority opinion in the 1986 homosexual sodomy case, *Bowers* (then still valid law), where the majority concluded, “regarding that very specific aspect of sexual conduct, to

³⁷⁵ Staab, *The Political Thought of Justice Antonin Scalia*, 203-204. See also Rossum, *Antonin Scalia's Jurisprudence*, 28-36.

³⁷⁶ 478 U.S. 186 (1986).

³⁷⁷ 491 U.S. 110, 127 n. 6.

claim that a right to engage in such conduct is deeply rooted in this Nation's history and tradition or implicit in the concept of ordered liberty is, at best, facetious."³⁷⁸

There is a pattern here. *Roe*, *Bowers*, and *Michael H.* all considered traditions relating to intimately personal and familial aspects of our lives, and the extent to which the state may regulate them: Can a woman be denied the right to an abortion because of a vote by her state's legislative body? (When there is no explicit Constitutional abortion provision?) Can a state deny custodial claims by a biological parent when a step-parent has adopted a child in all but name? (When there is no Constitutional explicit parental-rights provision?) Can a state criminalize homosexual sex acts? (When there is no explicit Constitutional sex-acts provision?) These are not unrelated questions—indeed, they are all part of an ideology that has been articulated by postwar American conservatives under the rubric of “family values” and moral traditionalism. They divide popular American opinion, and they also divide the Federalist Society's libertarian and conservative camps. “If you're a real strong believer in the right to life, it's hard to be very active in an organization where they don't take a position [on the issue], and somebody might be a speaker there who is pro-choice, making those arguments,” Federalist Society David McIntosh told me. “But it is these hard choices that challenge your commitment to the ideal.” McIntosh is himself strongly pro-life, and his unsuccessful 1999 campaign for governor of Indiana featured a strong anti-abortion message.

By explicitly calling for tradition to fill in important Constitutional vacuums—which Bork once called the “ink blots” of law—Scalia opens the door to the unbridled judicial activism he supposedly deplores. Indeed, Bork has been sharply critical of Scalia's

³⁷⁸ 491 U.S. 110, 127 n. 6, internal quotation marks omitted.

traditionalism. “History and tradition are very capacious suitcases,” he has written, “and a judge may find a good deal pleasing to himself packed into them, if only because he has packed the bags himself.”³⁷⁹ I think Bork wins on this point, and though he is something of a bogeyman for the left, on this point Bork would make a strategic, and surprising, ally.

Through sheer persistence beginning with his opinion in *Michael H.*, Scalia has taken up the mantle of protector of tradition—a surprising role, perhaps, for someone who normally berates “unelected judges” for offering their philosophizing as antidote to the results of deliberative democracy.³⁸⁰ In a 1998 case finding a certain police practice “shocking,” a dissenting Scalia quipped, “rather than ask whether the police conduct here at issue shocks my unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert.”³⁸¹

For Scalia and his allies, tradition is empirically knowable in a way that philosophy and conscience are not. In the words of conservative law professor and filibustered Bush judicial nominee Michael W. McConnell, “the traditionalist approach...is inductive and experiential.” It is about “historical rather than philosophical inquiry,” leading to decisions “hing[ing] on objective historical fact rather than on normative judgment.”³⁸² Tradition is knowable, empirical, unitary, and concrete,³⁸³ thereby forming a check on “judicial

³⁷⁹ Bork, *The Tempting of America*, 118.

³⁸⁰ Anthony G. Amsterdam and Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Ways We Understand the Law—and Ourselves* (Cambridge: Harvard University Press, 1990), 102-108.

³⁸¹ *County of Sacramento v. Lewis* 523 U.S. 833, 862 (1998).

³⁸² McConnell, “The right to Die,” 670, 672, 697 (“It was through objective history—not his own moral reasoning, and not any analogies drawn from unrelated cases—that [Justice John Marshall] Harlan found conclusive” [in his notable dissent in *Poe v. Ullman*]”).

³⁸³ For McConnell, traditions are largely about “longstanding consensus,” arrived at by “the people” (“The right to Die,” 682-683). Has he solved—or simply denied the validity—of the questions raised by

activism,” a “check against particular states or local jurisdictions whose practices contradict what most Americans would deem to be fundamental rights, but...without licensing courts to second-guess democratic judgments on the basis of their own ideological or philosophical preferences.”³⁸⁴

As is so often the case with political and legal rhetoric, what goes unsaid here is perhaps more important than the text itself: In the words of one legal critic, the problem with Scalia’s tradition-as-precedent is not just the matter of determining *which* tradition to point to when considering the case at hand but the more elemental assumption that there is a tradition “out there” in the first place, “waiting to be identified.”³⁸⁵ And even if traditions exist and are in some way empirically knowable, are they necessarily *national* in their scope? Meese’s arguments notwithstanding, most Americans do believe that the Supreme Court propounds the law of the land. As one legal critic has written, the dilemma inherent in any concept of tradition is “that our traditions are formed by many overlapping communities...the traditions of a geographical, ethnic, religious, or political community will run at cross purposes with the traditions of the larger communities-state and national-in which they are nested.”³⁸⁶ Tradition, under this view, is always traditions—always plural.

Needless to say, Scalia does not get bogged down in such postmodern quandaries. There *are* traditions—only the loony left would question such a basic idea—and they need protecting against the havoc wrecked by liberal judges like the majority on the Massachusetts

Michael McGee in his search for “the people”? Michael McGee, “In Search of the ‘People’: A Rhetorical Alternative,” *Quarterly Journal of Speech* 61 (1975): 235-249.

³⁸⁴ McConnell, “The right to Die,” 681.

³⁸⁵ Robert L. Hayman Jr., “The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism,” *Harvard Civil Rights-Civil Liberties Law Review* 30 (1995): 73; Levinson, *Constitutional Faith*, 35 (“‘Tradition’ is not found floating in the air.”).

³⁸⁶ Brown, “Tradition and Insight,” 205.

Supreme Judicial Court that declared gay marriage to be Constitutional. The tradition test in *Michael H.* is explicitly offered “to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones.”³⁸⁷

For conservatives, the objectivity-relativism dichotomy once again underpins their entire argument, with objectivity the conservative virtue and relativism the fault of sentimentalists liberals. Traditions are identified through “objective” analysis of history. In a recent case, Chief Justice Rehnquist explained that the use of objective history as a measure of tradition is an “approach [that] tends to rein in the subjective elements” of judicial review, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.”³⁸⁸ As for how to measure tradition—that’s not up for discussion. The stakes are too high.

As Bork has written, decades of misguided legal scholarship and the “moral imperialism” of the Warren Court had distorted the judicial landscape in a way that demands radical redress.³⁸⁹ In the landmark case ordering the Virginia Military Institute to allow female cadets into its ranks, Scalia wrote in a scalding dissent:

[I]n my view the function of this Court is to *preserve* our society’s values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national

³⁸⁷ 491 U.S. 110, 122 n. 2.

³⁸⁸ *Washington v. Glucksberg* 521 U.S. 702, 720 (1997).

³⁸⁹ Bork, *The Tempting of America*, 101, 69-100.

traditions that embody the people's understanding of ambiguous constitutional text.³⁹⁰

Coming from the leading proponent of “textualism” and “originalism” who actually works as a judge, this announcement might seem, at the very least, surprising. Is the Court to become a panel of Platonic guardians, providing a counterbalance to the ever-shifting winds of change³⁹¹—in this case, defending “the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government”?³⁹² Or, in the alternative, perhaps the Court should be more methodical in its assessment of tradition—the approach explicated by Scalia in his citations to *Bowers*, when the majority opinion surveyed cultural and legal postures toward homosexual sodomy through the totality of Western civilization. But would this not turn the Court, unelected interpreters of delineated texts, into a committee of social scientists, surveying and analyzing popular opinion and practice? Indeed, when a judge rattles off the statistics on homosexual sodomy statutes as implicit evidence of some form of “tradition,” is he offering up, as one legal critic has written, “Fourteenth Amendment due process jurisprudence made easy?”—jurisprudence as a matter of surveys, polls, and legislative tabulations?³⁹³

There are echoes here: this is precisely the objection raised by conservatives against the methodology employed in cases they see as wrongly reasoned, such as *Brown* and its

³⁹⁰ 518 U.S. 515, 568 (emphasis in original).

³⁹¹ Oddly enough, this is precisely the kind of arrangement envisioned by conservative philosopher Friedrich Hayek in *Law, Legislation, and Liberty, Volume Three: The Political Order of a Free People* (Chicago: University of Chicago Press, 1978), 111-124.

³⁹² 518 U.S. 515, 566.

³⁹³ Young, “Justice Scalia’s History and Tradition,” 592.

reliance on the testimony of child psychologists³⁹⁴ and *Roe v. Wade* with its discussion of evolving social acceptance of abortion.³⁹⁵ In these and other cases, conservatives argue that explorations and judgments about societal impact should be left up to the popularly elected legislatures; courts should act as interpreters of the legal texts they produce, nothing more...except, as we are beginning to see, when it comes to the notion of tradition, an inherently extra-textual source of authority.

In that same VMI case, Scalia had this to add: “Whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.”³⁹⁶ Here he does genuinely begin to approach a Burkean idea of obligation to the past for its own sake, in that command to craft “abstract tests” in a way reflecting past practice; of course his own test, from *Michael H.*, is itself reflective of tradition. As we shall see, Scalia’s view has triumphed almost unconditionally with the 5-4 decision in *Lawrence v. Texas*, despite the fact that he was writing for the dissent, not the majority. The Court in that case overturned *Bowers*, striking down a state law outlawing homosexual sodomy—and the way they went about it was by posing the primacy of one tradition, privacy and personal freedom, over another, rejection of homosexuality. So much for textualism.

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³⁹⁴ 347 U.S. 483, 493-495, 494 n. 11.

³⁹⁵ 410 U.S. 113, 129-147.

³⁹⁶ 518 U.S. 515, 566 (emphasis in original).

In his defense of traditional single-sex military cadet education in the VMI case, Scalia cites as precedent one of his many dissenting opinions, *Rutan v. Republican Party*,³⁹⁷ a 1990 case which found him in the odd position of defending political patronage jobs. The rationale? You guessed it: tradition—in this case, a tradition, “dat[ing] back to the beginning of the republic.”³⁹⁸ Tradition, “the stuff out of which the Court’s principles are to be formed,” is no match for “the personal (and necessarily shifting) philosophical dispositions of a majority of this Court”³⁹⁹; regardless of whether one’s conscience is shocked or not, “the desirability of patronage is a policy question to be decided by the people’s representatives,” not the Court.⁴⁰⁰

The actual Constitutional claim raised in that case—concerning the way a hiring freeze may have penalized state employees for exercising their right to free speech—was not dispositive for Scalia; rather, it was, once again, all about tradition. Because there was no “express prohibition” on patronage in the Constitution, and the practice (political patronage) “bears the endorsement of a long tradition of open, widespread, and unchallenged use... we have no basis for striking it down.”⁴⁰¹ Herein lies a striking jurisprudential challenge—“no basis”—but also, notably, a historical one: namely, that political patronage has *always* been “open, widespread, and unchallenged.” Could that really be so? As one critic has noted, Scalia includes no citation to any sources which might back up this claim.⁴⁰²

³⁹⁷ 497 U.S. 62 (1990).

³⁹⁸ 497 U.S. 62, 95.

³⁹⁹ 497 U.S. 62, 96.

⁴⁰⁰ 497 U.S. 62, 103.

⁴⁰¹ 497 U.S. 62, 95.

⁴⁰² Young, “Justice Scalia’s History and Tradition,” 605.

Justice John Paul Stevens took the opportunity to express his bafflement at Scalia's evolving deeply rooted tradition test, writing in a separate opinion that it would appear to "immunize" any long-standing practice from Constitutional scrutiny.⁴⁰³ His critics on and off the Court seem to sense this, but often get bogged down in disputes over legal doctrine—despite Scalia's admonitions that this is not what he is most concerned with. Like his fellow social conservative Bork, Scalia is concerned with the culture; it is part of what has led to the enduring relationship he has had with the Federalists, for theirs is a cultural project too. "When it appears that the latest 'rule', or 'three-part test', or 'balancing test' devised by the court has placed us on a collision course with a landmark [traditional] practice, it is the former that must be calculated by us, and not the latter that must be abandoned by our citizens," he wrote in the patronage case.⁴⁰⁴ Formalism is out, it seems, when tradition is at stake. Stevens's rebuttal quoted above goes on to make the predictable next move: O.K., but how about those nasty traditions like slavery and segregation? Or, as Bork writes, "History is not binding, and tradition is useful to remind us of the wisdom and folly of the past, not to chain us to either."⁴⁰⁵

The question has been taken up in some detail by law professor Ronald Turner in an article asking whether racial segregation and anti-miscegenation laws would have been found unconstitutional if cases such as *Michael H.* and *Rutan* had been in place as governing precedent at the time.⁴⁰⁶ *Brown* is the inevitable trump card in the broader debate over "originalism" as a methodology—after all, Thomas Jefferson did own slaves; the argument

⁴⁰³ 497 U.S. 62, 80.

⁴⁰⁴ 497 U.S. 62, 96.

⁴⁰⁵ Bork, *The Tempting of America*, 118.

⁴⁰⁶ Turner, "Were Separate-But-Equal and Antimiscegenation Laws Constitutional," *passim*.

over original meanings is off and running from there. Responding to accusations about whether his jurisprudence would have led to a different results in *Brown*, Scalia has countered that segregation was properly held to be unconstitutional, but not for the same rationale given by the Warren Court. For him, this is a matter of texts not traditions;⁴⁰⁷ “the Fourteenth Amendment’s requirement of ‘equal protection of the laws,’ combined with the Thirteenth Amendment’s abolition of the institution of Black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.”⁴⁰⁸ It is perhaps relevant here to quote a comment from Professor McConnell, usually a Scalia booster. Considering Scalia’s employment of “traditionalism” as well as “originalism” and “textualism,” he has written that

These various methods have something very important in common...they all respect the will of the people, as expressed at various points in time. But by failing to articulate the connection between these methods, or to explain how to decide cases when they are in conflict, Justice Scalia leaves himself open to the charge of inconsistency.⁴⁰⁹

According to his less amicable critics, Scalia’s inconsistency runs much deeper. It is the sense in which allowing the judge the power to select the “legally relevant tradition” seems as arbitrary as the “activist judges” the right believes are wantonly imposing their personal moralities under the cloak of law. “The problems faced by a jurist/historian/sociologist who scours the pages of history in search of our most specific relevant traditions are greater than the problems faced by an interpretivist jurist who

⁴⁰⁷ Turner, “Were Separate-But-Equal and Antimiscegenation Laws Constitutional,” 335-336.

⁴⁰⁸ 497 U.S. 62, 26 n.1.

⁴⁰⁹ Michael W. McConnell, “Textualism and the Dead Hand of the Past,” *George Washington Law Review* 66 (1998): 1140 n. 45.

struggles to divine the original intents of the Constitution’s framers,” writes one critic. “The deeply rooted traditions of this nation are not directly accessible to a jurist, but instead must be constructed by him.”⁴¹⁰

Scalia would scoff; there *is* a deeply rooted tradition of biological, two-parent families; there *is* a deeply rooted tradition of scorning and criminalizing homosexuality; there *is* a deeply rooted tradition of male military academies; there *is* a deeply rooted tradition of political patronage—and all merit protection. Indeed, for Scalia, traditions like these are the “stuff” of legal principle. Scalia has explained his broad interpretation of the First Amendment by stressing that the meaning of a *textual* phrase like “freedom of speech” is determined by the “practices” of the people; in that case and others, he perceives a long existing—“traditional”—tolerance for speech even when a community deems it to be of objectionable character (the case concerned liquor advertising).⁴¹¹ So, another tradition is added to the Scalian vision of America: a tolerant people, at least when it comes to free speech.

But still...that meddlesome problem of history, the “capacious suitcase,” as Bork put it. Has America really *traditionally* been tolerant of free speech? Is this tradition “constant and unbroken”?⁴¹² What about the Alien and Sedition acts? The Pentagon Papers? “Hate speech”? *Huckleberry Finn*? As one legal critic has asked, “Inasmuch as every ‘tradition’ harbors the trace of a ‘counter-tradition,’”—that every social action tends to produce an opposite one, equal or not—“the notion that any given ‘tradition’ may be reduced to an objective, determinate reality is undermined.” And as Rebecca Brown adds, “[W]hen we

⁴¹⁰ 491 U.S. 110, 127 n. 6.

⁴¹¹ 44 *Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 517-518 (1996).

⁴¹² 518 U.S. 515, 568.

examined the origins of traditions, it becomes apparent that the source of tradition is largely majoritarian. Traditions are not formed by the few, the eccentric, the outcast, the marginalized.”⁴¹³ Scalia would surely respond that this is as it should be, in a democracy. A libertarian like Epstein, we will see, would probably think otherwise. Sandwiched in-between these two contemporary, disagreeing conservatives is one of the earlier giants of American law, Oliver Wendell Holmes. A realist, pragmatist, and a lower-case-“r” republican, Holmes was, as we have seen, a predecessor to the Critical Legal Studies folk that both Scalia and Epstein still claim served as common enemies. But Holmes also professed a very anti-majoritarian distrust of The People. “I loathe the thick-fingered clowns we call the people,” he wrote during the Civil War. “Especially as the beasts are represented at political centers—vulgar, selfish, and base.”⁴¹⁴

More Traditions

Let us now consider some additional aspects of “our” traditions as perceived by the Court’s conservatives. In a 1997 decision upholding a state law that prohibited assisted suicide, the tradition-as-precedent baton was notably passed off to Chief Justice Rehnquist. Writing for the Court, Rehnquist proclaimed that the asserted right—once again, a Due Process Clause “liberty” interest—had no place in the country’s traditions. To bolster this claim, a vast historical survey ensues—from Henry de Bracton in 13th century England, to William Penn in Pennsylvania and from there two centuries of evolving American state law.⁴¹⁵

⁴¹³ Brown, “Tradition and Insight,” 204-205.

⁴¹⁴ Quoted in Horwitz, *The Transformation of American Law*, 123.

⁴¹⁵ 521 U.S. 702, 711-719.

A telling conclusion provides some insight into the structure and scope of the “tradition” under investigation: “Attitudes toward suicide itself have changed since Bracton,” Rehnquist writes, “but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decision-making, we have not retreated from this prohibition.”⁴¹⁶ Note the pronouns: “*our* laws”; “*we* have not retreated.” This is not anonymous history, it is *ours*. It is particular: the history of *our* Anglo-American society, as measured through certain categories of artifacts accumulated over 700 years—laws, legal treatises, learned commentaries, votes of representative legislatures. To Rehnquist and the conservatives, this is objective history, proof positive of a deeply rooted tradition.⁴¹⁷ As with all history, much is left out; what is kept in comes to constitute our collective memory. “Traditionalism,” writes legal philosopher David Luban, “which argues that the past claims *us*, overlooks the fact that it claims us only once we have colluded by claiming *it*.”⁴¹⁸

The traditions expounded by Scalia and Rehnquist in the right-to-die cases *Glucksberg* and its predecessor *Cruzan* are part of the rubric—the penumbra, one might even say—of decisions which implicate the touchstone of conservative ire, *Roe v. Wade*. It is a commonplace among conservatives to declare that there is no right to abortion “in” the Constitution; the question is what to do about it, with *Roe* on the books. The traditional thing to do is to follow precedent—though Scalia and his brethren are free to eschew that practice when another tradition or another legal mandate instructs otherwise. With overturning *Roe* not a practical goal in the current political moment, what Scalia *can* do is move the battle

⁴¹⁶ 521 U.S. 702, 719.

⁴¹⁷ 521 U.S. 702, 720-721.

⁴¹⁸ Luban, “Legal Traditionalism,” 1059.

from the domain of doctrine to the terrain of tradition; after all, Blackmun's opinion contains lots of history.

Writing in dissent in *Planned Parenthood v. Casey*, which upheld *Roe*'s central holdings, Scalia, argues that the issue in *Roe* is

...not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not...I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.⁴¹⁹

Scalia here is expanding his methodology as well as the stock of values and practices that he claims to factor into his decision-making—practices which are beyond the scope of legal protection the Court stands to offer.

Elsewhere in his dissent Scalia scoffs at the philosophic musings of the majority opinion—which, in the same eloquent vein as Warren in *Brown*, declares, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁴²⁰ This language is the antithesis of Scalia's style—his history, objectivity, or any kind of realistically workable, and fair, jurisprudence. It does appeal to a Catholic sense of the mystery of faith and life.

After all, Scalia continues, compared with abortion, "homosexual sodomy, polygamy, adult incest, and suicide, [are] all...equally 'intimate' and 'deep[ly] personal' decisions

⁴¹⁹ 505 U.S. 833, 980 (1992).

⁴²⁰ 505 U.S. 833, 851.

involving ‘personal autonomy and bodily integrity,’ which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable.”⁴²¹ So, we can add these practices to the list—or at least the practice of traditionally allowing them to be criminalized, which, it must be said, necessarily involves some moral judgment. The Court’s majority in this case, sensing perhaps that Scalia’s arguments from tradition demanded some attention, offered their own counter-tradition: the tradition of the Court’s “reasoned judgment.”⁴²² This move promptly sends Scalia into an apoplectic fit; that tradition is not specific enough!⁴²³ And surely he has a point: Chief Justice Taney doubtless felt his opinion for the court in *Dred Scott v. Sanford* was a reflection of “reasoned judgment.”

While Scalia has defended a “traditionally” expansive reading of the First Amendment’s free-speech clause, his readings of the religion clauses place him outside of the civil libertarian tradition. Dissenting from a ruling that held that including clergy at a public school graduation ceremony was unconstitutional, Scalia fumed that the Court was “oblivious to our history,” a history that (objectively, we may assume) shows that “[f]rom our Nation’s origin, prayer has been a prominent part of governmental ceremonies and proclamations.”⁴²⁴ In a “brief account” of this tradition of prayerfulness, Scalia points to the words of George Washington and James Madison and proceedings at “the first public high school graduation ceremony took place in Connecticut in July 1868.”⁴²⁵ Scalia also rails against the majority’s concern about the way peer pressure may operate during religious

⁴²¹ 505 U.S. 833, 984.

⁴²² 505 U.S. 833, 849.

⁴²³ For an example of how Scalia ignores his own rule when it gets in the way of his desired outcome, see Young, “Justice Scalia’s History and Tradition,” 596-603.

⁴²⁴ 505 U.S. 577, 633.

⁴²⁵ 505 U.S. 577, 635.

rituals at ceremonial school events, referring to the Court's opinion as a "psycho-journey"⁴²⁶: clearly, these issues are "subjective" and foreign to the "objective" processes which guide Scalia's analysis of tradition and historical practice. "His tone of outrage," writes one legal critic, "appears to be based on the idea that the court's judgment in the case undermined a government power that was *created* by long-standing tradition: an accretion of power."⁴²⁷ Tradition—and precedent, when it agrees with tradition—should govern the jurisprudence of the high court.⁴²⁸

Lawrence v. Texas: Law on The Terrain of Tradition

By establishing his own line of precedential cases beginning with *Michael H.*, Scalia has been able to push the rest of the Court toward a jurisprudence of tradition-as-precedent. His textualist views, which have had wide effect across the legal community, have evolved alongside his traditionalist ones, which reached apotheosis on the high Court in 2003. We find it in the starkly contrasting traditions that undergird the majority and dissenting opinions in *Lawrence v. Texas*, the controversial 2003 case striking down a Texas anti-sodomy law.⁴²⁹

⁴²⁶ 505 U.S. 577, 643.

⁴²⁷ Brown, "Tradition and Insight," 197-198.

⁴²⁸ There was no such agreement, apparently, in the infamous "peyote case," which found Scalia, writing for the majority. The Court denied a religious free exercise claim by two American Indians who claimed their eligibility for unemployment benefits should not be affected by their having been dismissed from their jobs as drug counselors for having ingested peyote, an illegal controlled substance. This despite the defendants claim that "free exercise" of his ancient religion *traditionally* included eating peyote. Scalia said the ban was a law of "general applicability," only "incidentally" affecting their religious practice, and therefore was not discriminatory; his reasoning is *entirely* textual rather than historical or cultural. The case is *Employment Division v. Smith* 494 US 872 (1990). See also Young, "Justice Scalia's History and Tradition," 13-16.

⁴²⁹ See, e.g., John W. Kennedy, "The Marriage Battle Begins," *Christianity Today*, April 11, 2003; Alan Cooperman, "Sodomy Ruling Fuels Battle Over Gay Marriage," *The Washington Post*, July 31, 2003, A1; William Murchison, "Judicial Activism: American Courts Join Culture Wars," *The Washington Times*, September 16, 2003, A19.

Justice Anthony Kennedy, a Catholic appointed by Ronald Reagan, was chosen to write the opinion for the Court. Signaling the place which tradition has come to play in the Court's jurisprudence, the opinion opens with the declaration that "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home." *Our* tradition: a communal and political practice which describes the relations between the state and the person; the public and the private. From here, Kennedy immediately begins to use the language of the Court's previous privacy cases, notably *Roe* and *Griswold v. Connecticut*, the case which struck down a state's ban on contraception: most importantly, the protection of an "autonomy of self" extending "beyond [the] spatial bounds" of the home into the realm of the "transcendent," including "freedom of thought, belief, expression, and certain intimate conduct."⁴³⁰

All of these high concepts, Kennedy asserts, constitute *our tradition*—and they are what is at issue. Not our precedential decisions here in the Supreme Court but our traditions here in this Nation. To the dismay and frustration of Scalia and his allies, Kennedy and the majority prove in *Lawrence* they're perfectly able to reframe the legal questions as cultural ones; you have your tradition—we have ours. This is a rhetorical move if ever there was one, unpersuasive to Scalia but certainly put down on paper with an eye toward the broader societal audience.

Precedent is consulted to support the initial claim of traditional personal autonomy, but throughout the opinion the master frame is tradition. Kennedy not only puts forth an alternative or "counter-" tradition (private personal autonomy), but attacks the validity of the

⁴³⁰ 539 U.S. 558, 562.

tradition asserted by Scalia and *Bowers*, the earlier sodomy case (proscription of homosexuality).

“[T]here is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter,” he writes at the outset of an extensive historical survey. Though he finds ample “objective” evidence from the distant past to support his claim about tradition, he suggests there is a deeper flaw with Scalia’s analysis. “We think that our laws and traditions in the past half century are of most relevance here,” he writes, before offering up a claim that has become fodder for criticism from the right: “These references [to *recent* laws and traditions] show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁴³¹

Kennedy’s suggestion is of deep importance as we think about the role the Court performs as our ultimate arbiter of justice. He is arguing that there can be, and indeed there is in this nation a tradition *of change*—of “emergence”—deeply rooted in the freedom which our Constitution is designed to protect.⁴³² On the Roberts Court, long after the departures of the liberal lions like Brennan, Marshall, and Blackmun, Kennedy may be the closest thing to an assertive liberal—or libertarian. If the Court is going to consider tradition, his tradition of

⁴³¹ 539 U.S. 558, 571-572 n. 4.

⁴³² Kennedy’s notions of “emergence” is, in a quite logical sense, rooted in the conception of the common law as a precedent-based, but evolving, corpus. As it relates to tradition, change, and democracy, “emergence” is also deeply rhetorical and epistemological in its implications. *Cf.* Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric* (Chicago: University of Notre Dame Press, 1969), 514: “If freedom was no more than necessary adherence to a previously given natural order, it would exclude all possibility of choice; and if the exercise of freedom were not based on reasons, every choice would be irrational and would be reduced to an arbitrary decision operating in an intellectual void. . . [we should strive] to develop what a logic of value judgments has tried in vain to provide, namely the justification of the possibility of a human community in the sphere of action when this justification cannot be based on a reality or objective truth.”

“emergence” deserves to be posed against Scalia’s supposed objectivity, with its necessarily populist, majoritarian, morally conservative version of American identity.⁴³³

Kennedy’s opinion, as one might expect, drives Scalia up a wall and back down again. Scalia stands by the Court’s existing precedent, *Bowers*, which contained its own survey of anti-sodomy “traditions,” and declares that the overruling of that case represents a “massive disruption of the current social order.”⁴³⁴ Linking up once again with *Roe*, he suggests that unlike these terrible consequences, overturning *Roe* would simply “restore the régime that existed for centuries before 1973.” Thirty years does not a tradition make.

Furthermore, Scalia attacks Kennedy’s central idea that there is—and that there ever can be—a tradition of emergence and change. “In any event, an ‘emerging awareness’ is by definition not ‘deeply rooted in this Nation’s history and tradition’,” he declares. This is the crux of the matter, then, and a very Edmund Burkean crux it is: traditions, *by definition*, have nothing to do with change; they are the very antithesis of change. Under this view, Kennedy’s opinion and concept of tradition simply make no sense. In a very immediate way, the opinions in *Lawrence* are a case study in the way rhetoric operates to frame issues, contextualizing the phenomena of the world in particular ways, and with deep moral and social consequences.

Kennedy has the audacity to go further, expanding the context of the tradition he invokes by arguing that the “emerging awareness” in our American society relates to “values

⁴³³ Kennedy also argues this notion of emergence should translate into jurisprudential practice. Following that esteemed judicial practice of quoting oneself, he cites an earlier opinion where he was also arguing (more tacitly) against Scalia, that “History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *County of Sacramento v. Lewis*, 523 U.S. 833, 857.

⁴³⁴ 539 U.S. 558, 591.

we share with a wider civilization.”⁴³⁵ “The *Bowers* majority opinion *never* relied on ‘values we share with a wider civilization’,” Scalia writes, “but rather rejected the claimed right to sodomy on the ground that such a right was not ‘deeply rooted in *this Nation’s* history and tradition’”—the emphasis is Scalia’s. Traditions, for Scalia, appear in this instance to be *per se national*. Thus a final note on the American identity Scalia has been putting forth: tradition stops at the water’s edge. More of this later, when we consider the move led by Federalists like Bork, and his students Steven Calabresi and John Bolton, attacking the citation of foreign law in Court opinions.

What are we to make of this remarkable two-track Scalian project, then? By all accounts, his textualist attitudes have genuinely affected the way law is practiced in this country, with argument rooted in text taking precedence and contextual materials like legislative histories or social effects coming in later, if at all. On the other hand, he has advanced traditionalism grounded in social practice and context. Along with other conservatives of both libertarian and conservative backgrounds he denounces judicial activism, “legislating from the bench,” and defends textualism as being first and foremost a way to rein in judges looking to cherry pick from endless contextual materials in order to write their own preferences into law. But why should the judge as guardian-of-tradition not be susceptible to exactly these same temptations? Kennedy and Scalia present two traditions, one undoubtedly operating at a higher level of generality than the other.

⁴³⁵ 539 U.S. 558, 576-577.

Which is it, then? Which story shall we tell about ourselves?⁴³⁶ What are *our* traditions, and how should we expect our Court to hold them up, having the force of law? The *Lawrence* opinions by Kennedy and Scalia pose these questions, and the debate played out among their pages epitomizes two quite different ways to answer. Whether one agrees more with Scalia or with Kennedy, the fact that this is the *way the case was decided*—that it became a dispute over how to think about our past, our traditions, and our place in the world—is quite remarkable.⁴³⁷ The consequences for legal theory and jurisprudence are substantial, the full impact of which only time will reveal. Scalia’s relentless intellectual work over the past two decades has had real effects on the way law is done today, despite his disappointment at not presiding over a revolution. “He still has to dissent, so he thinks he’s still losing,” Judge Rader quipped. “Maybe he’s not.”

Scalia’s dissents have been numerous—and it can hardly be said that he is following the early precedents in this regard; early in the nation’s history, dissenting opinions were extremely unusual. Of his 564 opinions, Chief Justice John Marshall wrote one.⁴³⁸ Scalia,

⁴³⁶ I am reminded of Richard Rorty’s remark in a conversation about the left’s inability to effectively respond to conservative politics: “They have out-narrated us.” Rorty, attacked by the radical left for his unabashed pragmatism and Americanism, offered a re-framed (meta-)narrative of American identity, tradition, and progress in his 1997 book *Achieving Our Country* (Cambridge: Harvard University Press). Rorty’s vision parallels Kennedy’s, emphasizing our society’s ability to change, to “emerge” toward a fuller realization of our ideals, for the Nation to “live up to the true meaning of its creed,” as Martin Luther King so memorably put it.

⁴³⁷ A similar dispute over the selection of relevant traditions plays out in *Georgia v. Randolph*, *supra* note 345. Scalia dissented in a separate opinion in order to take issue with Justice Stevens’ concurrence, which offered his own reading of tradition and history as partial justification of the case’s outcome. That Stevens would write separately for this express purpose—as a *justification for his opinion*—is an indication of the authority renditions of tradition now hold on the Court. That said, he begins his brief concurrence with a jab at Scalia’s crusade against legislative histories, as discussed at the outset of this chapter. “The study of history for the purpose of ascertaining the original understanding of Constitutional provisions is much like the study of legislative history for the purpose of ascertaining the intent of the lawmakers who enact statutes” 547 U.S. ___ (2005) (Stevens, concurring). Scalia fires back that Stevens’ “attempted critique of originalism confuses the original import of the Fourth Amendment with the background sources of law to which the Amendment, on its original meaning, referred” 547 U.S. ___ (2005) (Scalia, dissenting).

⁴³⁸ *Ogden v. Saunders* 25 U.S. 213 (1827).

who has written more dissents than any other conservative on the current Court,⁴³⁹ understands his role to be that of both a jurist and a teacher; his dissents are both legal and educational texts, as he told me. “I still consider myself a teacher. That’s the main reason I write my dissents,” he said. “I think the main point of the dissent is perhaps to try to change the future, and that will occur not by persuading my colleagues, who have made their mind up, but by persuading the next generation.” The Federalist Society founders were largely his students—and if not that, his eventual followers. His continued involvement with the group bespeaks his commitment to them and their project. “His strategy has succeeded brilliantly,” concludes scholar (and Constitutional law textbook author) Ralph Rossum, who has compiled statistics showing that Scalia’s dissents are the most likely to appear in law school hornbooks, as well as in the titles of Law Review articles.⁴⁴⁰

“The shelf life of the great American law review article is what, ten years? It’s not cited after that; it’s of purely historical interest,” Scalia told me. “But I still meet people who I taught at the University of Virginia in 1969 who say, ‘you taught me contracts, and you lit a flame, and I’ve loved the law since then’. You have an enormous influence in your teaching.” Scalia understands, as all great leaders do, the importance of audience. No argument functions without one, and good arguments produce results only if they find the right one. His has.

⁴³⁹ Rossum, *Antonin Scalia’s Jurisprudence*, 202.

⁴⁴⁰ Rossum, *Antonin Scalia’s Jurisprudence*, 205-206. The score, as of 2006: Scalia, 2006; Rehnquist, 57; O’Connor, 48; Thomas, 16; from thence to the single digits.

CHAPTER 7
RICHARD EPSTEIN, THE LIBERTARIANS,
AND THE LANGUAGE OF ECONOMICS

Epstein and the Federalists

Richard Epstein has been teaching law at the University of Chicago since 1968, and his students have included Federalist Society founders Lee Otis and David McIntosh. Epstein was at that first Yale conference they organized in 1982 and is still a regular at its events around the country. Long after his two prodigal students left the ivy-covered walls of Hyde Park he continues to take the time to advise his former students successors, the up-and-comers of the legal right. As I have seen repeatedly over my several years of research, Epstein's dedication is very much the norm within the group.

In typically sarcastic terms, Epstein put it this way—moments after his phone rang during my interview with him in his Chicago office. “One of the things this damn society does is that it leads people to think it's perfectly O.K. to call you up 25 years later and say, I saw you speak at my school at the Federalist Society and can you do this favor for me,” he said. “And my answer's always sure; that's all you need. Even if they say I hated everything you said at the Federalist Society.”

Perhaps even more than his Chicago colleague Richard Posner—a prolific author and judge on the Federal circuit—Epstein has been among the most influential scholars to bridge the fields of law and economics school, advocating cost-benefit analysis of legal problems—

even Constitutional legal problems, where seemingly cold calculation might strike some as out of place. While Posner has written *New York Times* bestsellers and is a familiar name on op-ed pages, Epstein has stayed ensconced in the Academy and few beyond its walls know his name—even among GOP activists. “I’ve finally learned how to speak to lay audiences of all kinds,” Epstein told me, “but nobody will ever put me in front of a microphone to speak to all the delegates at the Republican Convention.”

“I’ve never written a runaway best-seller, and never will,” he said. “But what happens is that if there is somebody else who reads what you say and *they* can hit the popular audience—take these ideas and put them in a concrete fashion which preserves most of their truth and avoids all of their needless subtlety, they’re doing you a real service. I’ve decided you can’t be all things to all men as a scholar.” Still, his reach as a scholar has grown substantially; the kind of network effects he describes here are exactly what the Federalist Society has facilitated. Thanks to an ever larger pool of acolytes among the “Feddie” and elsewhere, his ideas have gained in political currency.

Epstein is quick to note that the Federalist network had much to do with this process. Federalist booster Ed Meese invited him to the West House for policy discussions and the Society has turned him into something of an ivory tower rock star. “What they did was say, come and talk to us, and that gave me an opportunity,” he told me of his White House visits. “And I said, well, I’m going to a group of people who seem to be interested... What it did was give a chance to put something forward.”

Epstein's career took off with the 1985 publication of his book *Takings: Private Property and the Power of Eminent Domain*.⁴⁴¹ The book sets forth a radical critique of Constitutional law not only on Fifth Amendment "takings" question—the Amendment requires that the government provide "just compensation" for the "taking" of private property⁴⁴²—but also a broader assault on post-New Deal jurisprudence and the legitimacy of the modern American welfare state. Somewhat to his chagrin Epstein has become an apostle of the "Constitution in Exile" movement, arguing that by way of his court-packing scheme Franklin Roosevelt bullied the Superemes into accepting his Depression-era reforms—everything from Social Security to the minimum wage—at the expense of legal legitimacy. The "real" Constitution, the argument goes, went into exile in 1937 when the Supreme Court began accepting Roosevelt's expansion of government and the creation of the modern welfare state.⁴⁴³

As we will consider below, this line of argument plays into the hands of liberal critics and also lays bare the cleavages between libertarians and social conservatives in the coalition of the right and within the Federalist ranks. Although Epstein is a constant presence in the Federalist milieu he is by no means its party-line spokesman; as I have been illustrating, there simply is none. Among the libertarian and economic-minded wing of the coalition, though, Epstein casts a long shadow.

Takings was born through years of scholarship, Epstein told me, but the Federalists provided him a forum that helped move his ideas into a constructive, coherent argument. "I

⁴⁴¹Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Chicago: University of Chicago Press, 1985).

⁴⁴²United States Constitution, Amendment V. The issue was recently revisited by the Supreme Court in *Kelo v. City of New London* 545 U.S. 469 (2005).

⁴⁴³See footnote 90, *supra*.

went in with an early version of my Takings book,” he said of that first Federalist conference in 1982. “You could see the combination of amazement and fear in their eyes,” he said of the more liberal faculty and students there. “How could anyone put forward this kind of stuff, which completely tries to put this kind of accepted, complacent New Deal hegemony at risk,” he asked; “It’s what I was trying to do. I make no bones about it then, I make no bones about it now.”

Epstein’s debt to the Federalists should not be understated. While he has remained an academic, his theories have dramatically impacted the legal culture—and the substantive law itself. As many lawyers and judges told me in the course of my research, one noticeable effect the conservative legal project has had on the practice of law is resulting the acceptance of cost-benefit, economic-styled arguments. While some courts and judges are more accepting of economic arguments than others there seems to be no doubt that the overall norm has changed.

What makes Richard Epstein interesting for our purposes here is not only that he taught the founders of the Federalist Society or that he influenced the policies of the Reagan administration or that his theories on the Takings Clause of the Fifth Amendment helped catapult libertarian theory to the forefront on Constitutional scholarship. Epstein is also a rhetorical critic: his presentations and articles are often explicitly concerned with the interpretive acts of lawyers and judges as they grapple with the always flexible meanings of words and phrases—the substance of law. In most cases Epstein comes down on the side of certainty, wincing at postmodern critiques of linguistic indeterminacy.

“Language is a marvelously subtle, powerful, persuasive tool,” he said at a 1984 Federalist event. “The entire pattern of social and historical discourse takes place not because of the occasional unreliability of language, but because of its magnificent reliability.”⁴⁴⁴ For Epstein and his cohort, legal interpretation is to be treated “as a science,”⁴⁴⁵ a domain offering Right Answers to Problems. Epstein’s understanding of law is more aligned with mathematics than a traditionally humanistic endeavor such as history, where multiple understandings and perspectives always seem possible.

But Epstein’s rhetorical critiques—including his critiques of Judge Posner⁴⁴⁶—come off sounding a bit more pragmatic than he might like to admit. As he concluded in one article, “Texts must be clear enough to bind those who would like to violate their commands.”⁴⁴⁷ This view is fundamentally pragmatist, arguing that the ends (effectively binding those who would like to violate) should be used to judge the efficacy of the law (and its interpretable clarity). Later in this same article Epstein articulates a position he is uncomfortable with but which his realist sensibilities force him to consider: “Words are like the critical fortifications on a battlefield. You have to take them in order to win.”⁴⁴⁸

Regardless of how things should be, Epstein says legal interpreters should work pragmatically with the way things are. He separates the normative and the positive, and reveals his realist but pragmatic attitude in this way:

⁴⁴⁴ Epstein, “The Pitfalls of Interpretation,” 103.

⁴⁴⁵ Epstein, “The Pitfalls of Interpretation,” 107.

⁴⁴⁶ See generally Richard Epstein, “The Perils of Posnerian Pragmatism,” *University of Chicago Law Review* 71 (2004): 639-658.

⁴⁴⁷ Epstein, “Some Doubts on Constitutional Indeterminacy,” 363.

⁴⁴⁸ Epstein, “Some Doubts on Constitutional Indeterminacy,” 366.

Whenever we have a question about what a certain phrase means—be it to an author or a reader—we can ask two kinds of questions. One is the question of philosophical adequacy. If we had infinite time, infinite resources, and infinite patience, would the statement remain ambiguous after all efforts at clarification took place? Then you also have to ask the question of reliability: given this statute, these political constraints, and these historical circumstances, can we show that there is a bonafide ambiguity in this particular position?⁴⁴⁹

Thus his acknowledgment of the controlling importance of context in producing legal meaning, ambiguity, and “reliability” (if not its philosophical perfection). As an example he points to the Constitution’s Commerce Clause,⁴⁵⁰ which figures so prominently in post-New Deal jurisprudence. Beginning in the 1920s he argues that the Progressive movement managed to capture legal language—the Commerce Clause in particular—and use it in legal argument, as well as crafting their political and scholarly work to turn the crucial phrase to their own desired policy ends—namely a more centralized Federal government regulated from Washington.⁴⁵¹ But Epstein argues quite clearly that the Progressives and New Dealers got it wrong.

Thus do Epstein’s libertarian critiques of political economy and the role of the state flow from his rhetorical critiques of law, from his reading of the Constitution. His arguments for a flat tax or for school vouchers, for example, are grounded in particular ways of reading the written law. In this, he is a lawyer/rhetorician if ever there was one—and any denial of his pragmatism or his rhetoricity (his persuasiveness as opposed to his stating of The Facts) only stands to substantiate Wetlauffer’s stinging criticisms, discussed in Chapter Two: that in

⁴⁴⁹ Epstein, “The Pitfalls of Interpretation,” 102.

⁴⁵⁰ Constitution of the United States, Article I, Section 8, Clause 3, empowering the Congress “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

⁴⁵¹ See generally Richard Epstein, *How Progressives Rewrote the Constitution* (Washington, D.C.: CATO Institute, 2006). Discussion follows below.

this most rhetorical of disciplines, how is it that so many lawyers are afraid to admit that texts may be read different ways, and that their preferred reading is only one of several?

Epstein's bet-hedging on this question runs deep indeed, and I quote here a passage from his philosophical treatise defending "Classical Liberalism."

I would freely concede that all social truths are not derived from some inevitable principles, the truth of which can be denied only on pain of self-contradiction. Political and moral theory, however, need *not* be 'contingent' in the empirical sense, which stresses their irregularity and unpredictability...the challenge is to identify those empirical regularities across time and space, and culture to which any viable legal system will have to respond.⁴⁵²

I think Epstein makes one of his strongest points here—a point that, at various other moments, he seems less sure of when speaking the language of economics and science. Contingency is a fact of life, so to speak, but we in the legal community have to work with it—to integrate it into our work, which ultimately revolves around finding of fact, verdicts of guilt or innocence, and other *certainties*. Meaning in the philosophical sense may be completely contingent, ambiguous, even unknowable. But in the realm of the law, which demands reliability to produce fairness we should—and this is a normative claim—make use of language's usual reliability. We must make philosophical concessions in order to foster a system that produces respected decisions and provides for predictable outcomes—including predictable outcomes when the existing laws are challenged. This is the essence of fairness within the boundaries of the common law.

⁴⁵² Richard A. Epstein, *Skepticism and Freedom* (Chicago: University of Chicago Press, 2003), 19.

Indeterminacy exists hand-in-hand with determinacy in our mixed system, I would argue; judge-made common law and statutory texts must both be considered—a methodological conundrum, as we have seen in the controversy caused by Meese’s Tulane speech. The mixed nature of our system is what defines it against the British, with their unwritten Constitution, and the Continental Europeans who have only the legislative code. Comparatively speaking it is at this point that Epstein’s theories run into trouble: If we eliminate our “Doubts about Constitutional Indeterminacy,” to borrow his article title, we eliminate the jury trial, the common law, and Anglo-American jurisprudence.

Doubt is the linchpin in our conception of justice, I believe. Unlike Civil Law nations where judges mechanically search for the relevant Code passage (and dispatch letters of inquiry to the legislature if none exists) our Common Law system demands that judges act as interpreters. They must grapple with doubt and *must* resolve it, as must jurors when interpreting purported facts. Conservatives have always, in fact, been great doubters: Doubting courts, doubting public opinion, doubting liberalism, doubting the Revolution in France, doubting man’s inherent equality to his fellow man. I would argue that Epstein’s “doubts” are only that. As he told me, he is no libertarian, in favor of eliminating the state. (With “elimination” a highly relative term!)

He is a Classical Liberal who recognizes the need for a state. “It is only the parody of libertarian theory that holds that no form of regulation is appropriate,” he wrote in 2002.⁴⁵³ Whether regulation—such as the minimum wage—is “appropriate,” Epstein might say, is one question; whether it is Constitutional is another. Thus merge the realms of rhetoric and

⁴⁵³ Richard A. Epstein, “Beyond Judicial Activism and Restraint,” *Georgetown Journal of Law and Public Policy* 1 (2002), 90.

law. While a persuasive political or even moral case can be made for progressive taxation, for example, Epstein argues that a legal one cannot.

How Progressives Rewrote the Constitution

The horror stricken into minds of contemporary liberals by Epstein's arguments—gestating ever since that first Federalist conference in 1982—was given coherence by a phrase coined by failed Reagan Supreme Court nominee Douglas Ginsburg: the “Constitution in Exile.”⁴⁵⁴ In 2005 the idea was fleshed out in a controversial *New York Times Magazine* piece by Jeffrey Rosen, a professor of law at Georgetown University and a self-described “recovering textualist.” Rosen's cover story in the magazine explained the ideas espoused by Epstein, Ginsburg, and others who believe the Supreme Court went unforgivably astray during the New Deal era. The Magazine's cover photo featured a depiction of the Constitution literally frozen in a huge block of ice. Stern photos of Epstein and others were shot from low angles with low light and suggested a dark, sinister mood.⁴⁵⁵ Conservatives went berserk.

“You looked at those photos, and those headlines, and you knew it was a hatchet job,” Epstein told me, adding that he had spent over six hours on the telephone with Rosen in preparation for the article. “I had at least a half a dozen people come up and say they would represent me in a case for defamation against the *New York Times* for free,” he said—though he took no such action. Rosen publicly apologized to the Federalists at the 2006 lawyers' convention and Epstein suggested that the young professor was “double-crossed” by his

⁴⁵⁴ Strictly speaking, Ginsburg was never nominated. Reagan announced his intention to nominate him, but the scandal that forced him to decline the nomination erupted so quickly that Reagan never formally sent the nomination to the Senate.

⁴⁵⁵ Jeffrey Rosen, “The Unregulated Offensive,” *New York Times Magazine*, April 17, 2005, 42-53.

editors and had no authority over the photographic depictions of his interview subjects. “I thought it was a terrible commentary on how frightened people can be about ideas they don’t know how to deal with,” Epstein told me, “that they have to put it into this crazy frame.”

Just how crazy is that frame? One of the headlines accompanying the Rosen piece puts it this way: “The movement has urged conservatives to get over their aversion to judicial activism and embrace the courts as an agents of economic and political change.”⁴⁵⁶ Epstein may not have been happy with the overall impact (and those grim photos) but if Roger Pilon of the CATO Institute can be believed, this headline is right on the money. A committed libertarian and a longtime Federalist, Pilon disavows “the conservatism of Bork and Scalia,” telling me that ideally, he would look “for the judiciary to be active [in] securing both enumerated and nonenumerated rights.” Not only *active* (as opposed to restrained) but securing both enumerated (i.e. textual) and *nonenumerated* (i.e. implied or “natural”).

Many traditional conservatives wince at this formulation, invested as they are in the rhetoric of judicial restraint. “As Mr. Pilon makes very clear, scratch a libertarian and you find a judicial activist,” wrote Meese Justice Department veteran Gary McDowell in a *Wall Street Journal* column.⁴⁵⁷ But Pilon and his libertarian cohort see no insult here; for them, judicial activism in the defense of liberty is no vice.⁴⁵⁸

⁴⁵⁶ Rosen, “The Unregulated Offensive,” 47.

⁴⁵⁷ Gary L. McDowell, “Scratch a Libertarian: Voila! Judicial Activist,” *The Wall Street Journal*, April 10, 1992, A17.

⁴⁵⁸ Hence Pilon’s enthusiastic response to the Supreme Court’s *Lopez* decision, which struck down the Federal Gun Free Schools Act. *United States v. Lopez* 514 U.S. 549 (1995). The case was manna for the Constitution in Exilers, its decision specifically grounded in the lack of Congressional authority for the law. It might be a good idea to have gun-free schools, but the legal justification—that gun transactions affect interstate commerce, which Congress can regulate—was simply a bridge too far for the Court. “Could the New Deal be on the ropes,” asked Pilon in the *Washington Post*. “Not yet,” he answered (rhetorically), but after *Lopez* “the potential is there.” Pilon, Roger. “It’s Not About Guns: The Court’s *Lopez* Decision Is Really About Limits on Government.” *The Washington Post*, May 21, 1995. “*Lopez* awakened Washington from its dogmatic slumber,” he told me.

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One of the brash young turks of the right, attorney Mark W. Smith, telegenic author of *The Official Handbook of the Vast Right-Wing Conspiracy*,⁴⁵⁹ has taken this attitude to new heights. Advancing a realism that outdoes even the progressive-era theories the Federalists Society's founders were reacting *against*, Smith argues that conservatives should abandon their idealistic hopes for judicial restraint, originalism, and textualism. "If conservatives want to thwart the liberal assault, the first thing we have to do is abandon the illusions we have clung to for so long," he writes in *Disrobed: The New Battle Plan to Break the left's Stranglehold on the Courts*.⁴⁶⁰ Smith looks askance at the theoretical projects of Epstein and others, reaching conclusions strangely similar to the CLS movement several decades before. For example, he outlines five "myths" conservatives must abandon, all of which one must imagine would prompt dismissal by the Federalists' professoriate and policy wonks:

MYTH: Courts should exercise judicial restraint.

REALITY: Judicial restraint will never be a reality—and even if it could be a reality, we don't want it now.

MYTH: Judges should be apolitical.

REALITY: Judges don't—and can't—check their ideology at the courtroom door; they often, by necessity, function as politicians wearing black robes.

⁴⁵⁹ Mark W. Smith, *The Official Handbook of the Vast Right-Wing Conspiracy* (Washington, D.C.: Regnery, 2004).

⁴⁶⁰ Mark W. Smith, *Disrobed: The New Battle Plan to Break the left's Stranglehold on the Courts* (New York: Crown/Randon House, 2006), 10.

MYTH: Judges should follow the law.

REALITY: Deciding what the law is ain't always easy.

MYTH: Judges should defer to the elected branches.

REALITY: Judges make law all the time, and we often want them to.

MYTH: Judicial activism tramples on the rule of law.

REALITY: Judicial activism *is* the rule of law.⁴⁶¹

For Smith the realist, “Judicial activism is nothing but a tool; what matters is for what purposes the tool is applied—for good or for bad.”⁴⁶²

This anti-theoretical stance is of little intellectual consequence to many in the Federalist Society, and in conversations over the years I heard more than a few negative quips about certain self-promoting Fox News “legal experts.” Still, Smith is hardly alone in having his work criticized by fellow conservatives or fellow Federalists. He continues to serve as vice-president of the New York chapter and is a popular guest of Federalist chapters on the law school circuit. That someone who attacks the broader intellectual and political project of the legal Right remains a cheerleader for its largest and most influential organization serves to further illustrate the internal fissures with the Federalist coalition, and the organization’s uncanny ability to bridge them.

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Epstein confidently defends the project of theory: “It takes a theory to beat a theory,” he says. What the Progressive Left developed over a generation, beginning before the New

⁴⁶¹ Smith, *Disrobed*, 10-13 (emphasis in original).

⁴⁶² Smith, *Disrobed*, 9, 56-83.

Deal, he believes, must be met on the terrain of intellectual debate and met with developed refutation. Epstein's "theoretical imperative," we might call it, requires consideration of history and careful grounding of legal arguments in political context as well as a grounding in Constitutional text. In his latest epistle he lays out the case that progressive advocates and politicians "rewrote" the Constitution during the upheaval years of the Great Depression. We will consider this argument in some detail, also looking at his landmark book on the power of the government to seize property in *Takings: Private Property and the Power of Eminent Domain*.

Even as he advances his arguments Epstein wants to distance himself from doctrinaire libertarianism and is at pains to distinguish his Classical Liberal position from that of CATO types.⁴⁶³ "The Classical Liberal position is not frozen in the past," he writes, suggesting the icy *New York Times* cover photo. "The constant theme," he says, is "small government, which offers as little comfort to the new generation of religious and social conservatives as it does to the traditional American left."⁴⁶⁴

Epstein echoed this theme in our interview, honing in on the sharp difference between social conservatives and libertarian-types (including Classical Liberals) within the coalition of the right. "Modern social conservatives are not interested only in organizing their own lives, they're also interested in running everybody else's," he said. "What's happened is that they've gained in power. They're no longer thinking defensively, they're thinking offensively...and this is of course true of the [George W. Bush] administration...this means

⁴⁶³ See generally Michael D. Tanner, *Leviathan on the right: How Big-Government Conservatism Brought Down the Reagan Revolution* (Washington D.C.: CATO Institute, 2006).

⁴⁶⁴ Epstein, *How Progressives Rewrote the Constitution*, x.

that you're really speaking out against both parties at different times for the same reason: each of them wants to meddle in the lives of each other."

"Meddling." The offensiveness implied here ties up neatly with the conservative emphasis on liberty discussed earlier in the context of social equality. Epstein's focus on political economy and commerce leads him to conceptualize "meddling" primarily as interference in business transactions, or to use the business transaction as a metaphor for virtually all aspects of decision making in private life (since "privacy" is an illegitimate legal category for conservatives in general). This perspective leads him to resurrect a long disavowed aspect of legal "liberty interests" that held strong sway in the pre-New Deal Supreme Court, the "liberty of entering into voluntary contracts with whomever one pleased, and only with such people."⁴⁶⁵ Liberty of contract is one of the rights often cited by those associated with the Constitution in Exile movement, and often at peril of being labeled racist; the Civil Rights Acts of the 1960s invalidated rights of innkeepers, for example, to refuse contracting with Blacks simply due to their own prejudices.

Epstein's arguments on this and other controversial assertions often turn on economic and statistical analyses. In treating the Progressive crusade against child labor, for example, he argues not for the immorality of the practice or the state's authority to police it, but for the Court's unnecessary intervention into the marketplace. Under Epstein's reading, child labor rates were declining "naturally" in the years leading up to the Court's ruling on the matter.⁴⁶⁶ To the economically-minded critic, Constitutional rights-based arguments were simply spurious. Epstein approaches the question from a totally different angle: "The gains from

⁴⁶⁵ Epstein, *How Progressives Rewrote the Constitution*, 8.

⁴⁶⁶ *Hammer v. Dagenhart* 247 U.S. 251 (1918).

child labor diminished in comparison with its costs,” he writes. “The theories of Adam Smith work rather well.”⁴⁶⁷ In other words, let the market function, and the laws of efficiency will lead to the most desirable result—morally and otherwise. It’s a strong case, if hardly an absolute one. As an aside, it’s also worth noting that Adam Smith’s first academic post was as a professor of rhetoric.⁴⁶⁸

Viewed through the cost-benefit lens all problems become reducible to transactions and transaction costs. “Social justice” becomes a non sequitur, a “mirage,” as conservative Austrian economist Friedrich Hayek argued in the second volume of his magnum opus *The Constitution of Liberty*. As Epstein neatly summarizes, “The only programs that should survive are those that produce some *net* social improvement” (the emphasis is Epstein’s).⁴⁶⁹ “Net gains” would likely strikes many as a rather depersonalized means by which to consider whether justice is or is not being done. Years of criticism notwithstanding, Epstein has stuck to his guns. Eschew the particular; focus on the broader, common (or “net”) good.

“Nothing in laissez-faire economics places people under a legal obligation to be selfish or greedy,” he wrote in 2003. “The system simply recognizes that giving each person the right to make choices about the use of his or her talents and resources is a strong spur to their efficient allocation.”⁴⁷⁰ That efficiency might not produce just outcomes on a case-by-case basis is not questioned, nor is it denied. Recall what Leonard Leo told me. “For the left,

⁴⁶⁷ Epstein, *How Progressives Rewrote the Constitution*, 62.

⁴⁶⁸ Deirdre N. McCloskey, *The Rhetoric of Economics* (Madison: University of Wisconsin Press, 1998), 95.

⁴⁶⁹ Epstein, *How Progressives Rewrote the Constitution*, 73.

⁴⁷⁰ Epstein, *Skepticism and Freedom*, 60.

it's 'Well gosh, I don't know if I like that interpretation of the Establishment Clause, because what happens to this guy over here?' Suddenly you've left the four corners of the document and you're having a debate or dispute over what this means." Social consequences—"what happens to this guy over here"—are not the province of the judge. Or, some might say, of the conservative.

Hayek's "Road to Serfdom" conservatism is often cited by law-and-economics types and his name is bandied about at Federalist events with proud frequency. Epstein, though, thinks Hayek's brand of "Night Watchman" capitalism is not necessarily to be trusted. He is suspicious of Hayek's sometimes metaphysical-sounding faith in "spontaneous order," a concept explicitly related to Adam Smith's Invisible Hand, that acts to distribute the assets of the market based on supply and demand. In contrast to the metaphorical Smith or mystical Hayek, Epstein at times comes off as something of a materialist, a mindset borne out in his constant emphasis on net benefits, efficiency, cost-benefit analysis, and formulaic methodology. Consider this:

At points, Hayek sounds almost mystical; the success of spontaneous order made Hayek deeply suspicious of rational efforts to alter the patterns of these social implications...The ideal Constitution within a Hayekian world would be the English Constitution with its unclear origins, slow growth, and shadowy conventions. But he should be suspicious of the quite deliberate architecture of the United States Constitution, with its conscious reliance on the staples of political theory—separation of powers, checks and balances, enumerated powers, federalism, and entrenched rights.⁴⁷¹

⁴⁷¹ Richard A. Epstein, "Hayekian Socialism," *Maryland Law Review* 58 (1999): 283.

Thus does Epstein dispense with the idealistic and metaphysical aspects of conservative theory so central to many in the movement and the Federalist Society.

Epstein latches on hard to Hayek's accessions to state regulation, generally missed by liberal critics. As Lawrence Grossberg has noted, Hayek—writing in the context of National Socialism in Germany and Stalinism in Russia—seems to be giving contemporary American liberals ninety percent of what they want. Epstein notices this. In *The Road to Serfdom*, Epstein says, “Hayek lists an impressive array of services that he is willing to let the state provide...in order to slay the dragon of central planning, he thought it imperative to concede some points to the opposition.”⁴⁷² In light of Hayek's extensive revisiting and justification of his views on state regulation and individual liberty in his later work, Epstein's write-off does not entirely hold water. Hayek was no socialist. He wrote in a different era and from the perspective of a tradition (as Epstein notes) without written Constitutions. One might even imagine the Austrian's bafflement at Epstein's assertions in *Takings*, at once explicitly ideological but also grounded in textual provisions of the U.S. Constitution, the supreme law of our land.

The libertarian and Classical Liberal wing of the conservative movement finds itself pitted against the majority both among today's GOP and within the Federalist Society. Social and religious conservatives tend to privilege immaterial things such as spiritual beliefs and tradition, and to see the judge and the legislator as guardian of these legacies. In this they are the legatees of Edmund Burke, whose conservatism was deeply imbued with the

⁴⁷² Epstein, “Hayekian Socialism,” 294, 299.

metaphysical power of tradition and practiced truth communicated from generation to generation, the very lifeblood of the unwritten British constitution.

Ken Cribb, who in his youth studied Burke with Russell Kirk in Scotland, is one of the Federalists' defenders of the old English conservatism. Conservatism is not an ideology, Cribb told me. "Kirk would say...it's a disposition toward the openness of reality. Conservatism is open to new experience," he said. "I think libertarian types would disagree with me violently on this, as would Christian Right types." On that he is most certainly correct. He is also the Society's chief counsel; Like Gene Meyer, we might surmise that his third-way position allows him to move among the factions.

Takings

Many of the seeds of the Constitution in Exile movement were planted by Epstein—or at least they were given fertile intellectual sustenance by his work. *Takings* is a case in point. It is a manifesto, but a distinctly professorial one: short on hyperbole and heavy on economic analysis. Many of its themes are restated in condensed form in *How Progressives Rewrote the Constitution*, which I have been quoting from thus far. *Takings* deserves consideration on its own, however. It was a landmark achievement and has contributed directly to the legitimating of a radical critique of postwar Constitutional law and the expansion of the welfare state.

What *Takings* lacks in flourish it makes up for with its pithy sarcasm and bold assertion. "I argue that the eminent domain clause and parallel clauses in the Constitution render constitutionally infirm or suspect many of the heralded reforms of the institutions of the twentieth century," Epstein writes in the book's opening pages, going on to enumerate the

likely offenders: “zoning, rent control, workers’ compensation laws, transfer payments, progressive taxation.”⁴⁷³ 300 pages later, one can also add the Federal minimum wage to this list.⁴⁷⁴ Make no mistake about it: Epstein was declaring war on the welfare state.

And where could he look to find an incubator for this seemingly Quixotic crusade, a forum for its elaboration and development, and the recruiting grounds for its avant garde? The Federalist Society. From its very first conference Epstein used the Society as an intellectual proving ground.

Epstein approaches his reading of the takings clause rhetorically, considering text, context, and understanding. He follows the original understanding model in acknowledging that the Clause “contains a set of terms that are not defined in the Constitution itself: private property, taken, just compensation, and public use.” The meanings of these words, he writes, “comes of necessity from outside the text.” Like Meese, Epstein suggests that the only “outside” that matters for Courts derives from the “ordinary” meanings attached to the words at the time they were set down.⁴⁷⁵ Epstein will have nothing to do with concerns about indeterminacy and multiple meanings, calling them unwarranted and the product of intellectual “despair.” In response to liberal critic Thomas Grey, he writes that there is “no reason to give up on language at the first sign of difficulty.”⁴⁷⁶

As Epstein’s sees things, the terms of the Takings Clause are easily knowable. They point to common concepts just as easily defined in an 18th Century understanding as in a 20th Century one. As an action verb, “to take” hardly requires complicated explanation. Nor

⁴⁷³ Epstein, *Takings*, x.

⁴⁷⁴ Epstein, *Takings*, 327.

⁴⁷⁵ Epstein, *Takings*, 20.

⁴⁷⁶ Epstein, *Takings*, 21.

does “just” as in “just compensation.”⁴⁷⁷ If the government “takes” from you, it must compensate you “justly.” It is this requirement, specifically, that Epstein believes has been read out of the law.

One of the most controversial ways he claims this has occurred is through the progressive taxation of private income. Responding to one common argument—put forward recently by liberal consultant George Lakoff, for example—taxation cannot be justified simply on the grounds that everyone must pay (hence Lakoff’s analogy to membership fees) or that everyone of certain income brackets must pay what others in that bracket pay. “The process is purely additive,” Epstein writes. “No secret alchemy transforms repeated takings of private property into something else which is Constitutionally neutral.” As for the argument that taxation goes toward services enjoyed by all persons, Epstein hedges; like Hayek he allows for some governmental functions⁴⁷⁸ but not all of those created in the post-New Deal era. Roads and national defense, yes; welfare no.⁴⁷⁹ As for taxation, the best and most realistic solution Epstein sees is a flat tax.⁴⁸⁰

To Epstein’s economically driven mind, the current progressive system results in a “mismatch of taxes and benefits”; there is nothing “just” about forcing a multimillionaire to pay for a welfare system he will never use.⁴⁸¹ His language is devoid of the appeals to

⁴⁷⁷ Epstein, *Takings*, 26-31.

⁴⁷⁸ “The current patterns are so deeply rooted that they cannot be undone by constitutional means” (discussing “Medicare and virtually every other welfare program that has worked itself into American life”) Epstein, *Takings*, 327.

⁴⁷⁹ Epstein, *Takings*, 314-324.

⁴⁸⁰ Epstein, *Takings*, 298-299.

⁴⁸¹ Epstein, *Takings*, 298.

community, charity, and kindness that pervade the discourse of the liberal left. Let us parse one of his key sentences:

Welfare remains a transfer system [a wholly depersonalized characterization: *transfer system*] **whose tiny insurance component** [*insurance*, evoking parallels to automobile liability not, say, a *social safety net*] **does not furnish adequate compensation** [*compensation* must be financial in this sense, not the benefit of living in a community with values that support a welfare system] **to those who are taxed to support it.**

And when the Courts have upheld the power of government to tax and spend virtually at will, Epstein retorts with pithy sarcasm: “The thief who says ‘your money or your life’ has given his victim a choice, but he cannot keep the money on the grounds that the victim gave it to him.”⁴⁸²

Epstein extends these same arguments to government regulations, which he reframes as “partial takings.”⁴⁸³ Considering environmental regulations requiring the preservation of wetlands, even when they are located on private lands, he writes that the law might well “identify a possible gain to the public [but] does not eliminate the constitutional obligation...if the state wants to use private property to benefit mankind,” it must “pay for the privilege.”⁴⁸⁴ Hence if a developer is forbidden from constructing condominiums on land because of the presence of wetlands (or an endangered species) the state must “justly” compensate the developer for the amount of his lost profits. One can easily see how this

⁴⁸² Epstein, *Takings*, 99, 161 (criticizing *Berman v. Parker* 348 U.S. 26, 33 (1954)), which Epstein says dealt a “mortal blow” to the Takings Clause, when it declared “that ‘the concept of the public welfare is broad and inclusive’ enough to allow the use of the eminent domain power to achieve any end otherwise within the authority of Congress”). See also 295 (limited nature of taxing power).

⁴⁸³ Epstein, *Takings*, 100-104.

⁴⁸⁴ Epstein, *Takings*, 123.

arrangement would topple most land use regulations, environmental or otherwise. “Zoning stands in stark contrast to a system of private property,” he writes. “Routine judicial deference to local action is wholly inappropriate.”⁴⁸⁵

For Epstein as for his senior colleague at Chicago, Milton Friedman, private property is essential to ensuring freedom.⁴⁸⁶ “It allows for economic development, on one hand,” Epstein writes, “but on the other it has a crucial defensive function of saving the little man from the excesses of the imperial state.”⁴⁸⁷ When we incentivize the economic interests of the individual, in other words, the state is kept at bay.

In 1985 Epstein concluded that his arguments—legal, moral, and philosophical—had little chance of success. “The question then arises whether there is a political will to carry out these reforms, either by the courts or by the legislature. The short answer is that there is not,” he wrote. “And there may never be.”⁴⁸⁸ Thanks to his continued presence in the Federalist Society, though, Epstein can rest assured that in the intervening twenty-two years his ideas have not only gained in currency and legitimacy. They have gained rhetorically adept proponents among a new generation of libertarian-minded lawyers.

Critiques of Economic Discourse

Rhetorical scholar James Aune, in his book *Selling the Free Market*, adapts Robert Hariman’s work on Machiavellian realism to the realm of economics. Hariman explains how, following Machiavelli, realists attempt to deny the indeterminacies of interpretation by

⁴⁸⁵ Epstein, *Takings*, 265.

⁴⁸⁶ Friedman, *Capitalism and Freedom*, 8-9.

⁴⁸⁷ Epstein, *How Progressives Rewrote the Constitution*, 131.

⁴⁸⁸ Epstein, *Takings*, 329.

“telling it like it is,” cutting through the morass of possible meanings to *the* meaning. Aune’s point aligns for the most part with Wetlaufer’s condemnations of the legal profession and legal education, built as they are on realist notions of “right answers to legal questions” and a denial of the fundamental relativity of all lawyering—that the client must be zealously defended regardless of the lawyer’s personal view of the case. Lawyers are taught to argue all sides of a case, not just one.

Following Wetlaufer to a degree, Edward Panetta and Marouf Hasian, Jr. criticize Law and Economics, claiming it is “anti-rhetoric as rhetoric,” a “foundational quest for truth that privileges itself as *the* only or primary ‘rational’, ‘objective’, or ‘neutral’ means of acquiring epistemic knowledge.”⁴⁸⁹ Against this critique I would suggest that Epstein, at least, in *Takings* and elsewhere is as much pragmatic as monolithic—he recognizes the limits of his arguments due to contextual political and social factors even as he asserts their nonetheless-correctness.

Panetta and Hasian’s most effective critique has less to do with their typical scare quotes placed around any assertions of certitude (dreaded “objectivity”) than their wholly correct conclusion that the rhetoric of economics is “dehumanizing,”⁴⁹⁰ often eviscerating the moral, ethical, and communal aspects from our considerations of political and legal problems. As we have seen, welfare becomes a mere machine, a “transfer system” with an “insurance component”; the human experience is written out of this calculus. Still, Panetta

⁴⁸⁹ Edward M. Panetta and Marouf Hasian Jr., “Anti-Rhetoric as Rhetoric: The Law and Economics Movement,” *Communication Quarterly* 42 (1994), 58.

⁴⁹⁰ Panetta and Hasian, “Anti-Rhetoric as Rhetoric,” 71.

and Hasian press even this point too far by half, suggesting that “in a Law and Economics world one’s rights are determined via economic calibration.”⁴⁹¹

This mischaracterization reflects what lawyers call a category mistake: Economic calibrations are central to the thinking of theorists like Epstein, as we have seen. But they are not central to the determination of “one’s rights”; for the conservative textualist, rights derive from legal texts (or from their original understanding)—and whatever misgivings we might have with this methodology, it has nothing to do with economic calibrations. The cult of efficiency which many in Epstein’s camp believe should govern *policy* must be separated from questions of *rights*. For many on the left the distinction simply does not obtain.

For Hasian and Panetta, economics is not only denied the legitimacy of being rhetoric at all, but is further accused of “acting as a brake on the extension of rights to worthy citizens.”⁴⁹² Epstein would doubtless ask: Which rights? And from whence derived? And how, precisely, is my non-rhetoric functioning (rhetorically) to prevent the extension of these rights?

By far the most comprehensive critique of economic discourse comes from Deirdre McCloskey, a former colleague of Epstein’s at Chicago and now a professor of economics and history at the University of Iowa.⁴⁹³ McCloskey’s book *The Rhetoric of Economics* is not particular to Law and Economics, and Epstein’s work is not cited. But McCloskey’s critique has much to say about the use of economic language in the domain of the law and political economy. McCloskey, like Hariman, frames her discussion in terms of the broader trope of

⁴⁹¹ Panetta and Hasian, “Anti-Rhetoric as Rhetoric,” 71.

⁴⁹² Panetta and Hasian, “Anti-Rhetoric as Rhetoric,” 71.

⁴⁹³ McCloskey gained notoriety for her decision to undergo a sex change operation in 1996. She was formerly known as Donald.

realism particularly favored by scientists and economists who tend to view their work as the product of proof, not persuasion.

It is apropos here to mention a stinging rebuke that Richard Posner offered some years ago when considering Robert Bork's "originalist" methodology. "Originalism—at least Bork's originalism—is not an analytic," Posner wrote, "but a rhetoric that can be used to support any result the judge wants to reach. The conservative libertarians whom Bork criticizes (Richard Epstein and Bernard Siegan) are originalists; his disagreements with them is not over methodology, but over result."⁴⁹⁴ Indeed, one of the basic points of agreement between the Federalist's libertarians and social conservatives is textualism, though Posner is entirely correct that this does not guarantee agreement.

When I asked him about this splinter with Posner, Epstein, and the economists, Bork just shook his head. "Basic microeconomics is a certain science," he said. "There's no such certainty in Constitutional law. I can argue with you all you want about originalism, and I can give reasons that are decisive. But I can't do anything like you can do with economics. Posner's tried it and it doesn't work...he wrote an article in which he tried to consider police entrapment in terms of the misallocations of resources." Bork scowled dramatically at this. Oddly enough it is as offensive to his methodology as it is to Professor McCloskey's.

"There are libertarians who are perfectly fine with abortion, who are perfectly fine with saying homosexual sodomy can be found in the Constitution, or a muscular interpretation of the Takings Clause," Federalist Executive Vice-President Leonard Leo told me. "But all of them are textually based...we're within the four corners of the document,

⁴⁹⁴ Richard A. Posner, "Bork and Beethoven," *Stanford Law Review* 42 (1990): 1378.

more or less.” More or less is right—since, as we have seen, both Bork and Epstein do move outside the “four corners” in their considerations of originalism, context, history, and tradition. Leo correctly responds, however, that among textualists, these moves to the outside are almost always prompted by conflicts on the inside—the interactions of the Constitution’s various provisions. “It’s not really the Takings Clause that causes the problem,” he said. “It’s the interplay between the Takings Clause and the structural provisions of the Constitutions.” On the one hand the Takings Clause, on the other the broad grants of power to the state under the Necessary and Proper Clause⁴⁹⁵ and the traditional policing power⁴⁹⁶ to enforce the laws laid down.

Originalism is a way of reading texts, but so too is it a set of rhetorical tools, a way of making arguments, “devices of language,” as McCloskey puts it. Just as Hariman exposes Machiavelli’s realist trope (“My liege, I will tell you what’s *really* going on in the intrigues of Court!”) Posner points to the originalist’s realism (“Here is what people *really* understood the First Amendment to mean in 1791”), just as McCloskey points to the economist’s (“The cost-benefit analysis comes out thus; the result is *real*, proven by the correctness of the data.”) McCloskey goes on to show in a series of case studies, however, that assertions of proofs and theorems in economics unfold just as rhetorically as those of any other discipline

⁴⁹⁵ Constitution of the United States, Article I, Section 8, Clause 18 (“The Congress shall have power...To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”).

⁴⁹⁶ The police power is generally considered to be implied or inherent to established government, as it was at the time of the Founding. A long line of Supreme Court cases considers the limits on the police power, but legitimates it even as it outlines its boundaries.

(even—gasp!—literature) but simply make use of a different set of presuppositions and an exclusive lexicon.⁴⁹⁷

She concludes with another passage, this time from Mark Perlman, one of the most prominent economists of the post-war era. What he says of economists in general is true of Law-and-Economists, Epstein included. “Economists’ self-perception is as of ‘*en expert*.’ But economists are not experts; they are basically persuaders.” As are we all, we scientists, mathematicians, and economists together.”⁴⁹⁸

Don’t forget the lawyers!

⁴⁹⁷ McCloskey, *The Rhetoric of Economics*, 22-34.

⁴⁹⁸ McCloskey, *The Rhetoric of Economics*, 167, quoting Mark Perlman, “Review of Hutchinson’s *Knowledge and Ignorance in Economics*,” *Journal of Economic Literature* 16 (1978), 582ff.

CHAPTER 8
THE “NEW SOVEREIGNTY” AND INTERNATIONAL LAW:
THERE’S A NEW BAD GUY IN TOWN

In this final chapter I will examine a topic timely to both the Federalist agenda and national politics at their most consequential: the theory and practice of international law. Since President Bush took the nation to war in Afghanistan and Iraq following the September 11, 2001 terrorist attacks, there has been a steady stream of international law questions before the public, the courts, and Congress—from the validity of the September, 2002 resolution authorizing Bush to use force in Iraq; the administration’s dealings with the United Nations and its Security Council; the detention and treatment of prisoners in U.S. custody in Guantanamo Bay and the Abu Ghraib prisons; and on and on. Political and legal controversies have plagued the administration’s foreign policy and its lawyers have been kept busy. In this chapter I will consider rhetorical, theoretical, and legal aspects to these ongoing challenges. The application of rhetoric here is markedly less theoretical than in preceding chapters considering Meese’s and Scalia’s arguments about interpretation in general; here we are concerned more directly with the application and enactment of law—more with policy than process.

As an introductory matter it is important to recognize the authoritative way that the Bush administration reacted to September 11th. Beginning on the following day the President and his administration launched an aggressive foreign policy that has taken the nation into

two foreign wars articulated under the broad rhetorical umbrella of a “war on terror.” Their communications strategy was masterful, defining the terms of debate for the years to come and making it almost impossible for adversaries to effectively question the premises of Bush’s foreign policy. As with previous topics we have considered throughout this dissertation, it would be incorrect to say that the Federalist Society was “behind” the construction of Bush policy. Federalist conservatives have, however, taken up the project of international law with gusto: Leonard Leo told me bluntly that he and many others on the legal Right see international law as the successor to Constitutional law in the Warren Court era: “The empty vessel into which liberals would pour all sorts of concepts that they couldn’t get through the political process.”

From a technical legal standpoint Bush’s military action in Iraq was justified in part by a national security strategy of “preemption” in conjunction with the traditional national right to self-defense.⁴⁹⁹ With few exceptions at the time,⁵⁰⁰ conservatives supported Bush’s policy, offering up both political and legal justifications for its necessity, wisdom, and constitutionality. Preemption combined with self-defense equated to an aggressive policy critiqued as “unilateralism” and defended as a basic assertion of national sovereignty.

In the intervening years, though, Bush’s go-it-alone stance has become increasingly unpopular, costing him political capital and costing the nation the lives of thousands of young men and women. The intellectual vanguard of the post-9/11 national security strategy—the so-called “neo-conservatives”—are less in favor: Donald Rumsfeld and his

⁴⁹⁹National Security Strategy of the United States at 19. *Available at* <http://www.whitehouse.gov/nsc/nss.pdf> (accessed April 15, 2007).

⁵⁰⁰ See, e.g., Patrick J. Buchanan, *Where the right Went Wrong: How Neoconservative Subverted the Reagan Revolution and Hijacked the Bush Presidency* (New York: St. Martin’s Press, 2004), Chaps. 1-2 *passim*.

deputy Paul Wolfowitz were both cashiered as were many of their acolytes. Even high-powered intellectual neo-conservative Francis Fukuyama repudiated the geopolitical ideology that was behind much of Bush's Middle East policy.⁵⁰¹ One of the most vocal proponents of Bush's policies, John Bolton, lost his chance to become permanent representative to the United Nations when Democrats captured control of Congress in the November 2006 midterm elections. Bolton faced opposition even under the Republican Congress, but with the confirming committee now in the hands of democratic Sen. Joseph Biden, Bolton had to bow out. His nomination was "going nowhere," Biden said.⁵⁰²

Defeating Bolton was a major blow to the foreign policy wing of movement conservatism—if not to "neo-conservatism" per se. The broader coalition of the foreign policy Right concerns itself first and foremost with national self-determination and is extremely skeptical about the role of international bodies such as the United Nations. Christened the "New Sovereignists" by critics, these scholars and policymakers were strongly supportive of the Bush foreign policy, particularly the toppling of Saddam Hussein and the earlier decision to unilaterally withdraw from the Anti-Ballistic Missile Treaty with Russia. Both moves were predicated on their relation to American national interests, regardless of international consequences.

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⁵⁰¹ See, e.g., Louis Menand, "Breaking Away: Francis Fukuyama and the Neoconservatives," *The New Yorker*, March 27, 2006.

⁵⁰² CNN, November 10, 2006, transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/061110/cnr.01.html> (accessed April 15, 2007); But see Jennifer Senior, "Bolton in a China Shop," *New York Magazine*, January 3, 2006 (reporting that Bolton was more well received at the U.N. than many of his political detractors would suggest).

Led by Bolton and others, New Sovereigntists fuse traditional elements of mainstream conservative thought with post-9/11 nationalism⁵⁰³ to articulate a statist, Bismarckian theory of international relations that questions the very premise of international law, treaties, and the international institutions they create. Discussing the International Criminal Court in 2001, Bolton put the matter in typically blunt terms: “It is one of those international law phenomena that just happens ‘out there’, among academics and activists;”⁵⁰⁴ representative of an agenda “clearly inconsistent with American standards of constitutional order.”⁵⁰⁵ As we will see, this perceived inconsistency is rooted in the legal theories of representation and interpretation examined in the preceding chapters.

Mentioning Bismarck—the prototypical foreign policy Realist—is intentional, since I will also be relating the New Sovereigntists’ debt to Carl Schmitt, a 20th Century German political and legal theorist whose provocative insights were damaged by his complicity with the Nazi regime. Schmitt was interested in the conceptual frameworks of political and transnational conflict, conflicts at the root of the adversarial legal process and of the relationships of adversarial states. Just as questions over the meaning of personal autonomy and liberty are implicit in the split between libertarian and social conservatives, questions of national autonomy and transnational law implicate our particular understandings of state sovereignty and international law. Here too different factions exist within the Federalist Society—but the dominant view aligns with Bolton and the New Sovereigntists.

⁵⁰³ See, e.g., William J. Bennett, *Why We Fight: Moral Clarity and the War on Terrorism* (Washington, D.C.: Regnery, 2003), 1-8, 143-168.

⁵⁰⁴ John R. Bolton, “The Risks and Weaknesses of the International Criminal Court from America’s Perspective,” *Law and Contemporary Problems* 64 (2001): 171.

⁵⁰⁵ Bolton, “The Risks and Weaknesses,” 169.

Schmitt is not necessarily the root of New Sovereigntist theory but he does help illuminate it.⁵⁰⁶ For one thing, for some conservatives, Schmittian realism melds with a utopian American exceptionalism to form a comprehensive worldview—a phenomena I will consider below. Believing that America is uniquely situated to lead the world, idealism melds with realism in a rejection of multilateral compromise and international law in favor of what Schmitt calls a statist *nomos*, or global order, where the nations of the earth look to the United States for the model of enlightened self-interest, constitutional democracy, and morally-derived nationalism.

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First I will consider what the New Sovereigntists have been saying in public. Bolton has been point man, but I will also be looking at statements from other government officials and Cornell University professor Jeremy Rabkin.⁵⁰⁷ Both Bolton and Rabkin are celebrities in Federalist circles and boast impressive conservative pedigrees. Bolton was taught Constitutional law at Yale by Robert Bork (who recalls him as the lone conservative in the class) and cut his teeth in the Reagan administration. It is not without irony that Bolton was put in charge of shepherding Bork's Supreme Court nomination through the Senate in 1987; twenty years later the student faced his own political demise.

⁵⁰⁶ See generally Sunic, *Against Democracy and Equality*, 54-64.

⁵⁰⁷ Aside from his 2004 book *The Case for Sovereignty: Why the World Should Welcome American Independence* (Washington, AEI Press) see also Jeremy Rabkin, "In the Looking Glass: A Review of *The Majesty of Law: Reflections of a Supreme Court Justice* by Sandra Day O'Connor," *Claremont Review of Books*, Winter 2003; Jeremy Rabkin, "Original Dissent: Keith Whittington Makes the Case for Constitutional law," *The Weekly Standard*, March 6, 2000, 34-36 (arguing that theory is needed to undergird the argument for "originalist" interpretation of the Constitution); Phyllis Schlafly, "Constitution, Not U.N., Is our Governing Authority," *Human Events*, July 7, 2004, <http://www.humaneventsonline.com/article.php?id=4407> (favorably citing Rabkin's work) (accessed April 15, 2007).

Rabkin, who has spent his entire career in academia, has less of a storied past but no less of a Federalist resume; he mentored a young conservative student by the name of Leonard Leo during his formative years. Rabkin's scholarly arguments in favor of the New Sovereignty have found a ready ally in his former student, who has guided the Federalists toward their current focus on international law. Although the national office does not direct local and student chapters in their areas of focus, it does have a degree of agenda-setting power in its selection of topics highlighted on the website, in publications, and at national conventions. Bolton, for example, was the featured speaker at the 2006 student division conference, focused on international law. He was cheered like a rock star.

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Many of the barbs traded at that conference related to the *Lawrence* decision, discussed earlier in our consideration of Justice Scalia's use of "tradition" in his opinions. In a key footnote, the author of the majority *Lawrence* opinion, Justice Anthony Kennedy, cited opinions of the European Court of Human Rights.⁵⁰⁸ In one of his most acerbic and angry dissents, Scalia blasted Kennedy for the audacity of going beyond the questioning of Scalia's use of history; instead, Kennedy expanded the context to a global scale. He argued in his majority opinion that the Court's decision is justified by the "emerging awareness" of personal autonomy in American society that relates to "values we share with a wider civilization."⁵⁰⁹

⁵⁰⁸ 539 U.S. 558, 576-577.

⁵⁰⁹ 539 U.S. 558, 576-577.

Citing *Bowers v. Hardwick*, the case *Lawrence* overturned, Scalia frames his dissent in global terms. “The *Bowers* majority opinion *never* relied on ‘values we share with a wider civilization’,” Scalia wrote, “but rather rejected the claimed right to sodomy on the ground that such a right was not ‘deeply rooted in *this Nation*’s history and tradition” —the emphasis here is Scalia’s. Traditions, for Scalia, are *per se* national: like citizenship, they cease at the border. Hurling the ultimate judicial epithet, Scalia refers to Kennedy’s invocation of global consciousness and community as *dicta*, language in an opinion that has no bearing on *stare decisis*—an illustrative story or anecdote, for example. Scalia sees Kennedy’s discussion of international law and global norms as not only “meaningless dicta” but—“dangerous.” The ante is upped, to his mind. He quotes a 2002 concurring opinion by Clarence Thomas for the proposition that “this Court ... should not impose foreign moods, fads, or fashions on Americans.”⁵¹⁰

The frenzy aroused by Kennedy’s few international references in *Lawrence* may seem irrational to those not familiar with the longstanding conservative distrust of multilateralism or the sense of American exceptionalism vital to Ronald Reagan’s “shining city on a hill” articulated in the legal world by Meese and others in their Founding Fathers-centric version of originalism. Combined with the anti-European mood on the right in the wake of the invasion of Iraq, Scalia’s denunciation of Kennedy in *Lawrence* took on the status of a battle royal functioning synechdocally for broader New Sovereigntist doctrine. For the coalition of the legal Right, *Lawrence* is a perfect legal storm, providing something for both the libertarian formalists and social conservative majoritarians to hate. For formalists, rules about

⁵¹⁰ 539 U.S. 558, 598, citing *Foster v. Florida*, 537 U.S. 990 (2002). Mark Tushnet, a rather mellowed CLS veteran by 2006, responded with a critical distinction: “the recent invocations of non-U.S. law in Supreme Court opinions are references, not uses.” Symposium “Outsourcing Authority,” *Albany Law Review* 69 (2006), 809. The distinction is perhaps a slippery one. See also Mark Tushnet, “Transnational/Domestic Constitutional law,” *Loyola of Los Angeles Law Review* 37 (2003). See also Rossum, *Antonin Scalia’s Jurisprudence*, 48-50.

judicial authority must have textualist or originalist underpinnings—clearly, European courts and global norms do not fit this bill. Social conservatives were additionally outraged by the case’s outcome: an apparent declaration of the right to homosexual sodomy under the general doctrine of the right to privacy.

At this point I will move into a more theoretical mode, considering the work of a scholar and politician who might be thought of as a forbear to the New Sovereignists—his repugnant ties to Nazi Germany notwithstanding. To invoke Grossberg’s dictum once more: Ideas are not responsible for the people who have them.

Meet Mr. Schmitt

Carl Schmitt (1888-1985) was among Europe’s preeminent jurists before his reputation was undone by collaboration with Hitler’s régime. In recent years, however, his works have been revisited by theorists on the liberal left interested in exploring the concepts of politics, identity, and the state.⁵¹¹ In thinking about the with-us-or-against-us nature of Bush’s foreign policy, it is interesting to consider the implications of his seminal work *The Concept of the Political* (1932).

Schmitt argues here that the key notion in all politics is the distinction between friend and enemy—and the inevitable confrontation between the two. Without this distinction, he argues, there *is no politics*.⁵¹² “The friend and enemy concepts are to be understood in their concrete and existential sense, not as metaphors or symbols,” Schmitt writes, “not mixed and

⁵¹¹ See, e.g., Chantal Mouffe, ed., *The Challenge of Carl Schmitt* (London: Verso, 1999); David Dyzenhaus, ed., *Law As Politics: Schmitt’s Critique of Liberalism* (Durham, N.C.: Duke University Press, 1989).

⁵¹² Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996 [1932]), 26, 35, 57 (emphasis added).

weakened by economic, moral, and other conceptions.”⁵¹³ The notion that nations might build alliances based upon common interests, central to post-World War I Wilsonian utopianism, was in the crosshairs—and under one reading, Schmitt ultimately can be seen as having been correct. The League of Nations failed and World War II ensued.

Schmitt’s politics is not only grounded in polar oppositions but suggests that *all* aspects of social life are inherently political. “Every religious, moral, economic, ethical, or other antithesis transforms into a political one,” he writes, “if it is sufficiently strong to group human beings effectively according to friend and enemy.”⁵¹⁴ Human community and identity are indelibly and inevitably intertwined with the friend/enemy distinction.

For Schmitt as for the New Sovereignists, sovereignty cannot exist without borders and states cannot exist without absolute sovereignty. “The concept of the state presupposes the concept of the political,” is the opening sentence of *The Concept of the Political*.⁵¹⁵ The political power of naming the *other*, the enemy to be confronted,⁵¹⁶ is the most essential power of all, the most “decisive.”⁵¹⁷ Decisive because it determines the alignment of political and social existence on the globe, what Schmitt would much later describe in his essays on the “*Nomos* of the Earth.”⁵¹⁸ As neatly summarized by political critic Tomislav Sunic,

⁵¹³ Schmitt, *The Concept of the Political*, 17-28.

⁵¹⁴ Schmitt, *The Concept of the Political*, 37.

⁵¹⁵ Schmitt, *The Concept of the Political*, 19.

⁵¹⁶ Schmitt, *The Concept of the Political*, 37.

⁵¹⁷ Schmitt, *The Concept of the Political*, 43-44.

⁵¹⁸ Carl Schmitt, “The New *Nomos* of the Earth,” in *Nomos of the Earth in the International Law of Jus Publicum Europaeum* (New York: Telos Press, 2003), 351-355 (“First, *nomos* means *Nahme* [appropriation]; second, it also means division and distribution of what is taken; and third, utilization, management, and usage of what has been obtained as a result of the division, i.e., production and consumption. Appropriation, distribution, and production are the primal processes of human history, three ask of the primal drama.” Schmitt, *Nomos*, 351.)

Schmitt warns that “the process of depoliticization, undertaken by both Marxists and liberals in an effort to create a war-free world, is a dangerous liberal illusion that runs counter to human historical development. Human history in its entirety is primarily a history of perpetual struggle...the ocean of wars in the parentheses of peace.”⁵¹⁹

For conservatives the Cold War fit this model perfectly: a world divided into friends and enemies, of states locked in an intransigent ideological and military struggle just one provocation away from obliterating war. “That the state is an entity and in fact the decisive entity rests upon its political character,” he writes.⁵²⁰ For Schmitt, war is necessarily involved. A worthy successor to his countrymen Bismarck and Carl von Clausewitz, Schmitt argues not only that war is a continuation of politics by other means but that politics without war is meaningless.

For Schmitt, war “underlies every political idea”⁵²¹—not only for Clausewitz’s practical reasons, but due to a finer intellectual point: politics always necessarily implicates war.⁵²² A world without war is a world without politics,⁵²³ a world without states.⁵²⁴ It is a world reimagined and reshaped under the terms of a false generic “humanity” that eliminates necessarily different interests and unavoidable conflict in favor of an imperial, leveling liberal economism, Schmitt argues.⁵²⁵ And recall here the conservative rejection of the egalitarian principles of the French Revolution and even of Jefferson’s “All men created

⁵¹⁹ Sunic, *Against Democracy and Equality*, 57.

⁵²⁰ Schmitt, *The Concept of the Political*, 44.

⁵²¹ Schmitt, *The Concept of the Political*, 35.

⁵²² Schmitt, *The Concept of the Political*, 33-34.

⁵²³ Schmitt, *The Concept of the Political*, 35.

⁵²⁴ Schmitt, *The Concept of the Political*, 55.

⁵²⁵ Schmitt, *The Concept of the Political*, 54-55.

equal.” We are *not*, say the conservatives: It follows that our states are not, as they exist to protect of distinct interests which must necessarily differ across the globe.

Schmitt’s ideas not only illuminate conservative New Sovereignty—they also begin to strangely dovetail with contemporary leftist critiques of globalization, such as the anonymous omnivorous corporate leviathan depicted in Michael Hardt and Antonio Negri’s *Empire*.⁵²⁶ Hardt and Negri gained a surprise bestseller with their 2001 book, part philosophy and part leftist economic manifesto. Schmitt too saw a looming hegemonic, economic *nomos* as something to be feared. But Schmitt is no leftist, and he focuses on political relations rather than economic ones. In a utopian world of liberal economic humanity, a world without states and without others, without difference, Schmitt asks: “For what would men be free?”⁵²⁷ I have found no evidence that Richard Weaver ever read Carl Schmitt, but recall that conservative Southern rhetorician’s similar pronouncement about equality: “Where egalitarianism obtains, no one knows where he belongs.”⁵²⁸ Bereft of nations, bereft of identity, bereft of order, there can be no society, be it local or global.

Schmitt argues for the viability of nationhood and the friend/enemy distinction as a means to preserving these things and against liberalism as a recipe for their demise. Conflict, he says, must be accepted as the necessary condition for survival. “[L]iberal concepts typically move between ethics (intellectuality) and economics (trade),” Schmitt writes.⁵²⁹

⁵²⁶ Michael Hardt and Antonio Negri, *Empire* (Cambridge, Mass.: Harvard University Press, 2001), 201, 360 (“[T]he Imperial sovereignty...is organized not around one central conflict but rather through a flexible network of microconflicts. The contradictions of Imperial society are elusive, proliferating, and nonlocalizable...the concept that defines Imperial sovereignty might be omni-crisis...the royal prerogatives of Imperial government, its monopoly over the bomb, money, and the communicative ether, are merely destructive capacities and thus powers of negation.”).

⁵²⁷ Schmitt, *The Concept of the Political*, 57-58.

⁵²⁸ *Supra*, note xx [210].

⁵²⁹ Schmitt, *The Concept of the Political*, 71.

“From this polarity they attempt to annihilate the political as a domain of conquering power and repression...instead of a clear distinction between the two different states, that of war and that of peace, there appears the dynamic of perpetual competition and perpetual discussion. *The state turns into society*.”⁵³⁰ Here one is reminded of Margaret Thatcher’s famous dictum, itself a distillation of Friedrich Hayek’s anti-statist individualism: “There’s no such thing [as society]; there are individual men and women and there are families.”⁵³¹

“Everywhere in political history,” Schmitt writes, “in foreign as well as domestic politics, the incapacity or the unwillingness to make this distinction [friend/enemy] is a symptom of the political end.”⁵³² The state, possessing the decisive power of war—the *jus belli*—must act politically to preserve internal peace and defend against foreign enemies.⁵³³ The morass of liberal humanism, with its reliance on supranational institutions (the Holy Roman Empire; the League of Nations; the United Nations) and its whitewashing of the friend/enemy distinction—all of these are one more iteration of a similar impulse: an abdication of politics ultimately destructive of the people’s “way of life” and “own form of existence.”⁵³⁴

I have just as little reason to believe that John Bolton has studied Schmitt as I do Richard Weaver, but Schmitt’s arguments provide a useful analytic for understanding the

⁵³⁰ Schmitt, *The Concept of the Political*, 71-72 (emphasis added), 28 (“In the domain of economics there are no enemies, only competitors, and in a thoroughly moral and ethical world perhaps only debating adversaries”).

⁵³¹ Douglas Keay, “Aids, Education, and the Year 2000” (interview with Margaret Thatcher), *Women’s Own*, Sept. 23, 1987, 8.

⁵³² Schmitt, *The Concept of the Political*, 68.

⁵³³ Schmitt, *The Concept of the Political*, 45-46.

⁵³⁴ Schmitt, *The Concept of the Political*, 27. A comment of Etienne Balibar’s is relevant here: that “Schmitt keeps running up against the fact that while the states can be personified as a subject, the people cannot be” (Balibar, Etienne. *We, The People of Europe?* (Princeton: Princeton University Press, 2004), 140.

implications and rhetorical posture of the New Sovereignty school that led this nation to war in Iraq and continues to dominate foreign policy in Republican circles (though failure in Iraq is threatening to change this). What's more, the Schmittian connection points to one more intellectual vulnerability in the structures of conservative legal thought: that a movement so elementally grounded in a rejection of New Deal realism has so much in common with the philosophical Realpolitik of Carl Schmitt.

Mr. Schmitt Goes to Washington

For decades, conservatives have grounded their arguments in patriotism, American exceptionalism, and mistrust of internationalism. This network of issues presented a problem as early as 1948 when “Mr. Conservative,” Ohio Senator Robert Taft, challenged Dwight Eisenhower over joining NATO. It presented a similar dilemma for Bill Buckley and his crew at *National Review* when they took the step to part ways with the anti-United Nations John Birch Society.

The anti-U.N. argument persists today—what could better embody Schmitt's feared elimination of the friend/enemy distinction?—and Bolton was frequently criticized precisely because he was a critic of the organization Bush appointed him to as a representative. He was joined by many other conservatives (not all “neo”) as well as his teacher Robert Bork, who has directly attacked not only the U.N. as such but international law in general. For Bork, international law and United Nations resolutions are fundamentally illegitimate, having no domestic popular genesis, no direct connection to the expression of the views of the peoples' representatives.⁵³⁵ Outnumbered in a chamber where the smallest and least legitimate

⁵³⁵ Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Washington: AEI Press, 2003), 18-21.

governments are represented on a one-to-one basis with the United States, Americans' interests have no chance at reaching a fair outcome.⁵³⁶ "It is not just that the United Nations is useless," Bork declares, "it is, in fact, almost entirely detrimental to the interests of the United States."⁵³⁷

Hostility to the United Nations and to international law in general is no longer the result of Birch Society conspiracy theories or defiant isolationism, as one might more easily have assumed fifty years ago. Bork's dismissals are echoed in academia by Professor Rabkin and others including Federalist founder Steven Calabresi, whose recent work is focused on defending American exceptionalism. The Federalist Society has been home to debates over sovereignty and international law since its inception in an era when the conservative Cold War ethos promoted a stark friend/enemy barrier. The "war on terror" is a rather unwieldy successor, despite the Bush administration's rhetorical efforts to relate the two. Bush's mishandling of the Iraq conflict as well as its broad assertions of executive authority have chipped away at conservative support, however, estranging libertarians, fiscal conservatives, and old-guard Goldwaterites alike. Though many Federalists are now outwardly opposed to Bush's foreign policy and its domestic implications, such as wiretapping, the sovereignty argument has remained a vibrant one. And with some scattered exceptions, it remains a point of Federalist unity.⁵³⁸

⁵³⁶ The U.N. representation scheme mirrors the U.S. Senate, where every state, regardless of population, has two seats. There is, however, no balancing chamber, no U.N. House of Representatives where states are represented proportionally. The Security Council acts in some ways as a check on the General Assembly, but is more analogous to the American Executive Branch—though Security Council members cannot veto a G.A. resolution, only measures internal to the Council.

⁵³⁷ Bork, *Coercing Virtue*, 49.

⁵³⁸ For example, paleo-conservative Richard Viguerie, whose pedigree dates back to the Goldwater campaign, is both a fierce Bolton defender and a vigorous Bush critic; his memoir's title says it all: *Conservatives Betrayed*. (esp. Chap. 12, "Standing up for the U.S. in a Dangerous World.").

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Addressing the Federalist Society's national lawyers convention in 2003, former Boston University School of Law Dean Ronald Cass described the relationship of American sovereignty to international law as a combination of "one term that no one can define with another term that virtually no one believes in."⁵³⁹ The line surely received a chuckle, but Cass's sarcasm belies the seriousness with which conservatives have addressed sovereignty and its implications as a fundamental theory underlying the aggressive policies of the Bush administration.

At a 2004 conference on "War, International Law, and Sovereignty," Rabkin began his presentation with a definition of sovereignty remarkably in line with Schmitt's ideas. Rabkin was at the time completing his book *The Case for Sovereignty: Why the World Should Welcome American Independence* (published by AEI) and his remarks represent a succinct version of his argument. The AEI connection is notable not only because that think tank has become known as a bastion of neoconservative thought but also because of the ideological and communications apparatus the institute commands—recall our consideration of the way Washington think tanks have helped disseminate and popularize the conservative argument against Affirmative Action.

Speaking to the Federalists Rabkin declared that "The reasonable understanding of sovereignty is that it is not about governance, it's about government, and government is

⁵³⁹ Ronald Cass, Introduction of Hon. John Bolton, 2003 Federalist Society National Lawyers Convention. Available at <http://www.fed-soc.org/pdf/bolton.pdf> (last accessed April 15, 2007).

about force,” Rabkin said. “That is what government is, force, coercion.”⁵⁴⁰ This “sober”⁵⁴¹ view, he tells us, is about certain first principles—what a state *is*, what a constitution *is*, and what law *is*. The choice to characterize his view as “sober” is a typical rhetorical move in the classical realist vein, as we have seen from Hariman’s critique.

“A law which has no means of enforcement, a law which has no penalty attached, is not a law,” Rabkin argues, citing Alexander Hamilton in the Federalist Papers.⁵⁴² This argument imagines law in a wholly Schmittian manner: law as coercion, the force of the *nomos* which shapes and re-forms the boundaries between nations and persons. It aligns with leftist cultural theorist Etienne Balibar’s view of Schmitt, that “sovereignty is always established upon a border and is primarily exercised in the imposition of borders.”⁵⁴³ For the New Sovereignists, good fences make good neighbors, even on the international scale. Sovereignty is “a way of promoting peace by establishing borders,” Rabkin writes.⁵⁴⁴

In his Federalist Society remarks Rabkin goes on to relate his concept of law as coercion to constitutionality as law. “If we need force, who controls the force?” he asks. “We have a constitution precisely to define who gets to use force, [and] when. *That’s what a constitution is.*”⁵⁴⁵ Absent from his constitutional scheme is any notion of shared social identity or values, what communication scholars like James Boyd White call constitutive

⁵⁴⁰ Jeremy Rabkin, “War, International Law, and Sovereignty.” American Enterprise Institute conference transcript, June 24, 2004. http://www.aei.org/events/filter_.eventID.843/transcript.asp (accessed April 15, 2007); see also Rabkin, *The Case for Sovereignty*, 14-15.

⁵⁴¹ Rabkin, “War, International Law, and Sovereignty.”

⁵⁴² Rabkin, “War, International Law, and Sovereignty.”

⁵⁴³ Balibar, *We the People of Europe?*, 140.

⁵⁴⁴ Rabkin, *The Case for Sovereignty*, 19.

⁵⁴⁵ Rabkin, “War, International Law, and Sovereignty.”

rhetoric; what Jefferson Powell views as a political community “built on words”; what Sanford Levinson sees as a civic constitutional faith. For Rabkin, as for Schmitt, these ideas are decidedly secondary. As constituted by law the sovereign power, the fundamental *political* power, is about force and ultimately war. What is *constituted*, for Rabkin, “is a scheme of government which determines when and where and how force will be applied... sovereignty is fundamentally about constituting the exercise of force.”⁵⁴⁶ American sovereignty, the argument proceeds, is dependent upon our freedom to exercise force with or without the support of other sovereign states. As he writes in *The Case for Sovereignty*,

At its most basic level, sovereignty is an inherently limiting principle. A sovereign state rules here—and not there. What is done “there”—in another country—may be an example for “us,” or a dreadful counterexample. In the meantime, sovereignty allows people “here” to resolve their differences by focusing attention on what is needed to improve things “here”—in the here and now, where our actual political community operates.⁵⁴⁷

For both Rabkin and Schmitt, the true notion of sovereignty and law as *force* has been dangerously obscured by liberal abstractions of global governance and egalitarian humanism—linking up to our earlier examination of equality in the context of American racism. Rabkin tells us that “delusions” of abstraction “were particularly powerful in the nineties when everybody talked about global governance.”⁵⁴⁸ This notion of global governance puts trust and authority in the United Nations and other supranational bodies such as the European Union. Rabkin will have none of this. None of its “egalitarian passion,”

⁵⁴⁶ Rabkin, “War, International Law, and Sovereignty.”

⁵⁴⁷ Rabkin, *The Case for Sovereignty*, 31.

⁵⁴⁸ Rabkin, “War, International Law, and Sovereignty.”

its “socialist moralizing applied to international relations,” its claim that “Every country is equal, every country should be equal. Therefore, all of us need to be consulted.”⁵⁴⁹

For Rabkin as for Schmitt, this is a kind of humanitarian “mysticism”⁵⁵⁰ denying self-interest and the essence of politics, the enemy/friend distinction. When it comes to the use of force against the enemy, “No serious government is going to allow the answer to be determined by foreigners who don't care or don't care as much about that country is the country itself,” Rabkin says.⁵⁵¹ Self-interest is here defined as the sovereign power to determine who the enemy is—the political power, in Schmitt's sense. The argument in favor of the Bush administration's preemption doctrine and general disdain for the United Nations flows logically from this position.

In the history of movement conservatism, as we saw in Chapter One, the specter of isolationists and United Nations conspiracy theorists has loomed long and large. To be sure, Know-Nothing conspiracy types are still seen among the ranks of the GOP faithful (and at Federalist conventions). When does legitimate opposition to U.N. corruption, inefficacy, and moral repugnance, as in the infamous Zionism-is-racism resolution,⁵⁵² become jingoistic nationalism?

The question is complicated by Rabkin's heated rhetoric just as it is by the more media savvy Fox News reporter Eric Shawn, author of the fantastically polemic 300-page

⁵⁴⁹ Rabkin, “War, International Law, and Sovereignty.”

⁵⁵⁰ Rabkin, “War, International Law, and Sovereignty.”

⁵⁵¹ Rabkin, “War, International Law, and Sovereignty.”

⁵⁵² United Nations General Assembly Resolution 3379, adopted Nov. 10, 1975; repealed by Resolution 46/86 on Dec. 16, 1991.

screed *The U.N. Exposed: How the United Nations Sabotages America's Security*.⁵⁵³

Shawn's case is not subtle. "I am disgusted by the fact that the altruistic efforts of so many U.N. staff members are undercut by the greed, corruption, and ineptitude of the bureaucracy they serve," he writes.⁵⁵⁴ Under this view, the corrupt U.N. was actually supporting America's "enemies" in Iraq and elsewhere.⁵⁵⁵ Not only was American sovereignty compromised, but our interests were as well.

Sovereignty as constituted by law is thus not about community in the sense of some global forum like the League of Nations or the U.N; it comes before these things and should not be confused with them. "It's not the sum of either human happiness or political understanding," Rabkin says, "but it's the precondition for human happiness and also for political understanding both at home and abroad."⁵⁵⁶ It is the ur-concept, and it is fundamentally about war, force, and determining the nature of our enemies—and it must not be ceded to some other power, lest law itself be abandoned. "The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage in business transactions," Schmitt wrote decades ago.⁵⁵⁷ "But he is, nevertheless, the other, the stranger"⁵⁵⁸ ... what always matters is only the *possibility* of conflict."⁵⁵⁹ "Security," in our modern sense, could be theorized this way: the

⁵⁵³ Eric Shawn, *The U.N. Exposed: How the United Nations Sabotages America's Security* (New York: Sentinel/Penguin, 2006).

⁵⁵⁴ Shawn, *The U.N. Exposed*, xviii.

⁵⁵⁵ Shawn, *The U.N. Exposed*, 87-126.

⁵⁵⁶ Rabkin, "War, International Law, and Sovereignty."

⁵⁵⁷ Schmitt, *The Concept of the Political*, 27.

⁵⁵⁸ Schmitt, *The Concept of the Political*, 27.

⁵⁵⁹ Schmitt, *The Concept of the Political*, 39 (emphasis added).

threat of war, which would necessarily be diminished should a consensus of other sovereigns be required for its execution.

Speaking in 2003, then-Undersecretary of State for Arms Control and International Security Bolton addressed the Federalists' national lawyers convention on these same issues. Bolton was at this point already known as an aggressive defender of the Bush administration's foreign policy⁵⁶⁰ whose confrontational rhetoric had even prompted propagandistic responses from the Kim Jong Il régime in North Korea.⁵⁶¹ "The decision to use military force is the most important decision that any nation-state faces," Bolton told the Federalists, employing somewhat more nuanced language than Rabkin.⁵⁶² "Limiting these decisions or transferring them to another source of authority is ultimately central to a diminution of sovereignty."⁵⁶³

The key for Bolton here is authority and from whence it derives. To be sovereign is to possess this authority, the war-making authority. Regarding the U.S. action against Iraq, Bolton goes on to say that authority rested in the president in light of the October 17, 2002 congressional resolution which authorized the use of force.⁵⁶⁴ And the legitimacy of this authority derives from our constitutional system. "We should not shrink from the debates on legitimacy to disarm the Iraqi régime under the Constitution," he says.⁵⁶⁵ Going on to

⁵⁶⁰ Brooke Lierman, "Who Is John Bolton," Center for American Progress, March 7, 2005. <http://www.americanprogress.org/issues/2005/03/b252671.html> (accessed April 15, 2007).

⁵⁶¹ BBC News, "U.S. Official Lambastes North Korea," July 31, 2003. <http://news.bbc.co.uk/2/hi/asia-pacific/3112163.stm>; (accessed April 15, 2007); full text of Bolton's address is available at http://kyl.senate.gov/legis_center/rpc/rpc_073103.pdf (accessed April 15, 2007).

⁵⁶² John Bolton, "Address to the Federalist Society National Lawyers Convention" (Washington, D.C., Nov. 13, 2003), 7. http://www.fed-soc.org/doclib/20070324_bolton.pdf (accessed April 15, 2007).

⁵⁶³ Bolton, "Address to the Federalist Society," 7.

⁵⁶⁴ Bolton, "Address to the Federalist Society," 7.

⁵⁶⁵ Bolton, "Address to the Federalist Society," 8.

identify the issue as “a fundamental problem of Democratic theory,” Bolton argues, “we should not shrink from the debates on legitimacy through concern that following our own constitutional procedures on the use of force is somehow not enough to justify our actions.”⁵⁶⁶ Not doing so, he warns, “will result over time in the atrophying of our ability to act independently.” Mr. Schmitt has come to Washington: Surrendering the power to determine who the enemy is and to wage war against them is to surrender the political power, and with it sovereignty is sacrificed.

* * *

In laying out his theoretical justification for the use of force against Iraq as a component of the larger Bush administration policy of preemption, Bolton makes an interesting detour outside the realm of Constitutional law. As Abraham Lincoln did when addressing the question of federal authority over the sovereign states,⁵⁶⁷ Bolton looks to the Declaration of Independence as an authority on questions of legitimacy, as distinguished from what he calls “actual political power or political impact.”⁵⁶⁸ “One can certainly have legitimacy without power, and vice versa,” he adds, and “for Americans, the basis of legitimacy for government is spelled out in the Declaration of Independence.”⁵⁶⁹

The key concept from the Declaration (an extra-Constitutional source, we should remember) is that the just powers of government are derived from the consent of the

⁵⁶⁶ Bolton, “Address to the Federalist Society,” 8 (emphasis added).

⁵⁶⁷ William, *Lincoln’s Virtues*, 296-297, 351-353, 365-367; Levinson, *Constitutional Faith*, 140-141.

⁵⁶⁸ Bolton, “Address to the Federalist Society,” 8.

⁵⁶⁹ Bolton, “Address to the Federalist Society,” 8-9.

governed. For Bolton, this “fundamental precondition for understanding the use of any governmental power” has been “fundamentally misunderstood in the U.N. system.”⁵⁷⁰ Again he returns to the question of authority and finds that the problem lies in the perception that “international law does not derive directly from the consent of the governed.”⁵⁷¹ The layers of representation inherent in a multinational body where states are represented equally—Rabkin’s “egalitarian passion”—makes direct, populist “consent of the governed” impossible. As another Federalist Society contributor has pointed out, all international agreements involve a decision on whether the benefits accrued outweigh the tradeoffs in sovereign authority.⁵⁷² The implications for sovereignty in a tradeoff with the United Nations are, for most Federalist conservatives, both unacceptable and unconstitutional.

Aside from Iraq and questions over whether the United States acted improperly in exercising its sovereign power to invade that nation, Bolton also cites Bush’s opposition to the International Criminal Court (ICC) as a case where “legitimacy” was the driving factor in policy formation.⁵⁷³ Bolton showed no qualms in resurrecting Stephen Douglas’s old warhorse of “popular sovereignty,”⁵⁷⁴—the ICC not only runs contrary to this “fundamental American precept and basic constitutional principle,” but also to the notion of checks and balances and “national independence,” a fuzzier idea he leaves unexplored in the remainder of his address.⁵⁷⁵ The exceptions to the ICC treaty prohibiting the handing over of American

⁵⁷⁰ Bolton, “Address to the Federalist Society,” 9.

⁵⁷¹ Bolton, “Address to the Federalist Society,” 9.

⁵⁷² Damara Griffith, “NAFTA, Sovereignty, and Tradeoffs,” (Washington, D.C.: The Federalist Society, 2003), 1, 17.

⁵⁷³ Bolton, “Address to the Federalist Society,” 14.

⁵⁷⁴ See also Bork, *The Tempting of America*, 171, 259.

⁵⁷⁵ Bolton, “Address to the Federalist Society,” 14, 18-19.

citizens to the international tribunal are presented by Bolton in starkly Schmittian terms: they serve to prevent the enemy from launching illegitimate, politically motivated prosecutions against American nationals. The surrender of authority and loss of legitimacy inherent in a supranational institution such as the ICC is a surrender of the political power—deciding who the enemy is and how they will be treated. Surrender that power and one has surrendered everything. “A basic right of any representative government [is] to protect its citizens from the exercise of arbitrary power,” he tells us.

For Bolton and other conservatives, the chain of representational authority and legitimacy can only extend so far. If not contemplated explicitly by the Constitution or in the Declaration, legitimacy and legality are called into question. Rabkin, for example, refers to the Universal Declaration of Human Rights—a treaty traditionally praised by human rights activists around the globe—as less of a legal pronouncement than a call to prayer. “One could say, with only slight exaggeration, that instead of an international regulatory authority, or a serious treaty structure, the human rights conventions sought to found a new church,” Rabkin writes. “The conventions appealed to the faithful to believe.”⁵⁷⁶ And for Rabkin this is a false church. After all, the U.N. is singularly ineffective in enforcing its resolutions, from Rwanda to Darfur to Iraq, conservatives are quick to point out.

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Bolton’s then-colleague Paula Dobriansky, Undersecretary of State for Global Affairs, amplified many of his themes at that 2003 Federalist convention. After first calling

⁵⁷⁶ Rabkin, *The Case for Sovereignty*, 110.

sovereignty “the basis of our freedom,”⁵⁷⁷ she repeated Bolton’s consent-of-the-governed theme. After leaving the Bush administration, in fact, Bolton broke publicly with the GOP party line, attacking Bush’s concessions to the North Koreans in ongoing negotiations over Pyongyang’s nuclear pursuits. The concessions were viewed by some as further evidence of the waning influence of the AEI neo-cons, but also the product of political pressures brought on by the November, 2006 elections and Bush’s plummeting poll numbers.⁵⁷⁸

In an interesting rhetorical move, Dobriansky in 2003 conflated comparison of North and South Korea with the embrace or rejection of globalization—defined as “the increasingly free flow of ideas, information, goods, capital, and people across borders and around the globe,” which, she says, is an overall “positive development” that “entails more freedom and opportunity for people in every country.”⁵⁷⁹ The comparison of North Korea and South Korea is indicative of the ideological work going on in this rhetorical production: “Free flow” of ideas, capital, and people (an interesting notion, given the uproar over illegal immigration) is linked with the capitalist South where “the people are sovereign.” Isolation, repression, and “estrangement from the international community” are linked to the dictatorial North, where the people’s “rightful sovereignty has been usurped.”⁵⁸⁰ There the dictator is sovereign in the royal sense alone.

⁵⁷⁷ Paula Dobriansky, “Address to the Federalist Society National Lawyers Convention” (Washington, D.C., Nov. 15, 2003), 4. http://www.fed-soc.org/doclib/20070324_dobriansky.pdf (accessed April 15, 2007).

⁵⁷⁸ See, e.g., Bill Gertz, “Bolton Hits Agreement as ‘Bad Signal,’” *The Washington Times*, February 14, 2007.

⁵⁷⁹ Dobriansky, “Address to the Federalist Society,” 6.

⁵⁸⁰ Dobriansky, “Address to the Federalist Society,” 9.

The sovereignty of the people, she says, is “real” sovereignty.⁵⁸¹ As with Rabkin, who talked not of the conception of law or the conception of a constitution but of what law *is* and what a constitution *is*, Dobriansky speaks in an assertively realist voice—a voice of sureness, certainty, and fixity. As Hariman argued, realism is a master trope: a mode of argument which presents itself as eschewing argument altogether. It is not the way things can be seen but the way things are.⁵⁸²

“Our sovereignty rests always with the American people,” Dobriansky says, “and never with a foreign government or international organization.”⁵⁸³ The pairing of these alternatives presents an interesting strategy: opposition to “ceding authority to the U.N.” is a common refrain among many on the right, but certainly no one, on the left or otherwise, has ever suggested that the United States should cede authority to some other *foreign government*. Equating the United Nations, a transnational membership organization to which the United States has treaty obligations, with a “foreign government” is a rhetorical ploy clearly meant to analogize an organization with the states who are its members. But with the United States only one member state among many (the one-state, one-vote representation scheme) this argument has some resonance.

Dobriansky acknowledges that at times certain policy goals “may require the United States to collaborate with multilateral organizations and even be bound by decisions made by others”—again carefully gauging her argument so as to marginalize the obligations already

⁵⁸¹ Dobriansky, “Address to the Federalist Society,” 10.

⁵⁸² Hariman, *Political Style*, 13-50.

⁵⁸³ Dobriansky, “Address to the Federalist Society,” 5.

incumbent upon the United States as a signatory to the United Nations Charter.⁵⁸⁴ Instead she frames the notion of national decision-making with the rhetoric of a Lockean *tabula rasa* where cooperation with multinational or supranational organizations “may be required.” Even this, she says, “understandably gives rise to the concern that American sovereignty is being undermined.”⁵⁸⁵ Dobriansky emphasizes a critical factor into these considerations of sovereignty: The key reason to fear the “undermining” of American sovereignty is that “foreign interests that do not necessarily share our values will gain influence and power over us.”⁵⁸⁶ Values matter, as do traditions and cultures and identities—and these are best defended (and defined) within boundaries.

Sounding very much like Robert Bork in his popular sovereignty mode, Pepperdine Law School professor David Davenport echoes this theme in a recent book. “State sovereignty protects national self-determination and cultural diversity,” he writes, “allowing people to keep historical languages and customs.”⁵⁸⁷ Another group of New Sovereignists put it this way in a 2007 article: “Sovereignty implies that every state has the right to order its own preferences,” “their rights to cultural integrity, national dignity, and religious freedom.”⁵⁸⁸

So, I would ask, what are the values identified by Dobriansky and these other New Sovereignists? Independence, certainly—whether as established by the Declaration of, or

⁵⁸⁴ Dobriansky, “Address to the Federalist Society,” 5. Bear in mind that critics like Rabkin question this obligation as an unconstitutional delegation, just as Congressional opponents to the League of Nations did many years before.

⁵⁸⁵ Dobriansky, “Address to the Federalist Society,” 5-6.

⁵⁸⁶ Dobriansky, “Address to the Federalist Society,” 6.

⁵⁸⁷ David Davenport, “New Diplomacy Threatens American Sovereignty,” in *A Country I Do Not Recognize*, ed. Robert Bork (Stanford, Calif.: Hoover Institution Press, 2005), 132.

⁵⁸⁸ Anna Simons et al., “The Sovereignty Solution,” *The American Interest* 2 (2007), 34.

not. Independence must be the watchword, Dobriansky says, when considering our collaborations in interactions with “other nations and multilateral bodies.”⁵⁸⁹ For Rabkin, in his Schmittian vein, independence means the ability to declare the enemy and wage war against him is the most essential value—the ability to preserve one’s own existence against the threat of destruction and violence from outside; the right to determine one’s own self-interest. Bork put the point succinctly in 2004: “There is no possibility of democratic accountability in international organizations.” Connecting political sovereignty and moral self-determination he concludes that the problems of international law are directly connected to what libertarians deride as “majoritarianism,” as we have seen before. “There is not enough agreement on morals among the various cultures of the world to support an international law of human rights,” Bork concludes.⁵⁹⁰

American Exceptionalism and the New Sovereignty

For many conservatives and New Sovereignists self-determination is deeply intertwined with a sense of American Exceptionalism that relates specifically to matters we have discussed earlier. Attorney General Edwin Meese’s originalism venerates the Founders and privileges their views, creating a utopian and triumphalist history; Scalia’s textualism flows from this view because the Constitution was the Founders’ own; Bork’s populism is rooted in a moralistic common sense that he argues the American people inherently possess—as opposed to nattering nabob elitists. These strands of thought come together in the American Exceptionalism boldly defended by Federalist founder Steven Calabresi in

⁵⁸⁹ Dobriansky, “Address to the Federalist Society,” 15.

⁵⁹⁰ Robert Bork, “Address to Rome Conference on International Law, Democratic Accountability, and Moral Diversity,” June 13, 2004.

what is probably his most culturally provocative work, sure to be the centerpiece of the Federalists' 2007 national convention, which takes Exceptionalism as its theme. "Not only do Americans think of the United States as an exceptional country," Calabresi writes in his most recent article, "but it has actually become an exceptional country."⁵⁹¹ Citing an extensive body of literature from various disciplines Calabresi argues that "Americans are much more individualistic, libertarian, religious, patriotic, moralistic, and opposed to unions than are Canadians or Europeans."⁵⁹² We are an "outlier" nation, and we ought to be proud of it.⁵⁹³

Calabresi, who had a hand in Meese's Tulane speech and worked closely with other top Federalists in the Reagan administration, argues that American exceptionalism is tied directly to the alarm over Justice Anthony Kennedy's citations in *Lawrence* and to internationalism in general. Calabresi reasons that since most Americans "think that the United States is an exceptional country that differs sharply from the rest of the world...it must have its own laws and Constitution."⁵⁹⁴ Under this view, integrating non-American legal sources into our jurisprudence not only risks ceding authority but threatens our very identity. "This is why I think some conservatives responded to Justice Kennedy's reliance on foreign law in *Lawrence v. Texas* by calling for his impeachment," Calabresi concludes.⁵⁹⁵

As one critic points out, the exceptionalism argument can cut both ways; there is no reason why touting American global leadership must lead necessarily toward a New

⁵⁹¹ Calabresi, "A Shining City on a Hill," 1337.

⁵⁹² Calabresi, "A Shining City on a Hill," 1340.

⁵⁹³ Calabresi, "A Shining City on a Hill," 1340.

⁵⁹⁴ Calabresi, "A Shining City on a Hill," 1337.

⁵⁹⁵ Calabresi, "A Shining City on a Hill," 1412.

Sovereigntist position on international law. “A careful and measured sacrifice of sovereignty by acceding to reasonable agreements and norms, reciprocated by other nations, will strengthen the international legal system and the United States,” writes Christopher Linde. “The result could be the ultimate manifestation of American exceptionalism—the notion that the United States is destined for greatness—to be the superpower that benevolently accedes its own sovereignty for the good of the world.”⁵⁹⁶ Or as Mark Tushnet wrote after *Lawrence*, “The language of sovereignty is misleading...it overlooks the fact that a sovereign nation can decide that its sovereign interests are advanced overall by making agreements with other nations that limit what it can otherwise do.”⁵⁹⁷

As one more example of the diverse opinions within Federalist ranks, University of Virginia professor Robert Turner almost agrees with this critique.⁵⁹⁸ “I’m a strong believer in sovereignty,” said Turner, who has debated Bolton at past Federalist events and who co-founded Virginia’s Center for National Security Law. But for Turner there is no contradiction between sovereignty and multilateralism, treaties, and the obligations they entail. “One of the fundamental attributes of international sovereignty is the ability to make agreements,” he told me, making comparisons between an individual’s right to contract with a bank for a mortgage on a home—an arrangement resulting in present benefits at the cost of future obligations. “When we ratify the U.N. charter,” Turner said, “we give up our right to launch

⁵⁹⁶ Christopher Linde, “The U.S. Constitution and International Law: Finding the Balance,” *Journal of Transnational Law & Policy* 15 (2006), 338.

⁵⁹⁷ Tushnet, “Transnational/Domestic Constitutional law,” 262.

⁵⁹⁸ Not quite an Epstein-variety classical liberal or a positivist in the vein of Judge Frank Easterbrook, Turner is an example of what I might even call an anti-Burkean traditional conservative: an avowed Jeffersonian idealist. Hardly a traditionalist in the mold of Edmund Burke (or Robert Bork), Turner quotes the Sage of Monticello with no chagrin: “We are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it” (Letter to William Roscoe, December 27, 1820).

an aggressive war...if we say this is not a binding obligation on us, we can't possibly argue it is a binding obligation on Kim Jong Il or Saddam Hussein." Considering the varying views of the Founders on international law, Turner recalled a comment made to him by former Secretary of State George Schultz: skepticism of "entangling alliances" among some of the Founding generation⁵⁹⁹ must be considered in light of the fact that continental Europe was dominated at that time by monarchies, not democracies as it is today. In this light, for Turner, Justice Kennedy's references in the *Lawrence* case are not as flabbergasting as Scalia claims. "Looking to civilized societies around the world to see how other people have addressed them may be a useful thing," he said, "so long as they're not pretending it's precedent."

Turner, who has worked on Capitol Hill and in the Pentagon, is also a combat veteran. "I've been to war twice," he told me. "Our job as lawyers, as people who care about ethics and character," he said, "is to try to make sure that our behavior on the battlefield is honorable and within the laws of armed combat." Hence, for Turner, his opposition in the national media⁶⁰⁰ to the Bush administration's apparent flaunting of international law regarding the treatment of enemy detainees and the use of procedures classified as torture under the Geneva Conventions—matters of moral authority, as he sees it. "We have done horrible damage to our country," he said to me in a decidedly somber tone.

Turner perceives in the brashness of the New Sovereignists both hubris and a failure to learn from history. In contrast to the go-it-alone stance of the Bush administration he points to American policy following World War II, when the country had a monopoly on military power that included the atomic bomb. "We could have placed all sorts of demands

⁵⁹⁹ See, e.g., Washington, George, Farewell Address (1796).

⁶⁰⁰ See, e.g., Dahlia Lithwick, "Tortured Justice," *Slate.com*, Oct. 24, 2001. <http://www.slate.com/default.aspx?id=2057099> (accessed April 15, 2007).

on the world,” Turner said. Instead, there followed the Marshall Plan, the rebuilding of Japan, billions of dollars in foreign aid, and an invitation to the United Nations to establish itself on American territory in New York City. “And the world said, my God, the Americans are different,” Turner said wistfully.

* * *

Observing these legal and geopolitical tussles we would do well to keep ourselves attuned to the rhetorical work being done by the term *sovereign*. Who (or what), precisely, is represented by this term? A sovereign *nation* as such (Tushnet); a sovereign *government* that acts internationally as one nation among equals (Turner); a sovereign *people* whose representatives constitute a government beholden directly to their will (Dobriansky, Bork)? From citizen to representative to government to transnational governance—thus ascends the level of generality and accountability. With each step, the majoritarian warns, representation is diluted; authority is delegated and delegated and delegated until the delegator is erased from the political picture.

Addressing the Federalist Society several years ago, Bolton’s United Nations predecessor John Negroponte spoke to this question. He made clear that the scale on which this self-interest would be calculated: a global one. A conservative and a lifelong diplomat, Negroponte interjects a somewhat different perspective to this discussion among those on the right: “the United States has global interests, and where our national security truly is in jeopardy, we cannot and will not defer to other states.” Our interests are global, in other words, so our sovereign power extends globally as well. Indeed, Negroponte says as much.

“This is not hegemony,” he says, “it’s sovereignty, perfectly in line with the precepts of the U.N. Charter itself.” It is a sovereignty with the reach of the *nomos*—strictly speaking, Negroponte’s terminological objections can be conceded while still identifying the United States, in this assertion of its “global interests,” as a hegemonic power exercising a hegemonic sovereignty.

Negroponte here implies a view of the United Nations very much in harmony with the Bush administration’s views on sovereignty: The organization is a forum of sovereign states, not a sovereign actor. “It is an analytic mistake to think of the U.N. as an independent entity,” Negroponte tells us, “as separate and distinct from its members.”⁶⁰¹ This distinction mirrors the common mistake of those on the left who mistake the Federalist Society as a speaker rather than a forum.

As a pragmatist interested in the rhetorical significance to democracy on a global as well as a national scale, I think this a central point—and one of the best responses to the New Sovereignists. Forums matter. Debate matters. Rather than become mired in the questions that preoccupy some Federalists—did Thomas Jefferson recognize the validity of something known as *jus cogens*, “customary international law”? Rather, I would suggest that the U.N. provides a unique opportunity for debate and discussion...just like the Federalist Society. To dismiss its validity is to invite the end of the one universally accepted global forum. This is not to apologize for its flaws or defend its institutional failures, nor to undermine efforts at reform. It is merely to recognize the practical value the U.N. provides, and suggest—to use some economic language—we try to maximize that value. In a recent film about the first Iraq

⁶⁰¹ John Negroponte, “Address to the Federalist Society National Lawyers Convention” (Washington, D.C.: Nov. 13, 2003). http://www.fed-soc.org/doclib/20070324_negroponte.pdf (accessed April 15, 2007).

War, the actor playing CNN's Baghdad producer puts it this way to Saddam's information minister: "When we stop talking, we start shooting."⁶⁰²

That said, Negroponte repeats the primary legal-analytic error in the Bush administration's justification for the use of force in Iraq: "the President decided that the Security Council's numerous resolutions directed at [Saddam's] régime it must be enforced."⁶⁰³ Responding to the similarly-worded provision in the October 17, 2002 congressional resolution authorizing the use of force against Iraq, democratic California congressman Bob Filner put the point succinctly: "No nation can unilaterally decide to enforce the U.N.'s resolutions," he said, "Only the U.N. has that power."⁶⁰⁴

Not under the New Sovereigntist view. A consistent theoretical and political perspective has emerged from their quarters over the past five years—and it does not necessarily correspond with the so-called "neoconservative" plans for remaking the Middle East. New Sovereigntists like Bolton and Rabkin move beyond Bismarckian *Realpolitik* toward a more expansive conception of state power rooted in popular sovereignty and answerable to no one (and no institution) other than the nation's people.

Carl Schmitt's theory of politics illuminates the views articulated by New Sovereigntists conservative thinkers and policymakers and provides an analytic tool for understanding their discourse as well as, perhaps, their actions.⁶⁰⁵ The confrontation that began on September 11, 2001 has made their actions relevant to the lives of millions of

⁶⁰² *Live from Baghdad*, HBO Films, 2002. Directed by Mick Jackson.

⁶⁰³ Negroponte, "Address to the Federalist Society."

⁶⁰⁴ Jonathan Riehl, "The Ghosts of Tonkin: Questions and Resolutions," *Congressional Quarterly*, September 28, 2002, p. 2504.

⁶⁰⁵ Sunic, *Against Democracy and Equality*, 54-64.

people in this country and around the world. The wars we now wage represent, in a way, the bridge from their theory of sovereignty to its actual execution as force and as war. While the Federalist Society has not been responsible for these developments its has served as a forum for the incubation and diffusion of the ideas that have, as Richard Weaver wrote, had consequences.

With the advent of the Bush administration New Sovereignty became a realized theory, a melding of theory and practice into policy. Though opposition to the Bush War-on-Terror narrative is growing, the sovereigntist argument remains dominant in conservative circles: an assertion of global power and the right to destroy an enemy. It is also the project of a legal realism which treats law and sovereignty as forms of coercion and force in the service of a sovereign people and its leader. “If the American citadel can be breached,” Bolton said in 2001, “advocates of binding international law will be well on the way toward the ultimate elimination of the ‘nation state’.”⁶⁰⁶

As a closing note, it is worth remembering the place of “the people”—a term of art and very much an ideological construction—“deep rhetoric,” as we have seen in earlier discussions.⁶⁰⁷ “The distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, as of an association or dissociation,” Schmitt wrote.⁶⁰⁸ The language of nation and of nationalism is a rhetorical production, and for the New Sovereigntists the Schmittian distinction is front and center. The intensity of opinion in America on issues

⁶⁰⁶ Bolton, “The Risks and Weaknesses of the International Criminal Court,” 173.

⁶⁰⁷ See McGee, “In Search of the ‘People’,” 242 (“[T]he people’ are more *process* than *phenomenon*. That is, they are conjured into objective reality, remain so long as the rhetoric which to find them has force, and in the end wilt away, becoming once again it merely a collection of individuals”).

⁶⁰⁸ Schmitt, *The Concept of the Political*, 26.

relating to the war on terror is due in part to the ways in which these particular theories of politics and sovereignty have been debated in the public sphere—and enacted through policy.

Driven by a conservative ideology of sovereignty and law, America today is at work on a Schmittian political project which stands to remake the *nomos* of the earth. For the Federalists, this is item one on the agenda, and it's no conspiracy: Just check their website.

CONCLUSION

RHETORIC AND CHANGE

For fifty years conservatives have been working to change the political landscape in America. Their success has been indisputable. Not only did they capture the White House in 1980 and hold it for 20 of the ensuing 28 years but they used their positions of power to reshape the terms of debate on all major policy issues—from the Cold War to social welfare to the role of the courts. In doing this they have fundamentally attacked the “common sense” of mainstream political discourse and policy. In the realm of the law—which in turn impacts society in all its complexity, from Affirmative Action to foreign policy—the Federalist Society has been their intellectual avant garde. They have pushed the liberal left into a defensive position and legitimized their own theories of constitutional interpretation.

How has this attack manifested itself? Conservatives have turned “liberal activist judges” into a household phrase and vilified courts as “elitists” who “legislate from the bench.” Whatever the effects might be of George W. Bush’s big-government conservatism, a generation of Republican nominees is now moving into place in courtrooms and law firms across the nation. Bush may be the undoing of the Republicans’ hold on power, but he will not be the undoing of the conservative movement—at least not in its Federalist Society incarnation. In fact, with their enormous growth and increasingly broad reach across political, private sector, and educational institutions, the Federalists are poised to emerge as the epicenter of movement conservatism in a post-Bush world.

What we have seen in the Federalist Society's growth and success is a microcosm of how the broader conservative movement has gone about its project, of how the process of change is effected in both its persuasive and policy dimensions. Federalist conservatives have not just reframed questions: they have shifted and expanded the entire spectrum of ideas that provide the raw material for reframing. They have deligitimated old ideas and legitimated new ones.

Founded by a small group of young conservatives enthralled by Ronald Reagan, the Federalists benefited from the social and political power of an established national movement. This existing network, and their diligence in building their own, made it possible—in Weaver's phrase—for their ideas to have consequences. The popular language we use to talk about the law has changed. But so has the law itself. The Federalists' intellectual project grew in tandem with the broader conservative movement, through the Reagan revolution and into the twenty-first century. As Tomislav Sunic writes, the right understands "that the source of political power must be preceded by socio-cultural action. Cultural power is the prerequisite of political power."¹ A trickle-down effect, one might even say. The Federalist project is a vital part of the right's multidimensional social and political enterprise, focused as it is on the intellectual and interpretive challenges of law.

By serving as a forum for the generation and incubation of conservative legal thought the Federalist Society has provided an intellectual proving ground for lawyers, scholars, and law students. With chapters now active at all accredited law schools in the country the Society is widening its reach and providing a home for aspiring conservative lawyers, whether they seek to go into private practice, public service, or the judiciary. This is Leonard

¹ Sunic, *Against Democracy and Equality*, 35.

Leo's "pipeline": an ever-expansive network that spreads conservative ideas and individuals. It is the engine that drives the boldest Federalist goal: changing legal culture.

Cultural change is a tall order. Cultures manifest themselves in myriad ways, some formal and some informal; some institutionalized and some the creature of tradition; some elite and some commonplace; some intellectual and some decidedly not. Conservatives have pursued all of these angles. "The nature of culture in general, and of legal culture as well, is that it is that which absorbs everything else," Federalist president Meyer told me.

Considering the impact the Society has had over the years, he pointed particularly to the increased presence on law school campuses—which the Federalist faithful continue to regard as the core of the organization. At the same time, high-profile conservatives like Bork and Scalia have contributed to the broader popular discourse outside of the ivory tower.

With the "thrill of treason" dating back to the Goldwater campaign, the right has vigorously launched its attack on the status quo. The left has been slow to respond and must now confront the challenge of a dynamic opposition. The Federalist model embodies democracy but is ultimately concerned with a conservative political project; The challenge for the ACS and the liberal legal academy in general is to meet the Federalists head on, to enact democratic exchange in service of its own legal mission—and to contest the right's claims to historical integrity, guardianship over tradition and national sovereignty.

I talked in the first chapter about the importance of "pushback" in democracy. The Federalists allow for this in their own organizational context, and for this they deserve commendation; they are enacting rhetorical democratic practice in an open and intellectually invigorating way. But the Federalists need pushback. And, it must be said, to trivialize their work as conspiratorial or non-intellectual or extremist or "fringe" is to abandon the

democratic obligation—Madison’s thesis in Federalist 10—that faction must be met by faction. It is not enough for the left to be represented on Federalist Society panels. We on the left must have our own forums where we hash out our own differences, agree on common goals, and—most important—engage our opponents on the right. We must learn from the right in this regard. We must learn from the Federalists.

As I have shown, the Federalist Society functions effectively as a forum for debate and networking; it serves as a kind of engine, charging and revitalizing its members as they go about their work in the various tiers of legal culture. Cultural power is the prerequisite of political power: Arguments can be won; candidates can be nominated; elections can be won; majorities can be realigned; judges appointed and precedents overturned. “It’s a harmonious circle,” John Fund said. “The more you win elections, the more judges you get to appoint.” With the Federalists pushing legal issues to the front of the political table, the actions of these judges—favorable and unfavorable—become decisive, leading to added political leverage. And to more electoral victories. Jack Balkin agrees: “Political agitation and social movement activism followed by successful elections and judicial appointments change constitutional common sense.”² Common sense is the terrain of the political, the raw material of persuasion in an electoral democracy. Common sense defines who we are as a people: our expectations, our sense of justice and fairness, our shared identity, our values. As Federalist founder Steven Calabresi concludes in his recent article on American exceptionalism, “He who controls the interpretation of the Constitution controls the meaning of the American creed.”³

² Balkin, “Wrong the Day It Was Decided,” 702.

³ Calabresi, “A Shining City on a Hill,” 1397.

“We had to convince people that every issue that people care about begins and ends in the courts,” said Kay Daly, a communications consultant who has coordinated strategy for every Bush judicial nomination since he was elected. “This is an interlocking, interweaving project...the grass roots; the intelligentsia; the communications side; the political side,” she told me. The Federalists are integral to this broader, cultural project, not just because of their highly developed network, she said, but because of their focus on theory as well as practice. They provide “the legal anchor that keeps the message grounded, that keeps the message where it should be,” she told me. “If they weren’t there it could drift very easily...they are the touchstone, the guiding north star that is always there.” This connection between intellectual theory and politics is missing on the left. As one liberal law professor told me: There is indeed a vast resource of knowledge—and good argument—produced by liberal scholars in law and other disciplines, but “Rahm Emmanuel has no use for it.” Emmanuel heads the Democrats’ national campaign committee, and is seen as a primary architect of the 2006 Congressional victory. He has no direct channel to the work of liberal scholars in law to parallel the Federalists. He has no pipeline.

The ACS may be building one. In the meantime, the right forges ahead, reshaping political and legal common sense. Daly gave me a preview. She helped develop the rhetorical strategy opposing the Democratic filibusters of Bush’s first-term nominees, focusing on the idea of “fairness” and an “up or down vote.” (Never mind that the filibuster is fair under Senate rules.) Having claimed fairness as their own, she tells me that the next move may be to take ownership of “Constitutionalism”: You may like your Liberal Activist Judges with their Living Constitutions, but I like my conservative ones with their...*Constitutionalism*. Imagine that—sure, liberals are entitled to their view of Constitutional law. Those views just

aren't—Constitutional. This is the gambit she is contemplating. "My job is to do everything I can to make sure Constitutionalist judges are put on the courts," she said as if rehearsing the line. The phrase implies an opposite: My *Constitutionalists*—opposed to your non-Constitutionalists. Sounds impossible? Just ask Howard Dean, or Al Gore, or John Kerry, or Michael Dukakis why liberals don't call themselves liberals anymore.

Will it work? Time will tell. What we do know, though, is that movement conservatives, and Federalists in particular, understand the way rhetoric works. They understand the importance of audience; they understand, with my old boss Frank Luntz, that "it's not what you say, it's what people hear." The idea is as old as the profession of rhetoric itself, as old as the Greek and Roman ancients like Cicero who argued for a broad understanding of human perception, persuasion, and change. "That is the magic," Kay Daly told me. "That is the golden door."

As rhetoricians we ask our audiences to follow us there, to pass through the door and walk with us. But Daly knows, as all persuaders (and lawyers) do, that walking through the door involves choice—and we can always build a second door. The golden door is not owned by the right. But the left must rise to the challenge, meeting the right's arguments head on. They must open a door of their own.

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