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Grassroots Originalism: Rethinking the Politics of Judicial Philosophy

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GRASSROOTS ORIGINALISM: JUDICIAL ACTIVISM ARGUMENTS, THE ABORTION DEBATE, AND THE POLITICS OF JUDICIAL PHILOSOPHY

*Mary Ziegler**

I. INTRODUCTION

How has originalism become so politically successful?¹ In answering this question, leading scholarship has focused on the ways in which political leaders, judges, and lawyers have cultivated popular support for originalism. In one account, legal academics, politicians, and judges have explained the legal merits of originalism as a method of interpretation: its political neutrality and its democratic legitimacy.² In a second version, political leaders—in particular, the Reagan Administration and the judges it nominated—made apparent that originalism would often produce outcomes that social conservatives found satisfactory.³ With some exceptions, leading studies primarily address the contributions made by elites to rhetoric about and justifications for originalism, including those rationales based on judicial activism and judicial legitimacy.⁴

* I would like to thank Joel Goldstein, Roger Goldman, Anders Walker, and Eric Miller for their help with earlier drafts of this piece.

¹ This Article focuses in particular on claims justifying originalism as democratically legitimate when other interpretive approaches are “activist.” For discussion of claims of this kind, see, for example, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40 (1997); Thomas Colby, *The New Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 777 (2011); Jamal Greene, *On the Origins of Originalism*, 88 *TEX. L. REV.* 1, 11 (2009) (citing Rush Limbaugh’s view that “[t]he only antidote . . . to judicial activism is the conservative judicial philosophy known as Originalism”).

² See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 137–38 (1996) (summarizing the view that originalism’s appeal lies in the failure of liberals to introduce a “principled alternative”); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 2–8 (1971) (“Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other.”); Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 *UTAH L. REV.* 773, 779–95 (1987); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 *YALE L.J.* 1501, 1525 (1989) (“The appeal of originalism is that the moral principles so applied will be the foundational principles of the American Republic—principles we can all perceive for ourselves and that have shaped our nation’s political character—and not the political-moral principles of whomever happens to occupy the judicial office.”).

³ See, e.g., Jamal Greene, *Selling Originalism*, 97 *GEO. L.J.* 657, 662 (2009); Stefanie A. Lindquist et al., *The Rhetoric of Restraint and the Ideology of Activism*, 24 *CONST. COMMENT.* 103, 104–06 (2007) (offering empirical evidence that “restraintist” judges are guided by ideological commitments to federalism and to a strong Executive Branch); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 545–46 (2006); Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 *DEPAUL L. REV.* 555, 558–62 (2010).

⁴ See, e.g., *supra* notes 2–3 and accompanying text. It is worth noting that the term “grassroots,” used here

By focusing on arguments about the backlash against *Roe v. Wade*,⁵ this Article shows that an important justification for originalism—one based on the political consequences of “judicial activism”—emerged from interactions between activists, judges, and political leaders. However, these consequentialist contentions for originalism and against *Roe* emerged not in the academy or in the courts, but through dialogue between the elites, social-movement members, and the Grassroots Right.⁶ In 1980–1981, antiabortion advocates began arguing that *Roe* should be overruled because of the consequences of the Court’s activism: the creation of the antiabortion movement, the polarization of debate, and the effective preclusion of any meaningful legislative compromise.⁷

As we shall see, these were not justifications for originalism as such but rather arguments against judicial activism and *Roe*. But as this Article will show, by the mid-1980s, Reagan Administration officials had seized on these consequence-based justifications and transformed them into arguments for originalism. Later, these contentions featured in the work of first-generation originalist scholars. As this Article shows, the politics of originalism have been conducted from the bottom up as well as from the top down.

There is a good deal at stake in understanding the role of social-movement activists and the Grassroots Right in creating consequence-based justifications for originalism. First, scholars sometimes adopt consequence-based attacks on *Roe* as accurate descriptions of movement responses to the decision.⁸ As this Article shows, by contrast, claims about backlash to *Roe*

or in other scholarship, is inherently ambiguous: Are the leaders of major national movement organizations members of the elite, the grassroots, or both? Do physicians or attorneys working in movement organizations belong to the elite by virtue of their professional status? While acknowledging the complexity of these identity issues, this Article focuses on the interactions between social-movement members, including leaders and rank-and-file activists, and the elites.

⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶ For examples of similar consequence-based claims made in the academy and the courts, see *Stenberg v. Carhart*, 530 U.S. 914, 953–56 (2000) (Scalia, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (plurality decision) (Scalia, J., dissenting in part); *Cruzan v. Dir., Mo. Dep’t of Pub. Health*, 497 U.S. 261, 300–01 (1990) (Scalia, J., dissenting); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 159, 169, 193, 234 (1990); Lino A. Graglia, *Judicial Review on the Basis of “Regime Principles”: A Prescription for Government by Judges*, 26 S. TEX. L. REV. 435, 439–40 (1985). The term originalism first appeared in Paul Brest’s 1980 criticism of similar interpretive methods, making it unlikely that scholars would have defined themselves as originalists before the 1980s. See Paul Brest, *The Misconceived Quest for Original Understanding*, 80 B.U. L. REV. 204 (1980). On Brest’s coining the term, see Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1401 n.3 (2009). Nonetheless, this Article follows Richard Fallon and Reva Siegel in describing these scholars as first-generation originalists, distinguishable from a new generation of scholars discussed, among places, *infra* note 8 and accompanying text. On Fallon and Siegel’s use of “first generation” originalism, see, for example, Richard Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5, 13 (2011) and Siegel, *supra* at 1401.

⁷ See, e.g., BORK, *supra* note 6, at 159, 169, 193, 234; Graglia, *supra* note 6, at 439–40.

⁸ William Eskridge and John Ferejohn argue, for example, that, because of *Roe*, “Pro-life traditionalists

emerged from dialogue between New Right and antiabortion movement members and political leaders. We should be cautious about the historical validity of claims that have served so political a purpose.

Second, by so often focusing on the academics, politicians, and judges who have popularized consequence-based justifications for originalism, we have not fully captured the distinctiveness or importance of popular, judicial activism-based justifications for originalism. Some movement claims may appear to echo first-generation originalist arguments that activist decisions are undemocratic or even illegitimate. On closer examination, as this Article contends, grassroots claims against judicial activism have a distinctive language, and their purpose and rhetoric differ considerably from the arguments articulated by politicians and professors. As we shall see, these claims drew on the kind of natural law thinking rejected by first-generation originalists, invoking religious and moral concerns as much as democratic ones. Scholars should be more attentive to the uses, meaning, and purpose of these grassroots and movement claims.

For this reason, the materials assembled here suggest that the battle for the future of constitutional interpretation will not be won by whoever has the best theory. The politics of judicial philosophy have involved an unpredictable and highly contingent give-and-take between grassroots activists and the political and judicial elites. This will likely continue to be the case in the future.

My argument proceeds in three segments. Part II.A briefly sets out leading scholarship on the politics of originalism. Part II.B challenges current accounts by closely examining how a consequence-based justification for overruling *Roe* evolved in the 1980s. Drawing on the history, Part II.C examines the implications of this history for current studies of originalism. Part III briefly concludes.

mobilized as a normative social movement seeking to preserve not only human life but also a traditionalist ethic of family values and women's domestic role. They criticized *Roe v. Wade* because it took the most moral of issues away from family and state decision making, represented arrogant judicial legislation, and marginalized the interests of the fetus" WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 242 (2010). Cass Sunstein agrees that *Roe* "probably contributed to the creation of the 'moral majority'; helped defeat the Equal Rights Amendment; prevented the eventual achievement of consensual solutions to the abortion problem; and severely undermined the women's movement, by defining that movement in terms of the single issue of abortion, by spurring and organizing opposition, and by demobilizing potential adherents." CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 147 (1993); see also Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 *FORDHAM L. REV.* 1739, 1751 (1997) (describing the "conventional understanding of *Roe v. Wade*" as the notion that "far from reconciling abortion opponents to a woman's fundamental right to terminate her pregnancy, the decision actually spawned a right-to-life opposition which did not previously exist").

II. ANALYSIS

A. From the Top to the Right: Conventional Accounts of Political Originalism

The political appeal of originalism is at the center of at least three important scholarly debates. Of course, as Reva Siegel has written, “There is not one theory of originalism, but many.”⁹ My purpose here is not to argue for or against any kind of originalism or for or against originalism writ large. Instead, my focus is on why the public, and the Grassroots Right in particular, has been so receptive to a stylized, oversimplified version of originalism: Originalism as a method of constitutional interpretation that emphasizes text, history, and authorial intent and rejects the idea of a “living Constitution” that changes over time.

One body of scholarship on this question addresses the operation and appeal of originalism. Antonin Scalia, Michael McConnell, and other defenders of either first- or second-generation originalism assert that the appeal of the philosophy is primarily legal, and legitimacy-based claims for originalism are appealing in principle.¹⁰ For these scholars, ordinary citizens are attracted to originalism and its anti-activism justifications because it is the only democratically legitimate and politically neutral interpretive method.¹¹ McConnell explains that originalism, and legitimacy-based arguments for it, are seductive, because originalism “supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance.”¹² Scalia has described the attraction of originalism and the anti-judicial activism arguments supporting it by drawing attention to the flaws of its alternatives, which, in his words, focus on what the Constitution “ought to mean.”¹³

The suggestion in this scholarship is that originalism and concerns about judicial activism enjoy popular support because it is the most principled alternative available. In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Scalia further suggested that, in the

⁹ Siegel, *supra* note 6, at 1403. For a recent account of the different brands of originalism, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

¹⁰ See, e.g., *supra* note 1 and accompanying text.

¹¹ See, e.g., KALMAN, *supra* note 2, at 137–38.

¹² See Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN G. BREYER, *ACTIVE LIBERTY* (2005)).

¹³ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 39 (Amy Gutmann ed., 1997).

abortion context, the public has expected and even demanded that the Court adhere to originalism.¹⁴ By contrast, if the Court claimed that “the ‘liberties’ protected by the Constitution are . . . undefined and unbounded,” then the people would and should rise up.¹⁵ As Scalia framed it, popular demand for originalism and popular hostility toward judicial activism simply reflect an interest in democracy and apolitical judging.

For some time, scholars have questioned the legal merits of originalism.¹⁶ But as Jamal Greene has observed, the academic attacks on originalism do not appear to have made a dent in its popularity in the courts or with the general public.¹⁷ This phenomenon has led those skeptical of originalism to seek alternative explanations of its appeal. In a 2006 *Fordham Law Review* article, Robert Post and Reva Siegel argued that “[t]he current ascendancy of originalism does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement.”¹⁸ In the context of gun rights, for example, Siegel has shown that justifications for originalism emerged from a give-and-take between social-movement organizations, political leaders, and the courts.¹⁹

Following Post and Siegel, two bodies of scholarship have questioned what it means to describe originalism as a political practice. One body of work has presented and analyzed originalism and the judicial-activism arguments for it as a form of popular constitutionalism.²⁰ Much of this scholarship identifies one of two sources of this popular engagement. One body of work describes the role of the Reagan Administration in

¹⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting in part).

¹⁵ *Id.* at 1001.

¹⁶ See, e.g., J. M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 950–51 (1988) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)); Berman, *supra* note 9, at 5–6 (distinguishing between “hard” and “soft” originalism); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 216–18 (1980); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244–45 (2009) (arguing that originalists’ work consists of a “smorgasbord of distinct constitutional theories” that are “rapidly evolving”).

¹⁷ See Greene, *supra* note 3, at 659–60; *Ideological Chasm over Interpreting Constitution*, PEW RESEARCH CTR. PUBL’NS (June 20, 2011), <http://pewresearch.org/pubs/2029/poll-supreme-court-interpret-constitution-originalism>.

¹⁸ Post & Siegel, *supra* note 3, at 549.

¹⁹ See generally Greene, *supra* note 1, at 6 (“American originalism is an instrument through which a domestic, sociopolitical movement seeks to validate its political commitments and to influence our courts.”); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 215–16 (2008); Siegel, *supra* note 6, at 1401 n.3.

²⁰ See, e.g., David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2047 (2010); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 703 (2007); Siegel, *supra* note 19, at 192.

popularizing originalism.²¹ In particular, Post and Siegel have highlighted the role of former Attorney General Edwin Meese in drawing citizen attention to the issue of judicial philosophy.²²

Reagan's judicial nominees are also thought to have publicized originalist claims and anti-judicial activism claims for it.²³ For example, in studying the conservative groundswell that greeted the Court's decision in *Lawrence v. Texas*, Siegel claims that Scalia defended originalism and warned grassroots conservatives "that if they did not mobilize to protest the Court's decision in *Lawrence*, then the *Lawrence* opinion would soon be read to authorize gay marriage."²⁴ Other scholars have broadened this contention, focusing on the role of Republican politicians or judicial nominees in spreading popular arguments for originalism.²⁵

Using originalism as an example, a related body of scholarship seeks to identify what makes any judicial philosophy a political success.²⁶ This work has both descriptive and prescriptive dimensions: it helps to explain the current prominence of originalism and judicial-activism talk and identifies ways in which a truly competitive alternative might be developed.²⁷

Threaded through each of these debates, as we have seen, are important claims about the ways in which elites have popularized various arguments for a jurisprudence of original intent. These leaders may be scholars and judges highlighting the legal strengths of originalism, or they may be political figures hinting at the outcomes that philosophy will produce.

Scholars like Greene and Siegel acknowledge that the political appeal of originalism arises through interactions between the grassroots and the elites.²⁸ Nonetheless, current scholarship primarily analyzes the role played by the elites in popularizing originalism.²⁹ In the case of *Roe*, important legitimacy-based arguments for originalism were not spread by experts to lay audiences but rather were created in a discussion between activists, professors, and politicians.³⁰ The dialogue that helped to produce these arguments was complicated and fluid. It is important to stress that popularizing a particular theory of constitutional interpretation has not been

²¹ See, e.g., Greene, *supra* note 3, at 659–60; Post & Siegel, *supra* note 3, at 550–61.

²² See, e.g., Post & Siegel, *supra* note 3, at 550–51.

²³ See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CALIF. L. REV. 1323, 1347 (2006).

²⁴ *Id.* at 1346.

²⁵ See, e.g., Siegel, *supra* note 3, at 558–62.

²⁶ See, e.g., Greene, *supra* note 3, at 660–61.

²⁷ *Id.*

²⁸ See *supra* note 19 and accompanying text.

²⁹ See, e.g., *supra* notes 2 and 3 and accompanying text.

³⁰ See *infra* Part II.B.

and likely will not be a matter of simply persuading ordinary citizens. The process will be dynamic, unpredictable, and interactive.

Second, the history considered here suggests that too little is known about the vocabulary, aims, and strategies of grassroots opponents of judicial activism. By focusing on elite efforts to cultivate support for originalism, current studies have assumed that grassroots activists make the same kinds of claims about originalism as do the political leaders or academics who explain it to them. In truth, in the abortion debate, lay advocates critical of progressive activist judging have contentions and aims of their own.

How did the Grassroots Right participate in the creation of arguments for originalism? Part II.B turns next to this question.

B. Why to Overrule Roe, 1981–1990

As we shall see, the popularization of originalism, or something like it, began with politicians and academics.³¹ In the political context, during the 1968 presidential campaign, Richard Nixon promoted “strict constructionism,” whereby courts apply only the meaning of a legal text as it was written.³² During Nixon’s two terms in office, there was some public interest in what “strict constructionism” meant.³³ In announcing the January 1970 nomination of southern judge G. Harrold Carswell to the Supreme Court, Nixon promised to seek judges who would “interpret” but not “make” law.³⁴ He elaborated further on the meaning of strict constructionism during the successful nomination of William Rehnquist. Then, Nixon asserted that the alternative to a strict constructionist judge was one who would “twist or bend the Constitution in order to perpetuate his personal political and social views.”³⁵ During his hearings, Rehnquist echoed Nixon’s arguments and further explained that “constructionist” judges would rely exclusively on the “language used by the framers [of the

³¹ See generally Post & Siegel, *supra* note 3.

³² For analysis of Nixon’s “strict constructionism,” see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 280–83 (2009); Keith E. Whittington, *William H. Rehnquist: Nixon’s Strict Constructionist, Reagan’s Chief Justice*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 8, 9–27 (Earl M. Maltz ed., 2003); S. Sidney Ulmer, *Supreme Court Justices as Strict and Not-So-Strict Constructionists: Some Implications*, 8 LAW & SOC’Y REV. 13, 13 (1973).

³³ See FRIEDMAN, *supra* note 32, at 282–83.

³⁴ *Carswell Seen as Perfect “Strict Constructionist,”* N.Y. TIMES, Jan. 21, 1970, at 44, available at 1970 WLNR 54396.

³⁵ Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr., and William H. Rehnquist To Be Associate Justices of the Supreme Court of the United States, 337 PUB. PAPERS 1054 (Oct. 21, 1971).

Constitution], the historical materials available, and the precedents which other Justices of the Supreme Court have decided in cases involving a particular provision.”³⁶

The failed Carswell nomination and the direction taken by the Burger Court diminished interest in strict constructionism and in judicial philosophy more generally.³⁷ The month Nixon announced Carswell’s nomination, leaders of the civil rights movement went on the attack. Former NAACP legal advisor L. D. Clark informed the *New York Times* that “strict constructionism” was “open[ly] [and] blatant[ly] segregationist.”³⁸ During Carswell’s hearings, NAACP advocates revealed that, in 1948, the judge had made a speech extolling the virtues of white supremacy.³⁹ Nixon’s proposed philosophy had become inextricably linked with the politics of race.

What was more, once on the Court, Nixon’s nominees appeared to be more similar to the justices who had come before them than Nixon might have wanted. A series of sweeping decisions penned or joined by Nixon nominees, including *Roe*, appeared as far-reaching as anything issued by the Warren Court.⁴⁰ Whatever Nixon had been talking about, the Supreme Court seemed to be doing something else entirely.

The most developed discussion of judicial activism had emerged several decades earlier in the legal academy. Writing in 1959, in framing his now-famous criticism of *Brown v. Board of Education*,⁴¹ Herbert Wechsler presented an argument against judicial activism, contending that “[t]he man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them . . . as courts of law.”⁴² After the early 1950s, members of the legal process movement—a school of scholars who praised decisions based on the plain meaning of a text, on constitutional design and institutional competence, or

³⁶ *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearing Before the S. Comm. on the Judiciary*, 92d Cong. 55 (1971) (statement of William H. Rehnquist).

³⁷ See generally James B. O’Hara, *Introduction to THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?* 3, 4 (Bernard Schwartz ed., 1998); *G. Harrold Carswell; Rejected for U.S. High Court*, L.A. TIMES, Aug. 1, 1992, available at 1992 WLNR 4034548.

³⁸ See *Carswell Seen as Perfect “Strict Constructionist,” supra* note 34.

³⁹ *Nixon Says He Did Not Know of Judge Carswell’s ’48 Speech*, N.Y. TIMES, Jan. 31, 1970, at 15, available at 1970 WLNR 56553.

⁴⁰ For examples of the scholarship on the relationship between the Burger and Warren Courts, see generally *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T* (Vincent Blasi ed., 1983) and *THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?*, *supra* note 37, at 3–8.

⁴¹ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁴² Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

on the presumed neutrality of procedural or process-based solutions—also stressed claims against judicial activism.⁴³

In the 1970s, first-generation originalist scholars took up similar criticisms. In 1971, in setting out a jurisprudence of original intent, Yale law professor Robert Bork revived attacks on judicial activism, focusing on claims that judicial overreaching was unprincipled and illegitimate.⁴⁴ As Bork argued, the marital privacy right described in *Griswold v. Connecticut*, the Court's first substantive due process case in the modern era, was unprincipled, since the judge in such a case would have "no basis other than his own values upon which to set aside the community judgment embodied in the statute."⁴⁵ The only way to avoid this kind of overreaching, Bork went on, was to "stick close to the text and the history [of the Constitution] . . . and not construct new rights."⁴⁶ Other originalist scholars highlighted arguments against judicial activism. In several books attacking the Supreme Court's decisions on school integration, Lino Graglia criticized "judicial policymaking."⁴⁷ In 1977, Raoul Berger published a book-length defense of originalism, condemning as undemocratic the activist decisions of the Warren Court.⁴⁸ In 1976, then-Associate Justice William Rehnquist offered similar arguments in favor of a "dead Constitution."⁴⁹

During the 1980 presidential campaign, Ronald Reagan and the members of his staff began to popularize arguments against judicial activism.⁵⁰ As we shall see, however, these claims were less forceful and less developed than the ones that would appear in the decades to come. In particular, in the early years, Reagan and his allies did not defend

⁴³ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 51–59 (1962) (criticizing *Shelton v. Tucker*, 364 U.S. 479 (1960), as unprincipled); Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 162–67 (1964). On the legal process school, see Gerald B. Wetlauffer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 25–31 (1999).

⁴⁴ See Bork, *supra* note 2, at 4. For other examples of first-generation originalist criticism of activist judging in the 1970s, see William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976) (arguing that any outcome advanced by a "freewheeling, non-elected judiciary is quite unacceptable in a democratic society") and RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 389–401 (2d ed. 1997).

⁴⁵ See Bork, *supra* note 2, at 10. For the decision in *Griswold*, see 381 U.S. 479, 482–86 (1965).

⁴⁶ See Bork, *supra* note 2, at 8.

⁴⁷ See, e.g., LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS passim* (1976).

⁴⁸ See generally BERGER, *supra* note 44.

⁴⁹ See Rehnquist, *supra* note 44, at 693, 699.

⁵⁰ See, e.g., Post & Siegel, *supra* note 3, at 550–61.

originalism as much as they attacked what they described as judicial activism.⁵¹

Some of Reagan's natural allies were avowed opponents of legal abortion. Indeed, while he served as Governor of California and made an unsuccessful 1976 presidential run, Reagan had made himself into the favored candidate of the emerging New Right.⁵² "As they described it, leaders of the New Right rose from the ashes of the Watergate scandal: the result of 'impatience with the shambles of the Nixon-Ford Administration.'"⁵³ One of the orchestrators of this movement was Paul Weyrich, a co-founder of the Heritage Foundation, a conservative think-tank, and a co-founder of the Committee for the Survival of a Free Congress ("CSFC"), a group dedicated to electing social conservatives to Congress.⁵⁴ Weyrich saw his mission as the creation of a grassroots, politically pragmatic Right, a complement to the intellectuals who had dominated conservatism.⁵⁵ He explained to the press in November 1977: "Conservatives have been led by an intellectual movement but not a practical movement until now We [now] talk about issues people care about, like gun control, abortion, taxes, and crime."⁵⁶ Weyrich's organizations provided valuable training and money to fledgling New Right causes: by 1978, the CSFC and other conservative political action committees, including the National Conservative Political Action Committee ("NCPAC"), had raised more than \$3 million for conservative candidates.⁵⁷

While Weyrich provided political strategy for these groups, Richard Viguerie and his direct-mail organization offered lobbying and fundraising

⁵¹ See generally *id.* at 555–56.

⁵² See DAVID FARBER, *THE RISE AND FALL OF MODERN AMERICAN CONSERVATISM: A SHORT HISTORY 165–75* (2010). For some of the more influential biographies of Reagan, see LOU CANNON, *PRESIDENT REAGAN: THE ROLE OF A LIFETIME* (1991) and JOHN PATRICK DIGGINS, *RONALD REAGAN: FATE, FREEDOM, AND THE MAKING OF HISTORY* (2007).

⁵³ See Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After Roe v. Wade, 1973–1980*, 87 CHI.-KENT L. REV. 571, 588 (2012) (citing Barry Sussman, "New Right" in American Politics May Be Just an Expression of Discontent, WASH. POST, Mar. 5, 1978, at C3).

⁵⁴ *Id.*

⁵⁵ See DOMINIC SANDBROOK, *MAD AS HELL: THE CRISIS OF THE 1970S AND THE RISE OF THE POPULIST RIGHT* 330–31 (2011).

⁵⁶ Richard Boerth et al., *The New Activists*, NEWSWEEK, Nov. 7, 1977, at 41.

⁵⁷ See, e.g., Chip Berlet, *The New Political Right in the United States: Reaction, Rollback, and Resentment*, in *CONFRONTING THE NEW CONSERVATISM: THE RISE OF THE RIGHT IN AMERICA* 71, 83 (Michael J. Thompson ed., 2007); ALAN CRAWFORD, *THUNDER ON THE RIGHT: THE "NEW RIGHT" AND THE POLITICS OF RESENTMENT* 70 (1980); DANIEL K. WILLIAMS, *GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 169 (2010).

services.⁵⁸ In 1980, Viguerie raised between \$35 and \$40 million for his clients.⁵⁹

Allied with Weyrich and Viguerie was the newly powerful Religious Right.⁶⁰ Although the Religious Right of the 1970s is primarily associated with evangelical Protestantism, the movement attracted conservative Catholics, Mormons, and Jews.⁶¹ The Religious Right also unified a variety of Protestant groups that had previously disagreed on issues ranging from abortion to the civil rights movement.⁶² New socially conservative organizations included the fundamentalist Baptists like those to whom Jerry Falwell preached, Pentecostals like those loyal to Pat Robertson, and both northern and southern Baptists.⁶³ Historians point to a number of long- and short-term trends that contributed to the rise of this form of social conservatism: for example, the fragmentation of the civil rights movement of the 1950s and 1960s, the rapid demographic growth of populations naturally attracted to evangelical Christianity, and the migration of a significant number of Americans to states in the Sunbelt.⁶⁴

Members of the Religious Right themselves claimed to have been inspired by important cultural, social, and economic changes of the 1960s and 1970s. A list offered in the promotional materials put out in 1980 by one organization, the Moral Majority, may be representative: the Supreme

⁵⁸ On Viguerie's direct-mail services, see SARA DIAMOND, *SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT* 58 (1989); DAVID M. RICCI, *THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS* 167 (1993).

⁵⁹ SANDBROOK, *supra* note 55, at 329. For further discussion of Viguerie's direct mail empire, see, for example, Gillian Peele, *American Conservatism in Historical Perspective*, in *CRISIS OF CONSERVATISM?: THE REPUBLICAN PARTY, THE CONSERVATIVE MOVEMENT AND AMERICAN POLITICS AFTER BUSH* 15, 22 (Joel D. Aberbach & Gillian Peele eds., 2011).

⁶⁰ See SANDBROOK, *supra* note 55, at 357.

⁶¹ See Joel Kotkin, *Ready on the Right: Christian Soldiers Are on the March*, WASH. POST, Aug. 25, 1979, at A10. Jerry Falwell, the head of the Moral Majority, a leading Religious Right organization, stressed the diversity of his own organization and of social conservatives more generally. *Id.*

⁶² *Id.*

⁶³ See WILLIAMS, *supra* note 57, at 5–6. Notably, there had previously been disagreements between Billy Graham's National Association of Evangelicals ("NAE") and mostly southern fundamentalist groups about the propriety of clergy involvement in the civil rights movement. See *id.* There were also differences of opinion on abortion. For example, as early as 1973, both fundamentalist groups and the NAE opposed *Roe*. *Id.* at 114–16. By contrast, between 1971 and 1976, the position of the Southern Baptist Conference was that abortion should be permitted when there was evidence of rape, incest, severe fetal deformity, or a "likelihood of damage to the emotional, mental, [or] physical health of the mother." See *id.* at 115–16.

⁶⁴ On the history and origins of the Christian Right, see, for example, SARAH DIAMOND, *NOT BY POLITICS ALONE: THE ENDURING INFLUENCE OF THE CHRISTIAN RIGHT* (1998); DARREN DOCHUK, *FROM BIBLE BELT TO SUNBELT: PLAIN-FOLK RELIGION, GRASSROOTS POLITICS, AND THE RISE OF EVANGELICAL CONSERVATISM* (2011); CLYDE WILCOX & CARIN ROBINSON, *ONWARD CHRISTIAN SOLDIERS?: THE RELIGIOUS RIGHT IN AMERICAN POLITICS* (4th ed. 2010).

Court had banned school prayer and had legalized abortion, the women's movement had won influential allies in criticizing some aspects of the traditional family, and gays and lesbians had become more visible and more vocal in demanding equal treatment.⁶⁵ Between 1956 and 1977, the spread of Christian television broadcasting reinforced concern about these social changes: among others, Pat Robertson founded the Christian Broadcasting Network ("CBN") in 1970, and Jerry Falwell began broadcasting *The Old Time Gospel Hour* in 1956.⁶⁶

Falwell's Moral Majority seemed to be part of an important religious and cultural shift. By 1976, both *Time* and *Newsweek* reported on polling data from the American Institute of Public Opinion that led George Gallup Jr. to proclaim 1976 as the "Year of the Evangelicals."⁶⁷ In a 1976 Gallup Poll, 34% of respondents claimed to have had a born-again religious experience, and nearly half of all Protestants polled agreed that the Bible "is to be taken literally."⁶⁸

By the mid- to late 1970s, as this Article will show, the Religious Right had become a political force—a grassroots movement with a highly structured and professional leadership. One influential group, Christian Voice, was founded in 1978 as part of the Heritage Foundation.⁶⁹ By 1979, the organization had 100,000 members and a governing board that included fourteen members of Congress.⁷⁰ The Moral Majority, another Religious Right organization, had a \$3 million budget in its first year, one-third of which was raised in one month alone.⁷¹ Described by Falwell as a "coalition capable of steering America away from liberal, humanist and secular tendencies," the Moral Majority was also quickly establishing its political

⁶⁵ See DAVID SNOWBALL, CONTINUITY AND CHANGE IN THE RHETORIC OF THE MORAL MAJORITY 94–100 (1991); *What Is the Moral Majority?*, in THE GENERAL MATERIALS OF THE MORAL MAJORITY (1979) (on file with Liberty University); *The Moral Majority*, in THE GENERAL MATERIALS OF THE MORAL MAJORITY, *supra*.

⁶⁶ On the CBN, see DIAMOND, *supra* note 64, at 12–15. For an account given by Falwell's wife of the founding of *The Old Time Gospel Hour*, see MACEL FALWELL & MELANIE HEMRY, JERRY FALWELL: HIS LIFE AND LEGACY 45–46 (2008).

⁶⁷ See, e.g., Kenneth L. Woodward et al., *Born Again*, NEWSWEEK, Oct. 25, 1976, at 68–78; *Religion: Counting Souls*, TIME, Oct. 4, 1976.

⁶⁸ See *Religion: Counting Souls*, *supra* note 67.

⁶⁹ See Paul Boyer, *The Evangelical Resurgence in 1970s American Protestantism*, in RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 29, 45 (Bruce J. Schulman & Julian E. Zelizer eds., 2008); DIAMOND, *supra* note 64, at 62; Kotkin, *supra* note 61; WILLIAMS, *supra* note 57, at 153–70.

⁷⁰ See, e.g., Kotkin, *supra* note 61.

⁷¹ See *id.*

influence.⁷² By December 1979, Falwell was reaching an audience of 2.5 million and was raising \$1 million a week in mail contributions.⁷³

Founded in 1979 by former Colgate Palmolive salesman Ed McAteer, a third organization, the Religious Roundtable, was focused on encouraging conservative Christians to become politically involved.⁷⁴ The group came to include many of the best-known televangelists, including Falwell and Robertson.⁷⁵ During the Reagan Administration, when Christian conservatives angrily protested the nomination of Sandra Day O'Connor to the Court, Ronald Reagan's White House was obliged to assuage the concerns of Roundtable members, both in private sessions and in the media.⁷⁶

During Reagan's presidential campaign, to an unprecedented extent, the antiabortion movement allied itself with both the New Right and the Religious Right. For example, having failed for several years to secure a vote against the Equal Rights Amendment ("ERA"), in 1977, the National Right to Life Committee ("NRLC"), the nation's largest antiabortion group, finally passed a resolution condemning the Amendment.⁷⁷ The same year, those at the helm of major antiabortion organizations like the NRLC and March for Life appeared at a "pro-family" event led by Phyllis Schlafly, and the leaders of these groups joined in condemning not only abortion but also the ERA and publicly funded daycare.⁷⁸

Between 1977 and 1980, a number of self-identified evangelical Protestant antiabortion groups became prominent, including the influential Christian Action Council ("CAC").⁷⁹ At the same time, mainstream groups like the NRLC begin stressing openly religious arguments against abortion.⁸⁰ In the early 1970s, mainstream antiabortion leaders routinely

⁷² *Id.*

⁷³ Maxwell Glen, *The Electronic Ministers Listen to the Gospel According to the Candidates*, NAT'L J., Dec. 22, 1979, at 2142–43.

⁷⁴ See DONALD T. CRITCHLOW, *THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY 175–76* (2007).

⁷⁵ See SANDBROOK, *supra* note 55, at 359–60.

⁷⁶ See, e.g., Steven V. Roberts, *Foes of Abortion Meet with Reagan: March Marks 9th Anniversary of Decision on Legalization*, N.Y. TIMES, Jan. 23, 1982, at 1, available at 1982 WLNR 323369.

⁷⁷ On the earlier vote, see Nat'l Right to Life Comm., Board of Directors Meeting Minutes 1–3 (Sept. 20–21, 1975), in *The American Citizens Concerned for Life Papers* (on file with Gerald Ford Presidential Library and Museum, Ann Arbor, Mich., Box 8). For the 1977 vote, see Memorandum from Judie Brown, Executive Director of the NRLC, to Recipients (Oct. 17, 1977), in *The American Citizens Concerned for Life Papers*, *supra*.

⁷⁸ See, e.g., *A Fighter for Right to Life*, EBONY, Apr. 1978, at 78, 88–89; Judy Klemesrud, *Equal Rights Plan and Abortion Are Opposed by 15,000 at Rally*, N.Y. TIMES, Nov. 20, 1977, at 32, available at 1977 WLNR 105481.

⁷⁹ See, e.g., *Protestant Unit Hits Abortion*, WASH. POST, July 11, 1975, at C5.

⁸⁰ See Klemesrud, *supra* note 78.

insisted that their movement had nothing to do with religion. For example, in 1974, the NRLC vigorously objected to claims that “the rationale for abortion laws is related only to the religious convictions of individual citizens, and to the hierarchy of the Roman Catholic Church in particular.”⁸¹ By contrast, by October 1977, the NRLC had passed a resolution describing the organization as a religious (although not exclusively Catholic) organization, asserting that the “Right to Life Movement is founded upon the belief that God creates LIFE.”⁸² Other groups founded in the late 1970s, like Judie Brown’s American Life League (“ALL”), openly proclaimed a Catholic pro-life message.⁸³

At the same time, however, the leaders of the mainstream movement committed to a new pragmatism. As Keith Cassidy has documented, in the immediate aftermath of *Roe*, the movement focused primarily on passing a human life amendment that would have recognized rights to life from conception to natural death.⁸⁴ The appeal of an amendment was twofold. First, such a measure would have banned many more abortions than even the restrictions in place in many states before *Roe*.⁸⁵ Almost as importantly, as movement members saw it, an amendment would symbolize and communicate the movement’s ideological commitments and refusal to compromise. In 1973, for example, Joseph Witherspoon, an antiabortion activist and professor at the University of Texas School of Law, argued that an amendment was necessary not only to ban abortion but also to “assert[] a great moral and legal truth.”⁸⁶ Indeed, the movement almost uniformly opposed amendments that would have overturned *Roe* and returned the abortion issue to the states.⁸⁷ Activists described these measures as

⁸¹ See Press Release, Nat’l Right to Life Comm. (Mar. 6, 1974), in *The American Citizens Concerned for Life Papers*, *supra* note 77.

⁸² See Nat’l Right to Life Comm., Annual Board of Directors Meeting, Resolution (Oct. 7, 1977), in *The American Citizens Concerned for Life Papers*, *supra* note 77.

⁸³ For an official description of the ALL, see *About Us*, ALL, <http://www.all.org/nav/index/heading/MTQ/> (last visited Sept. 5, 2012).

⁸⁴ Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, 7 J. POL’Y HIS. (SPECIAL ISSUE) 128 (1995), reprinted in *THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE* 128, 144–47 (Donald T. Critchlow ed., 1996).

⁸⁵ For proposals of constitutional amendments of this kind, see, for example, Letter from Nellie J. Gray 1 (Sept. 24, 1973), in *The American Citizens Concerned for Life Papers*, *supra* note 77; Memorandum from Joseph P. Witherspoon, Commitment to Pub. Policy Comm., to NRLC Exec. Comm. 1–7 (Aug. 14, 1973), in *The American Citizens Concerned for Life Papers*, *supra* note 77; Memorandum from Dennis Horan, NRLC Legal Advisory Comm., to NRLC Exec. Comm. (Sept. 5, 1973), in *The American Citizens Concerned for Life Papers*, *supra* note 77 (summarizing the views of antiabortion attorneys surveyed by the NRLC).

⁸⁶ See Memorandum from Joseph P. Witherspoon, *supra* note 85, at 2–6.

⁸⁷ See, e.g., Leo J. Tibesar, Report to the NRLC Policy Advisory Comm., Weighing the Merits for a States’ Rights Amendment 1–4 (Apr. 1974), in *The American Citizens Concerned for Life Papers*, *supra*

compromises that would permit states like New York to legalize abortion.⁸⁸ As Fordham law professor and antiabortion activist Robert Byrn explained in 1973: “[W]e are a right to life movement. I rather doubt that our people will come out in vast numbers to support an amendment which by inference says that unborn children have no right to life.”⁸⁹

By contrast, in the early 1980s, those who came to lead groups like the NRLC were more willing to compromise, especially in the context of a human life amendment to the Constitution. This became apparent after late September 1981, when Utah Senator Orrin Hatch proposed a federalism amendment that would return regulation of abortion to the states.⁹⁰ Although the measure was proposed as a practical middle-ground solution, mainstream antiabortion groups came out in favor of it. After a bitter debate, the National Conference of Catholic Bishops endorsed the proposal in November 1981.⁹¹ Archbishop John Roach of Minneapolis, the President of the Conference, implied that the Bishops had endorsed a states’ rights amendment primarily because it was seen to be more politically feasible.⁹²

Similarly, in mid-December, a divided NRLC voted to endorse the Hatch amendment.⁹³ Indeed, Dr. John Willke, a leader of the organization, described it as part of a long-term, incremental strategy to chip away at *Roe*.⁹⁴ For the Reagan campaign, the movement mainstream had become an interesting and complicated potential partner. At the same time that the movement had become more socially conservative and even religious in its rhetoric, antiabortion leaders had made apparent a willingness to put

note 77 (explaining that the “states’ rights’ type of amendment” was “largely ignored by Movement leaders”).

⁸⁸ See *id.* at 2–3 (summarizing the views of William Ball, an attorney for the United States Catholic Conference, that a states’ rights amendment would “permit a state such as New York to have a statute which is very permissive with respect to abortion”).

⁸⁹ See Memorandum from Professor Robert M. Byrn to Edward J. Golden, Chairman, N.Y. State Right to Life Comm. 1–3 (Feb. 1973), in *The American Citizens Concerned for Life Papers*, *supra* note 77.

⁹⁰ *Washington Talk: The Calendar (Monday)*, N.Y. TIMES, Oct. 5, 1981, at B10.

⁹¹ Kenneth A. Briggs, *Bishops Support Plan by Hatch to Curb Abortions*, N.Y. TIMES, Nov. 19, 1981, at A19; Kenneth A. Briggs, *The Bishops Take a Risk: New ‘Peace’ Positions Sure to Ignite Dissent*, N.Y. TIMES, Nov. 23, 1981, at B10 [hereinafter *Bishops Take a Risk*].

⁹² See, e.g., *Bishops Take a Risk*, *supra* note 91; Steven V. Roberts, *Catholic Bishops for Amendment Allowing States to Ban Abortions*, N.Y. TIMES, Nov. 6, 1981, at A1.

⁹³ *Anti-Abortion Group Backs Hatch Proposal*, N.Y. TIMES, Dec. 13, 1981, at 39.

⁹⁴ There was disagreement within the movement about the desirability of incrementalism. For example, the American Life League, an anti-contraception, antiabortion organization, went further, labeling the proposal a “betray[al of the movement’s] supporters, as well as babies.” *Beware of False Friends!*, A.L.L. ABOUT ISSUES (Am. Life League), Oct. 1981, in *The Wilcox Collection* (on file with the University of Kansas); *Down The Hatch!*, A.L.L. ABOUT ISSUES (Am. Life League), Jan. 1982, in *The Wilcox Collection*, *supra*.

political success and strategic savvy before the abstract principles the movement espoused.

The summer 1980 platform announced at the Republican National Convention was designed in part to attract these antiabortion leaders, as well as their allies in the New Right.⁹⁵ At first, the Reagan campaign avoided the kinds of arguments made against judicial activism in the courts or in the academy, instead stressing the kind of natural-law proposal many first-generation originalists had found objectionable.⁹⁶ In particular, the platform proposed “the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”⁹⁷ The judicial selection plank immediately won praise from social conservatives. Jerry Falwell stated that the platform could hardly have been better if leaders of the Religious Right had written it themselves.⁹⁸

By October 1980, the judicial selection plank had drawn criticism from lawyers in both political parties, as well as from the American Bar Association House of Delegates, which had voted to oppose Reagan’s proposal to select judges “on the basis of particular ideological or political philosophies.”⁹⁹ Initially, Reagan defended the platform, arguing: “We all ought to have a compassion for innocent human life.”¹⁰⁰ Over time, however, the Reagan campaign revised its judicial selection proposal, balancing the interests of social conservatives and antiabortion leaders on the one hand and lawyers who advocated impartiality on the other.¹⁰¹

Leading this effort was Reagan advisor William French Smith.¹⁰² In November 1980, he worked to characterize Reagan’s interest in antiabortion judges as a desire to select only those judges who rejected what Smith saw as the judicial activism of the Warren and Burger Courts.¹⁰³ Smith did not make clear how Reagan thought judges should interpret the Constitution, but he drew on some of the attacks made on unprincipled judging by critics like Rehnquist and Bork. He explained: “In a nutshell, [Reagan’s] political

⁹⁵ See Barbara C. Burrell, *Gender, Presidential Elections and Public Policy: Making Women’s Votes Matter*, 27 J. WOMEN, POL. & POL’Y 31, 44 (2005).

⁹⁶ See, e.g., BORK, *supra* note 6, at 258–59; JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 112, 128 (2005); Robert H. Bork, *Natural Law*, FIRST THINGS, Mar. 1992, at 21.

⁹⁷ Stuart Taylor, Jr., *Politics of the Bench: Carter and Reagan Seek Gains from Prospective Judiciary Appointments*, N.Y. TIMES, Oct. 28, 1980, at A27.

⁹⁸ See Michael Kramer, *After the Coronation*, N.Y. MAG., Sept. 3, 1984, at 33.

⁹⁹ See Taylor, *supra* note 97.

¹⁰⁰ *Id.*

¹⁰¹ See Fred Barbash & Mary Thornton, *Smith Outlines Strategy to Curb Court Activism*, WASH. POST, Nov. 30, 1981, at A1.

¹⁰² *See id.*

¹⁰³ *See id.*

philosophy is the laws of the country should be made by the legislature and construed by the judiciary, and, to the extent possible, not made by the judiciary.”¹⁰⁴

Given Reagan’s prior commitment to pro-life judges and his need to address legal critics, abortion opponents could easily have understood Smith’s statements as code for opposition to abortion. At the same time, though, Smith’s language was vague enough to appease abortion rights supporters, especially after October 1980, when Reagan responded to feminist demands that a woman be nominated to the Supreme Court.¹⁰⁵

In either case, with the support of grassroots conservatives, Reagan and the Republican Party were spectacularly successful in 1980. Reagan handily beat incumbent Jimmy Carter, carrying forty-four of fifty states.¹⁰⁶ For the first time in twenty-five years, Republicans retook the Senate.¹⁰⁷ It seemed likely that a Reagan nominee could successfully navigate the Senate on his or her way to the Supreme Court. The remaining question was what kind of judges Reagan would appoint.

1. The O’Connor Dispute, 1981

Antiabortion activists believed that they had the answer to this question in early July 1981, when Reagan announced the nomination of Sandra Day O’Connor to the Supreme Court.¹⁰⁸ In her time as an Arizona legislator, O’Connor had several opportunities to weigh in on policy questions involving sex and reproduction. In the early 1970s, she had signed a statement calling for population control in the United States that had been drafted by Dick Lamm, the leader of an effort to reform Colorado’s abortion ban.¹⁰⁹ O’Connor had also been an acquaintance of Dr. Carolyn Gerster, a recent president of the NRLC, the nation’s largest antiabortion group.¹¹⁰ After the nomination was announced, Gerster immediately informed the rest of the antiabortion community that, during her time in the

¹⁰⁴ Elizabeth Olson, *Reagan May Have His Chance to Appoint*, BRYAN TIMES, Nov. 10, 1980.

¹⁰⁵ For the text of Reagan’s announcement, see Ronald Reagan, Governor’s News Conference (Oct. 14, 1980), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=85232&st1=#axzz1RrlrA2vZ>. At the time, Reagan specifically declined to make a choice based primarily on a nominee’s view on the abortion issue. See *id.*

¹⁰⁶ On Reagan’s victory, see Peter Goldman, *Mr. Reagan Goes to Washington*, NEWSWEEK, Nov. 24, 1980, at 38.

¹⁰⁷ See, e.g., Steven S. Smith, *Parties and Leadership in the Senate*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE LEGISLATIVE BRANCH 255, 260 (Paul J. Quirk & Sarah A. Binder eds., 2005).

¹⁰⁸ CRITCHLOW, *supra* note 74, at 199.

¹⁰⁹ *Id.*

¹¹⁰ JOAN BISKUPIC, SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 78–79 (2005); CRITCHLOW, *supra* note 74, at 199.

Arizona State Legislature, O'Connor had supported the Equal Rights Amendment and had voted in favor of an abortion liberalization bill.¹¹¹

Members of the antiabortion movement were outraged by the nomination. Representative Henry Hyde informed Edwin Meese III, a longtime Reagan advisor and then-Counselor to the President, that he would oppose the selection.¹¹² Dr. John Willke, then-President of the NRLC, threatened to attack O'Connor in the press if her nomination were not withdrawn.¹¹³ Harold O. J. Brown, the head of the Christian Action Council, an evangelical Protestant antiabortion group, wrote Meese that the nomination would have a "disastrous effect . . . on the enthusiasm of the evangelical community for President Reagan."¹¹⁴

Publicly, before the confirmation hearings began, the Reagan Administration paid little attention to the antiabortion attacks. In August 1981, Reagan himself described Carolyn Gerster as "vindictive."¹¹⁵ An anonymous aide told the *New York Times*: "[T]here's going to be a lot of sound and fury, but in the end, it's going to end up signifying little or nothing . . ."¹¹⁶ Less publicly, however, as we shall see, Edwin Meese argued to Reagan and the rest of the Administration that more had to be done to convince both the movement and the general public of the problems with judicial activism.

During Reagan's first term, Meese had become an unofficial go-between for social conservatives, and the O'Connor nomination proved to be no exception. In a memorandum to Meese, one of his aides claimed that antiabortion advocates believed that the courts had "been engaged in a systematic effort to prevent the public from working its will on the subject of abortion."¹¹⁷ In fact, movement members had never emphasized such an argument—the White House, not activists, had stressed the subject of judicial overreaching.¹¹⁸

¹¹¹ See BISKUPIC, *supra* note 110, at 84–86

¹¹² See Memorandum from Max Friedersdorf to Jim Baker et al. (July 6, 1981), in The Edwin Meese III Papers (on file with Ronald Reagan Presidential Library, Simi Valley, Cal., OA 2408).

¹¹³ Memorandum from Marilee Melvin to Ed Meese (July 6, 1981), in The Edwin Meese III Papers, *supra* note 112.

¹¹⁴ Memorandum from Marilee Melvin to Ed Thomas (July 6, 1981), in The Edwin Meese III Papers, *supra* note 112.

¹¹⁵ Patrick Buchanan, *Reagan Letter Fuel for 'Pro-Lifers'*, CHI. TRIB., Aug. 15, 1981, at 7.

¹¹⁶ See Hedrick Smith, *Reagan's Court Choice: A Deft Maneuver*, N.Y. TIMES, July 9, 1981, at A17, available at 1981 WLNR 181023.

¹¹⁷ Memorandum from Michael Uhlmann to Edwin Meese (July 6, 1981), in The Edwin Meese III Papers, *supra* note 112.

¹¹⁸ Some anti-activism arguments circulated within the antiabortion movement in the early 1970s. For example, the Board of Directors for the National Right to Life Committee passed a resolution condemning the *Roe* Court for its "irresponsible exercise of raw judicial powers . . ." Nat'l Right to

The memorandum continued: “Whatever one may think of that argument, or of the merits of abortion itself, the intensity of right-to-lifers on the issue of judicial power should not be underestimated.”¹¹⁹ The memorandum proposed a nomination strategy that would cater to antiabortion advocates without appearing to be partisan: “It does not follow that a pro-lifer must be nominated. It does follow, I think, that the nominee’s record on the issue be examined with special scrutiny and that the nominee regard *Roe v. Wade* and its progeny as most unwise assertions of judicial power.”¹²⁰ Although several years would pass before the Reagan Administration would be in a position to implement the ideas set forth in the memorandum, the basic outline of a strategy was in place. The antiabortion movement could be won over not by criticizing legal abortion but rather by condemning the *Roe* Court’s activism. Nonetheless, the Grassroots Right would play a more complex role than might have been predicted, creating as well as responding to claims about judicial activism.

2. Reworking the Argument

During the O’Connor confirmation hearings, leaders of the NRLC and other antiabortion groups challenged the connection between rejecting judicial activism and banning abortion. In congressional testimony, Father Charles Fiore, a member of the National Pro-Life Action Committee, the nation’s largest direct-action protest antiabortion organization, rejected the idea of judicial restraint and demanded open hostility to *Roe*.¹²¹ As he explained: “I find [O’Connor’s] philosophy as exemplified in her record as a legislator and leader in the State Senate of Arizona [to be] clearly proabortion, and so on the basis of criteria set forth by the platform of the majority party in the Senate . . . she would appear to be unqualified.”¹²² A beleaguered Carolyn Gerster also expressed doubt about Reagan’s promise

Life Comm., Resolution of the Board of Directors (July 10, 1973), in *The American Citizens Concerned for Life Papers*, *supra* note 77. Similarly, two New York State-based groups, Celebrate Life Committee and Women for the Unborn, circulated a pamphlet on the issue of curbing judicial activism. Celebrate Life Comm. & Women for the Unborn, *You and the Courts* (1973), in *The American Citizens Concerned for Life Papers*, *supra* note 77.

¹¹⁹ Memorandum from Michael Uhlmann to Edwin Meese, *supra* note 117.

¹²⁰ *Id.*

¹²¹ See *Nomination of Sandra Day O’Connor: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 368–74 (1981) (statement of Father Charles Fiore, Chairman, National Pro-Life Political Action Committee). For a discussion of the founding and evolution of the PLAL, see JAMES RISEN & JUDY L. THOMAS, *WRATH OF ANGELS: THE AMERICAN ABORTION WAR* 111–13 (1998).

¹²² *Nomination of Sandra Day O’Connor*, *supra* note 121 (statement of Father Charles Fiore).

to select “strict constructionists,” accusing the Administration of “misrepresentation, evasion, and distortion of fact”¹²³

Other advocates opposed to O’Connor, however, offered novel claims about the justifications for rejecting judicial activism. For example, Gordon Jones of United Families for America, a socially conservative grassroots lobbying group, explained that O’Connor’s supposed approval of *Roe* proved her judicial philosophy to be irrevocably flawed.¹²⁴ As he asserted: “[T]he issue is not abortion but judicial activism. *Roe v. Wade* happens to be the worst example of judicial activism in this century”¹²⁵ He even addressed the Supreme Court, suggesting that the justices should be concerned about the “seriousness of the loss of faith experienced by the federal courts in recent years.”¹²⁶

In his congressional testimony, Dr. John Willke elaborated further on this argument. As Willke stated, “The Supreme Court’s 1973 abortion decision had no authentic basis in the Constitution. Rather, they constituted the most extreme examples of ‘judicial activism’ . . . in this century”¹²⁷ He contended that O’Connor was, by definition, an activist if she regarded “the 1973 abortion decisions as constitutional”¹²⁸

Willke also developed a set of social and political justifications for undoing *Roe*. He first argued: “We exist as a movement because of . . . *Roe*”¹²⁹ Although he himself had been involved in antiabortion activism before *Roe* was decided,¹³⁰ he asserted that *Roe* had created and sustained a movement against abortion.¹³¹ Next, he claimed that *Roe* had destroyed any possibility of political compromise: “[W]e live in a Nation that is totally polarized on this issue. Unlike other issues in the body politic, there is no midground, there is no compromise. A baby is either a baby or not”¹³² Willke played on public anxiety about the emotion and intensity of the abortion debate. As he framed it, the best way to produce a cooler, more

¹²³ *Id.* at 281–82 (statement of Dr. Carolyn Gerster, Vice President in Charge of International Affairs, National Right to Life Committee, Inc.).

¹²⁴ *See id.* at 376–84 (statement of Gordon S. Jones, Executive Director, United Families of America).

¹²⁵ *Id.* at 378.

¹²⁶ *Id.* at 380.

¹²⁷ *Id.* at 334 (statement of Dr. John C. Willke, National Right to Life Committee, Inc.).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ For an excerpt reflecting Willke’s pre-*Roe* involvement, see DR. & MRS. J. C. WILLKE, HANDBOOK ON ABORTION (1971), reprinted in BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 99, 99–101 (Linda Greenhouse & Reva Siegel eds., 2010).

¹³¹ *See Nomination of Sandra Day O’Connor*, supra note 121, at 331–35 (statement of Dr. John C. Willke, National Right to Life Committee, Inc.).

¹³² *Id.* at 308.

rational debate was to overrule *Roe*. Willke was not yet making an argument for originalism as such. Instead, his consequence-based claim was made primarily against *Roe* and what he understood to be judicial activism.

Significantly, first-generation originalist scholars or other members of the elite had not yet used such consequence-based arguments, either in criticizing *Roe* or in defending originalism. The dominant defense instead was a theoretical one: originalism was portrayed as the only principled, law-like philosophy and the only one consistent with democratic principles. Bork had suggested that judicial activism was illegitimate regardless of its consequences, although admitting that the public might no longer support judicial review if a judge made “explicit the imposition of his own will”¹³³

Raoul Berger and William Rehnquist specifically addressed the consequences of judicial activism. Berger presented the Court’s usurpation of self-government as the only relevant “consequence” of judicial activism.¹³⁴ No decision, even *Brown v. Board of Education*, was enough to offset “countenancing undeniable judicial arrogations of power”¹³⁵ Moreover, Berger did not offer the effects of judicial activism as a stand-alone argument for originalism. Instead, he brought up the issue only in response to those who had argued for living constitutionalism by pointing to its beneficial results (and in particular to the decision in *Brown*).¹³⁶

Rehnquist went one step further, looking at historical examples of activist decision-making.¹³⁷ If living constitutionalism had given the public *Brown*, as Rehnquist reasoned, it had also led to the Court’s decision in *Dred Scott v. Sandford*, a notoriously racist decision striking down the Missouri Compromise on slavery.¹³⁸ Rehnquist did offer some explanation as to why the *Dred Scott* Court’s activism was so disastrous, highlighting the “injury [it caused] to the reputation of the Supreme Court”¹³⁹ Just the same, Rehnquist did not yet offer the negative consequences of activist decision-making as an affirmative justification for his own philosophy.¹⁴⁰

¹³³ Bork, *supra* note 2, at 4.

¹³⁴ See, e.g., BERGER, *supra* note 44, at 392–93.

¹³⁵ *Id.*

¹³⁶ See *id.* Berger was responding in particular to Gerard Lynch’s argument in the *Cornell Law Review*. See Gerard E. Lynch, *Book Review*, 63 CORNELL L. REV. 1091 (1978).

¹³⁷ See generally Rehnquist, *supra* note 44.

¹³⁸ See *id.* at 700–04. For the decision in *Dred Scott*, see 60 U.S. 393 (1857).

¹³⁹ Rehnquist, *supra* note 44, at 702.

¹⁴⁰ See *id.* at 700–02. There were hints of a consequence-based argument against *Roe* before Willke gave his testimony. First, writing in dissent in *Roe*, Justice Byron White explained that *Roe* would deprive the states and the people of the opportunity “to weigh the relative importance of the continued existence and development of the fetus, on one hand, against a spectrum of possible impacts on the

Of course, Willke was offering only arguments against judicial activism, not justifications for originalism as such. Just the same, his arguments made an important contribution to conversation about judicial legitimacy and judicial activism. He pointed to social and political consequences that followed from activism instead of merely asserting that it was undemocratic. He also suggested that the consequences of activism were one of the main reasons for forswearing it. Why avoid judicial overreaching? As Willke framed it, to answer this question, one needed only look at the aftermath of *Roe v. Wade*.

3. At Odds, 1981–1984

In the early 1980s, as we shall see, not all grassroots activists were convinced of the utility of Willke's claims about judicial activism. In the fall of 1981, in the aftermath of the confirmation, antiabortion leaders believed that it would be more effective to restructure the courts than it would be to try to change the interpretive method most judges employed or to focus on the issue of judicial nominations. In September 1981, at a Religious Right convention, Phyllis Schlafly instead argued for the abolition of lifetime tenure for federal judges.¹⁴¹ In November, Weyrich's Free Congress Foundation put out a book entitled *A Blueprint for Judicial Reform*, a volume partly focused on proposals to strip the federal courts of jurisdiction.¹⁴² That fall, as many as thirty jurisdiction-stripping bills were circulating in Congress.¹⁴³

mother, on the other hand." *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting). However, White was primarily establishing why *Roe* was undemocratic. *See id.* at 221–23. He was not predicting or describing the consequences of the opinion. *See id.* Nor was he using those consequences as a justification for a different method of constitutional interpretation. *See id.* Similarly, in 1975, Professor Joseph Witherspoon of the University of Texas Law School, a leading member of the antiabortion movement and the National Right to Life Committee, did formulate some kind of consequence-based criticism of *Roe*. *See S.J. Res. 6, Proposing an Amendment to the Constitution of the United States for Guaranteeing the Right of Life to the Unborn; S.J. Res. 10 and S.J. 11, Proposing an Amendment to the Constitution of the United States for the Protection of Unborn Children and Other Persons: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 94th Cong. 523–37 (1975) (statement of Joseph P. Witherspoon, Professor of Law, Univ. of Tex. Sch. of Law). Witherspoon contended that *Roe* "stirred the American populace as have few decisions of the Supreme Court since that institution came into being." *Id.* at 549. However, Witherspoon invoked these consequences only as evidence that the American people shared a commonsense judgment "that the unborn human child is a human being who from conception to birth is indistinguishable in any essential way from any other human being after birth . . ." *Id.* at 540.

¹⁴¹ *See* James M. Perry, *The New Right Campaigns for Its Social Issues*, WALL ST. J., Sept. 11, 1981, at 30.

¹⁴² *See* John P. East, *The Case for Withdrawal of Jurisdiction*, in *A BLUEPRINT FOR JUDICIAL REFORM* 29, 35 (Patrick B. McGuigan & Randall R. Rader eds., 1981).

¹⁴³ *See, e.g.*, David S. Broder, *New Right Sounds Attack on Courts*, WASH. POST, Nov. 22, 1981, at A3; Anthony Lewis, *Mr. Zero Goes to Washington*, N.Y. TIMES, Jan. 28, 1982, at A3.

Another option was the ratification of a human life amendment. Indeed, Orrin Hatch presented his proposed amendment as a solution to the kind of judicial activism highlighted by the White House.¹⁴⁴ In campaigning for the proposal, he stressed that the Supreme Court justices had, in *Roe*, “impose[d] their personal standards on 230 million Americans,” mistakenly intervening in “moral and social issues.”¹⁴⁵

In spite of a somewhat belated campaign by President Reagan in support of the amendment, antiabortion members of Congress could not muster the votes to end a filibuster on the proposal that began in September 1982.¹⁴⁶ Some in the movement despised the amendment, since it did not announce the personhood of the fetus and made it possible to force individual states to deny the humanity of the unborn child.¹⁴⁷ Because some advocates viewed it as a betrayal of the movement’s guiding philosophy, it seemed that the Hatch proposal had cast serious doubt on the connection between discouraging judicial activism and banning abortion.

In the fall of 1981, when the Reagan Justice Department again stressed arguments about judicial activism, Administration officials borrowed from and modified the antiabortion movement’s political justifications for avoiding activist decision-making and overruling *Roe*. For example, beginning in October 1981, Attorney General French Smith gave a series of speeches outlining the priorities of the Justice Department.¹⁴⁸ Without mentioning or defining a jurisprudence of original intent, he explained that the Justice Department would “focus upon the doctrines that have led to the courts’ activism.”¹⁴⁹ He singled out “the right to marry, the right to procreate, the right of interstate travel, and the right of sexual privacy that, among other things, may have spawned a right, with certain limitations, to

¹⁴⁴ Mary Thornton, *Catholics Back Hatch Bill to Curb Abortion*, WASH. POST, Nov. 6, 1981, at A3.

¹⁴⁵ *Id.*

¹⁴⁶ Bill Peterson, *Senate, Despite Appeals by Reagan, Refuses to Break Abortion Filibuster*, WASH. POST, Sept. 10, 1982, at A10.

¹⁴⁷ For examples of this view, see *Abortion—Part IV: Hearings on S.J. Res. 6, S.J. Res. 10 and 11, and S.J. Res. 91 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 94th Cong. 106–08 (1974)* (statement of Robert M. Byrn, Professor, Fordham Univ. Law School) (criticizing a states’ rights amendment as putting “the right to live at the perpetual mercy of shifting legislative majorities”). Byrn went so far as to argue that, if a states’ rights amendment were passed, it might be the “worst” outcome yet seen in the debate, for it would “expound the principle that some human beings are not human persons . . .” *Id.* at 108; see also *Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong. 304 (1976)* (statement of Humberto Cardinal Medeiros) (arguing that a states rights amendment would be inadequate because “[p]rotection of human life should not depend on geographical boundaries”).

¹⁴⁸ *Excerpts from Attorney General’s Remarks on Plans of Justice Department*, N.Y. TIMES, Oct. 30, 1981, at A22.

¹⁴⁹ *Id.*

have an abortion.”¹⁵⁰ While not explicitly condemning any of the Court’s decisions on these subjects, he labeled them arbitrary and “constitutionally dubious and unwise intrusions upon the legislative domain.”¹⁵¹

Nevertheless, he put as much emphasis on political reasons for rejecting judicial activism. In issuing decisions like *Roe*, as he explained, the Court risked losing its own independence and prestige because of “subjective judicial policy-making as opposed to reasoned legal interpretation.”¹⁵² Like Dr. John Willke, he attributed both antiabortion outrage and the 1980 election to dismay with decisions like *Roe*. As he put it: “We believe that the groundswell of conservatism evidenced by the 1980 election makes this an especially appropriate time to urge upon the courts more principled bases [of decision-making] that would diminish judicial activism.”¹⁵³

Together, Smith’s speeches and the O’Connor confirmation hearings also helped to increase the prominence of judicial activism arguments in mainstream antiabortion advocacy. In 1982, Reverend Jerry Falwell of the Moral Majority and Richard Viguerie put out books on *Roe v. Wade* and judicial activism, stressing that *Roe* was “made against the tide of public opinion” and had earned “condemnation by large segments of the public as well as legal scholars”¹⁵⁴

The new prominence of activism arguments was even more apparent in June 1983, after the Supreme Court decided *City of Akron v. Akron Center for Reproductive Health*.¹⁵⁵ The Court invalidated several abortion restrictions introduced by the city of Akron, including a twenty-four hour waiting period and an informed consent provision.¹⁵⁶

Instead of simply condemning the morality of the decision or speaking out in favor of the personhood of fetuses, antiabortion leaders also emphasized the issue of judicial activism. Senator Roger Jepsen, an avowed opponent of legal abortion, contended that, in *Akron*, “the Supreme Court [was] completely out of their jurisdiction.”¹⁵⁷ Gary Curran, a leading member of the American Life Lobby, added: “The Supreme Court thinks

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Commentary to JUDGMENT WITHOUT JUSTICE: THE DRED SCOTT AND ROE VS. WADE DECISIONS* 13, 15–16 (Deborah Huff ed., 1982).

¹⁵⁵ *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983).

¹⁵⁶ *Id.* at 446–51.

¹⁵⁷ Mary Thornton, *Court Ruling Will Spur Campaign to Prohibit Abortions, Critics Say*, WASH. POST, June 16, 1983, at A10.

they are a super legislature for every city, town, county and state in America.”¹⁵⁸

4. Connection Undone? 1984–1985

In 1984, several political events again made antiabortion activists downplay claims about judicial activism, including the consequentialist claims created at the grassroots level. As historian Daniel K. Williams has shown, in 1984 social conservatives made apparent that abortion was their leading issue, not simply one among many.¹⁵⁹ In trying to win back the disillusioned Religious Right, Reagan adopted the more overtly moral arguments that the movement had publicized in the 1970s. As part of his effort to solidify support among social conservatives, Reagan even published a book in 1984, *Abortion and the Conscience of the Nation*.¹⁶⁰ The book did restate judicial activism arguments against *Roe*, contending “abortion-on-demand is not a right granted by the Constitution” and calling *Roe* an act of “raw judicial power.”¹⁶¹ Much of the book focused, however, on moral and medical claims: arguments that “[m]odern medicine treats the unborn child as a patient” or that “[w]e cannot diminish the value of one category of human life—the unborn—without diminishing the value of all human life.”¹⁶²

For their part, advocates on both sides of the debate primarily addressed a prominent film, *Silent Scream*.¹⁶³ The film was narrated by one of the most controversial antiabortion activists, Dr. Bernard Nathanson, a man who had once been a leading member of the abortion rights movement and a founding member of NARAL (originally the National Association for the Repeal of Abortion Laws and, later, the National Abortion Rights Action League).¹⁶⁴ Narrated by Nathanson, the film depicted the abortion of a twelve-week-old fetus.¹⁶⁵ The film energized the movement, which spent millions of dollars to screen the film on television news programs and in schools.¹⁶⁶ In a January 1985 conversation with Nellie Gray of March for

¹⁵⁸ *Id.*

¹⁵⁹ See WILLIAMS, *supra* note 57, at 207.

¹⁶⁰ RONALD REAGAN, *ABORTION AND THE CONSCIENCE OF THE NATION* (1984).

¹⁶¹ *Id.* at 16.

¹⁶² *Id.* at 18, 21.

¹⁶³ See, e.g., William Johnson, *Anti-Abortion Message Taken to White House*, *GLOBE & MAIL*, Feb. 13, 1985, at 14.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*; Sandy Johnson, “Graphic in the Extreme”: *Anti-Abortion Doctor Plans Follow-Up Film*, *L.A. TIMES*, Dec. 5, 1985, at 24.

¹⁶⁶ See, e.g., Betty Cuniberti & Elizabeth Mehren, “*Silent Scream*”: *Abortion Film Stirs Friend*,

Life, Reagan expressed hope that that the film would sway Congress to pass legislation limiting abortion.¹⁶⁷

The film prompted a strong response from the abortion rights movement, one framed in the same moral terms used by the opposition. In 1985, NARAL began a campaign entitled "Abortion Rights: Silent No More," in which the group rounded up 40,000 letters from Americans who had benefited from the availability of legal abortion.¹⁶⁸ In August 1985, Planned Parenthood planned to spend approximately \$900,000 on newspaper and magazine ads in support of the campaign, showing the faces and names of women who had had abortions.¹⁶⁹

By the summer of 1985, the abortion debate had shifted again, raising interest in the issue of judicial activism. By June 1985, Douglas Johnson of the NRLC concluded that there would not likely be a dramatic change in Congress leading to passage of legislation that would overrule *Roe*.¹⁷⁰ The best strategy for the antiabortion movement was to abandon the doomed human life amendment and take up a more productive project. Johnson predicted a new focal point for debate: "The president has said he believes [*Roe v. Wade* was] unconstitutional and we expect his nominees to reflect that."¹⁷¹

As leading studies suggest, Edwin Meese, Reagan's second Attorney General, also brought new attention to the issues of judicial activism and originalism.¹⁷² By the summer of 1985, Meese began a campaign to reach the broader legal community, an effort he launched with a July speech before the American Bar Association.¹⁷³ The July speech was considerably more detailed than the Administration's previous analyses of judicial philosophy. Under French Smith, the Justice Department had primarily condemned "legislating from the bench" without fully explaining what restrained judges would do.¹⁷⁴ By contrast, in the July speech, Meese endorsed an "endeavor to resurrect the original meaning of [the Constitution] . . ." ¹⁷⁵ He urged courts to focus on discerning the motives of

Foe, L.A. TIMES, Aug. 8, 1985; Johnson, *supra* note 165.

¹⁶⁷ See, e.g., Dudley Clendinen, *President Praises Foes of Abortion*, N.Y. TIMES, Jan. 23, 1985, at A1.

¹⁶⁸ See Cuniberti & Mehren, *supra* note 166.

¹⁶⁹ *Id.*

¹⁷⁰ See Michael Shanahan, *Tide Seems to Have Turned on New Right's Wave of '80*, SACRAMENTO BEE, Aug. 27, 1985, at A1, available at 1985 WLNR 1230934.

¹⁷¹ *Id.*

¹⁷² See, e.g., Post & Siegel, *supra* note 3, at 550-51.

¹⁷³ See, e.g., Editorial, *Meese's Legal Fundamentalism*, CHI. TRIB., July 15, 1985, at 8, available at 1985 WLNR 868789; Stuart Taylor, Jr., *Meese, in Bar Group Speech, Criticizes High Court*, N.Y. TIMES, July 10, 1985, at A13, available at 1985 WLNR 656400.

¹⁷⁴ See *Excerpts from Attorney General's Remarks*, *supra* note 148.

¹⁷⁵ See Editorial, *supra* note 173.

the Constitution's framers and, if necessary, looking to the history and context of particular constitutional provisions.¹⁷⁶

He also borrowed heavily from the political justifications for overruling *Roe* that the antiabortion movement had created in the early 1980s.¹⁷⁷ As Meese presented them, however, these were arguments not just for undoing *Roe* but also for adopting originalist interpretive methods.¹⁷⁸ The Court's decisions, like *Roe*, had generated controversy and popular anger, producing "intense feelings" on subjects about which "the public [was] widely divided."¹⁷⁹ As he argued, originalism would allow the Court to avoid "the charge of being either too conservative or too liberal."¹⁸⁰

At the same time, in the mid-1980s, consequence-based claims slowly began to feature in the work of originalist scholars. For example, in 1985, in discussing the Supreme Court's opinion in *Dred Scott*, Graglia mentioned the social and political impact of this decision: "Preventing political settlement . . . and apparently making the Civil War inevitable. . . ."¹⁸¹ He also made clear that "[t]he consequences of that decision . . . must weigh heavily in any overall assessment [of it]."¹⁸² For the most part, however, in 1987, when Robert Bork was nominated to the Supreme Court, consequentialist arguments against *Roe* or for originalism had not become prominent in the academy or in the courts.¹⁸³ As we have seen, many antiabortion activists were not yet convinced of the relevance of the issue of judicial activism to their cause.

By the end of Bork's confirmation hearings, as we shall see, members of the Grassroots Right had begun to emphasize the issue of judicial activism to a much greater extent, convinced as they were that originalism would lead to the undoing of *Roe*. In turn, by the early 1990s, to a greater

¹⁷⁶ *Id.*

¹⁷⁷ *See id.*

¹⁷⁸ Meese Says Justices Heed Policy Instead of Principle, L.A. TIMES, July 9, 1985, at 1, available at 1985 WLNR 984844.

¹⁷⁹ Aaron Epstein, Meese: I Didn't Mean to Attack High Court, MIAMI HERALD, July 11, 1985.

¹⁸⁰ Meese Says Justices Heed Policy Instead of Principle, *supra* note 178.

¹⁸¹ Graglia, *supra* note 6, at 439–40.

¹⁸² *Id.*

¹⁸³ For samples of originalist scholarship in the period, see Raoul Berger, *A Political Scientist as Constitutional Lawyer: A Reply to Louis Fisher*, 41 OHIO ST. L.J. 147 (1980); Raoul Berger, *Soifer to the Rescue of History*, 32 S.C. L. REV. 427 (1981); Raoul Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751 (1984); Raoul Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 WIS. L. REV. 341; Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L. REV. 383 (1985); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Lino A. Graglia, "Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program, 65 TEX. L. REV. 789 (1987).

extent, scholars and jurists had begun to stress the consequence-based claims developed at the grassroots level.

5. The Meaning of Robert Bork

By 1987, Robert Bork had become the best known judicial and academic defender of originalism, as well as an outspoken critic of *Roe v. Wade*, primarily citing his opposition to substantive due process.¹⁸⁴ In introducing Bork to the American public in July 1987, the Reagan Administration—led by Chief of Staff Jim Baker—wanted to downplay Bork's views on *Roe* and present him as an apolitical figure. For example, a talking points memorandum issued by the White House framed the issue as “whether the judges and the courts are called upon . . . to interpret the laws . . . or whether judges and the courts should write orders and opinions which are, in effect, new laws—the ‘activist’ view.”¹⁸⁵ Since 1986, the Administration had been concerned about what one Reagan aide described as “opposition efforts to position the federal courts as ‘the tool of the far right’ under Reagan.”¹⁸⁶ In September 1987, the Administration responded that “[i]deology should have no role” in Bork's hearings.¹⁸⁷ The only interest groups shaping the process, the Administration suggested, were those opposed to Bork—what the Administration called “individuals and groups who have long demonstrated [that] they are outside the American political mainstream.”¹⁸⁸

It was abortion rights groups that fought back most effectively against this portrayal of Bork. At the head of these efforts was an alliance of left-wing advocacy groups known as the Block Bork Coalition.¹⁸⁹ The organization was formed by the groups that had previously comprised Ralph Neas's Leadership Conference on Civil Rights, a union of labor, civil-rights, women's-rights, disability-rights, and elderly-rights groups, and

¹⁸⁴ See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT OF PRIVACY AND THE MAKING OF ROE V. WADE* 668 (1998).

¹⁸⁵ Judge Robert H. Bork, The President's Nominee to the Supreme Court, Overview (July 28, 1987), in *White House Papers, Series III* (on file with Ronald Reagan Presidential Library, Simi Valley, Cal.).

¹⁸⁶ Memorandum from Tom Gibson to Pat Buchanan, Judicial Appointments Theme (Feb. 24, 1986), in *Bork Subject File, Series III* (on file with Ronald Reagan Presidential Library, Simi Valley, Cal.).

¹⁸⁷ See Judge Robert H. Bork, *supra* note 185.

¹⁸⁸ Key Points for the Weeks Ahead (Sept. 30, 1987), in *White House Papers, supra* note 185.

¹⁸⁹ See MICHAEL PERTSCHUK & WENDY SCHAETZEL, *PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* 41 (1989).

Nan Aron's Alliance for Justice, a smaller collection of groups that specialized in judicial nominations and in litigation.¹⁹⁰

After conducting extensive focus group research, in August 1987 the Coalition developed "themes" and "talking points" memos that offered the broad outlines of a strategy to defeat Bork. The August "Themes Memo" contended that, if Bork succeeded, particular political results would be guaranteed.¹⁹¹ He would "provide the decisive vote to turn back the clock for a number of decisions," including those on abortion.¹⁹² As the Coalition described it, the current Supreme Court was relatively apolitical, and most citizens "accept[ed] and want[ed] to put behind them rulings on issues like abortion."¹⁹³ A political crusader, Bork would introduce change and instability into the law.

As we shall see, Bork helped to confirm the view of him presented by both the antiabortion and abortion rights movements. In his opening statements before Congress, Bork insisted that he had a healthy respect for precedent, especially because judging required more circumspection than did life in the legal academy.¹⁹⁴ When pressed on his views about *Roe*, however, Bork described the privacy decisions leading to it as "utterly inadequate."¹⁹⁵ He deemed *Roe* itself to be a decision "contain[ing] almost no legal reasoning."¹⁹⁶ Under questioning, he admitted to thinking that *Roe* had been wrongly decided but proposed that the opinion might be "so deeply embedded" in the precedent and practice of the country that it could not be overturned.¹⁹⁷

To many antiabortion activists, the Bork confirmation hearings made clear that originalism did produce desirable results: Bork himself had suggested that an originalist Court would not have created *Roe v. Wade*.¹⁹⁸

¹⁹⁰ See generally *id.* at 36–61 (summarizing the founding of the Coalition).

¹⁹¹ See *id.* at 137–39.

¹⁹² *Id.* at 138.

¹⁹³ *Id.*

¹⁹⁴ See David Lauter, *Bork Assures Senators He Respects Precedent*, L.A. TIMES, Sept. 16, 1987, at 1, available at 1987 WLNR 1520956.

¹⁹⁵ GARROW, *supra* note 184, at 669.

¹⁹⁶ *Id.*

¹⁹⁷ Lauter, *supra* note 194.

¹⁹⁸ Judicial activism rhetoric became a staple of antiabortion advocacy. When George H. W. Bush announced the nomination of David Souter to the Supreme Court, Coalitions for America, a Paul Weyrich-headed alliance of antiabortion groups that included Concerned Women for America, stressed the nominee's record approvingly as one of "interpreting, not legislating." Jason DeParle, *Souter Approval Urged by Conservative Groups*, N.Y. TIMES, Aug. 20, 1990, at A20, available at 1990 WLNR 2984733. In June 1991, when Thurgood Marshall announced his retirement from the Supreme Court, Douglas Scott, then-Vice President of the Christian Action Council, an evangelical Protestant antiabortion group, stated: "Marshall is the most activist jurist of this century, and his resignation is good news for the country and the pro-life movement." Andrew Rosenthal, *Marshall Retires from High*

In time, as will become clear, these activists argued not only against *Roe* but also for originalism. In turn, consequence-based arguments against *Roe* seemed more salient to the originalist scholars, jurists, and sympathizers dismayed by the tenor and outcome of Bork's nomination hearings.

Consequence-based arguments figured centrally in originalist scholarship and jurisprudence in the aftermath of the Bork hearings. In 1990, Bork himself took up these claims. He attributed antiabortion "demonstrations, marches, television advertisements, and mass mailings" to the *Roe* Court's activism.¹⁹⁹ Because the Court had not relied on constitutional text or history, as Bork portrayed it, the *Roe* Court was "perceived, correctly, as political."²⁰⁰ He described a threat to the Supreme Court's legitimacy and "integrity" that was no longer abstract but evident in social and political changes.²⁰¹

A similar argument featured in Justice Scalia's 1992 dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁰² the opinion in which a divided Supreme Court preserved but narrowed *Roe*.²⁰³ Like the *Casey* majority, Scalia focused on the "political pressure" that *Roe* had produced.²⁰⁴ However, Scalia urged the Court to pay "more attention to the cause" of the unrest.²⁰⁵ In Scalia's view, that cause was a "mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls 'reasoned judgment,' which turns out to be nothing but philosophical predilection"²⁰⁶

Court: Blow to Liberals, N.Y. TIMES, June 28, 1991, at A1, available at 1991 WLNR 3087977. During the presidency of Bill Clinton, Weyrich and his allies in the antiabortion movement formed the Judicial Selection Monitoring Project to oppose the "liberal activist judges" Clinton had chosen. See, e.g., Anthony Lewis, *Far Right's Judge Campaign Takes a Toll*, DALLAS MORNING NEWS, Nov. 1, 1997, at 33A, available at 1997 WLNR 6674315. Similar efforts continued after George W. Bush, an opponent of legal abortion and a social conservative, was elected to the first of two terms in office. In 2001, social conservatives and abortion opponents formed the Center of Reclaiming America. See, e.g., Robert Stacy McCain, *Coalition Begins 'Rattle' Campaign for Pro-Life Justices*, WASH. TIMES, Sept. 5, 2001, at A3, available at 2001 WLNR 388395. The group spent \$2 million to promote the selection of "restrained judges" who would oppose *Roe*. *Id.* By 2004, leading opponents of legal abortion had penned book-length studies on judicial activism, including Phyllis Schlafly's *The Supremacists: The Tyranny of Judges and How to Stop It* (2004) and Pat Robertson's *Courting Disaster: How the Supreme Court Is Usurping the Power of Congress and the People* (2004).

¹⁹⁹ BORK, *supra* note 6, at 116.

²⁰⁰ *Id.*

²⁰¹ See *id.*

²⁰² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting in part).

²⁰³ See *id.* at 845–46 (plurality opinion).

²⁰⁴ *Id.* at 999–1001 (Scalia, J., dissenting in part).

²⁰⁵ *Id.* at 1000.

²⁰⁶ *Id.* (citation omitted).

What were the consequences of the *Roe* Court's activism? Here again, Scalia echoed the arguments honed by activists like Willke: “[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, . . . the Court merely prolongs and intensifies the anguish.”²⁰⁷ Like Willke, Scalia offered an account of the social and political consequences of *Roe*.²⁰⁸ Moreover, like Willke, he presented the impact of the decision as a reason to undo it.²⁰⁹

Following the decision of *Casey*, scholars adopted arguments similar to Scalia's.²¹⁰ Scalia himself made such arguments a centerpiece of his dissent in *Stenberg v. Carhart*, a decision striking down federal bans on partial-birth abortion.²¹¹ Scalia invoked the political and social consequences of both *Roe* and *Casey*. In his view, *Roe* “fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular”²¹² *Casey*, too, in Scalia's words would lead to “the perpetuation of that disruption”²¹³ In the end, as Scalia presented it, this political turmoil was an argument for decision-making based on “constitutional text [or] accepted tradition”²¹⁴ The consequences of activism were a powerful argument for originalism, at least if the Court was interested in “its own preservation”²¹⁵

Consequence-based arguments against *Roe* and for originalism have become so prominent that many defending non-originalist interpretive methods have had to explain the impact of their own approaches.²¹⁶ For example, in setting out a minimalist approach to constitutional

²⁰⁷ *Id.* at 1002.

²⁰⁸ *See id.* at 995 (“*Roe*'s mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level.”).

²⁰⁹ *See id.* at 1002.

²¹⁰ *See, e.g.,* Autumn Fox & Stephen McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223, 239–42 (1997); Frank Scaturro, *Abortion and the Supreme Court: Roe, Casey, the Myth of Stare Decisis, and the Court as a Political Institution*, 3 HOLY CROSS J.L. & PUB. POL'Y 133, 150–51 (1998).

²¹¹ *Stenberg v. Carhart*, 530 U.S. 914, 955–56 (2000) (Scalia, J., dissenting).

²¹² *Id.* at 956 (quoting *Casey*, 505 U.S. at 995–96 (Scalia, J., dissenting in part)).

²¹³ *Id.* (quoting *Casey*, 505 U.S. at 996 (Scalia, J., dissenting in part)).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *See* ESKRIDGE & FEREJOHN, *supra* note 8, at 242–43; JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 82 (2006); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 114–15 (1999).

interpretation, Cass Sunstein argues that the consequences highlighted by Bork and Scalia emerged not because of a failure to adopt originalist methods but because the Court decided too much too soon.²¹⁷ Ruth Bader Ginsburg has argued that the consequences Scalia describes occurred because the Court did not offer an adequately convincing constitutional rationale for abortion rights, especially one based on sex equality.²¹⁸

Consequence-based arguments against *Roe* have become a central part of debate about the decision and about the best methods of constitutional interpretation. To a greater extent than is acknowledged in prior studies, many grassroots activists and social-movement members created important popular claims about judicial activism, claims that have become a meaningful part of first-generation originalist scholarship and jurisprudence.

C. Rethinking the Politics of Originalism

What more can the history considered here tell us about the politics of originalism? As we have seen, the appeal of originalism figures in studies on popular constitutionalism.²¹⁹ It is at the center of discussion about the jurisprudential merits of originalism.²²⁰ Other studies look at the attraction of originalism in assessing why and how an interpretive method sustains public interest.²²¹ A common question runs through these debates: How do judges, professors, and politicians successfully popularize a judicial philosophy?

Scholars like Siegel and Greene envision the popularization of originalism as a dialogic process, in which elites and grassroots both participate.²²² Nevertheless, scholars analyzing the attraction of originalism often focus on the elites' role in creating or explaining originalism and its justifications.²²³ If we change the focal point of our analysis, we can better appreciate the importance of studying what kinds of exchanges have produced a politically successful judicial philosophy. As was the case with crucial arguments for overruling *Roe*, grassroots activists and social-movement members may well have played a central role in reshaping,

²¹⁷ See SUNSTEIN, *supra* note 216, at 114–15.

²¹⁸ See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381–82 (1985).

²¹⁹ See *supra* note 19 and accompanying text.

²²⁰ See *supra* notes 2 and 3 and accompanying text.

²²¹ See *supra* note 2 and accompanying text.

²²² See *supra* note 19 and accompanying text.

²²³ See *supra* notes 2 and 3 and accompanying text.

creating, or reinterpreting judicial activism claims that play an important part in justifying originalism.

As importantly, by stressing the role of elite actors, current scholarship has often assumed that the justifications for originalism offered by lay activists and government officials are one and the same. Indeed, grassroots advocates formulated and popularized their own definitions of judicial activism and judicial restraint.

1. Judicial Activism and the Radicals

One powerful example of this mode of reinterpretation can be seen in the claims made by the direct-action branch of the antiabortion movement in the 1980s. The radical wing of the movement was diverse and complex, especially by the late 1980s. For example, in 1981, Father Paul Marx founded one direct-action protest organization, Human Life International, in Gaithersburg, Maryland, focusing on clinic protests, while Mark Crutcher's Life Dynamics sought to harass abortion providers by tying up their phone lines and suing for malpractice.²²⁴ Moreover, the line between the direct-action organizations and the older, generally more moderate groups was fluid. The American Life League, a mainstream conservative Catholic group, supported Operation Rescue, a direct-action protest unit, and adopted tactics similar to those of the Pro-Life Action League, another similar group.²²⁵

Operation Rescue and the Pro-Life Action League were the largest and most influential direct-action protest groups.²²⁶ Although these organizations did not explicitly mention originalism or define restrained judging, they heavily emphasized the issue of judicial activism.²²⁷ Moreover, as this Article contends, these organizations also pioneered important claims on the subject.

²²⁴ On Marx and Human Life International, see, for example, MICHAEL W. CUNEO, *THE SMOKE OF SATAN: CONSERVATIVE AND TRADITIONALIST DISSENT IN CONTEMPORARY AMERICAN CATHOLICISM* 63 (1997). On Life Dynamics, see GARROW, *supra* note 184, at 715.

²²⁵ See, e.g., MARTIN DURHAM, *THE CHRISTIAN RIGHT: THE FAR RIGHT AND THE BOUNDARIES OF AMERICAN CONSERVATISM* 96–97 (2000).

²²⁶ Operation Rescue became “the first single nation-wide pro-life direct action organization.” CAROL J. C. MAXWELL, *PRO-LIFE ACTIVISTS IN AMERICA: MEANING, MOTIVATION, AND DIRECT ACTION* 54 (2002). On the Pro-Life Action League, see RISEN & THOMAS, *supra* note 121, at 67, 111–13.

²²⁷ See, e.g., *League Welcomes Confirmation of Justice Sam Alito*, PRO-LIFE ACTION LEAGUE (Feb. 1, 2006, 2:38 PM), <http://prolifeaction.org/hotline/2006/alito-2/>.

The most influential such group early in the 1980s, the Pro-Life Action League, was sustained largely because of the efforts of Joseph Scheidler.²²⁸ Born in Indiana to a prominent Roman Catholic family, Scheidler attended the University of Notre Dame, became a journalist, considered but ultimately decided not to join a Catholic religious order, and began teaching at journalism school.²²⁹ In 1974, he convinced the Illinois branch of the NRLC to hire him as director.²³⁰ In 1978, after he publicized a protest at the Concord Clinic in Chicago, he lost his job at Illinois Right to Life, but he and his remaining supporters within the group, including former Quaker Oats Vice President Tom Roeser, formed a new organization, Friends for Life (“FFL”).²³¹ FFL established its reputation as the most radical organization of its kind—the “Green Berets of the right-to-life movement,” in the words of columnist Patrick Buchanan.²³² In 1980, after a bitter internal battle, Scheidler left FFL, founding the Pro-Life Action League (“PLAL”) with his wife and one close ally.²³³

Scheidler began publicizing claims about judicial activism in 1984, when he was building Pro-Life Action Network (“PLAN”), a network of direct-action protestors.²³⁴ At a Fort Lauderdale, Florida, meeting that attracted 600 activists, Scheidler relied on the illegality of *Roe* and on the existence of a more important moral law in justifying his own tactics and those of his supporters.²³⁵ However, Scheidler used his arguments against judicial activism in favor of the kind of natural law reasoning rejected by many first-generation originalists.²³⁶ As he explained in the *New York Times* in December 1984: “I consider sit-ins obedience to a higher law. I’ll stay after I’m told to leave as an act of desperation because I’m trying to save a life.”²³⁷

Scheidler’s fame grew in 1985 when he published *Closed: 99 Ways to Stop Abortion*, a strategy manual for clinic protestors.²³⁸ That year, in responding to an increase in clinic bombings and other abortion-related

²²⁸ See generally CUNEO, *supra* note 224, at 59–61.

²²⁹ For a brief summary of Scheidler’s background, see generally *id.*

²³⁰ See, e.g., RISEN & THOMAS, *supra* note 121, at 108.

²³¹ *Id.* at 110.

²³² *Id.* at 111.

²³³ *Id.*

²³⁴ See, e.g., *The MacNeil Lehrer Newshour: Abortion* (MacNeil/Lehrer Productions Dec. 25, 1984); James Barron, *Violence Increases Against Abortion Clinics in '84*, N.Y. TIMES, Nov. 5, 1984, at B15, available at 1984 WLNR 480369.

²³⁵ RISEN & THOMAS, *supra* note 121, at 113.

²³⁶ See *supra* note 6 and accompanying text.

²³⁷ Barron, *supra* note 234.

²³⁸ See JOSEPH M. SCHEIDLER, *CLOSED: 99 WAYS TO STOP ABORTION* (Tan Books & Publishers, Inc. 1993) (1985).

violence, Scheidler reiterated his claims about judicial activism and said he “neither condone[d] nor encourage[d] violence While perpetrators of vandalism must be willing to accept the consequences of their act, in a real sense their actions may be more than an option. For many, these actions constitute a moral obligation.”²³⁹

As Scheidler became more prominent, he brought more attention to his claims about judicial tyranny in *Roe*. Moreover, as he explained to the *Chicago Tribune* in 1985, the Supreme Court had no authority “to force a [moral] view” on the public.²⁴⁰ The only consequence of this raw judicial power was obvious: the Court had “engender[ed] disrespect for the law”²⁴¹

Scheidler did echo some of the conventional claims made by first-generation originalists. But as we have seen, he also infused conventional judicial activism arguments with religious and natural law principles. These claims reworked and refracted conventional arguments against judicial activism.

An organization similar to Scheidler’s, Operation Rescue, became the most prominent such group in the late 1980s.²⁴² At the beginning, Operation Rescue was the brainchild of Randall Terry.²⁴³ Like many evangelical Protestants of his generation, Terry was first exposed to arguments condemning abortion and judicial activism when reading the works of Francis Schaeffer.²⁴⁴ A pastor in the Reformed Presbyterian Church, a fundamentalist sect, Schaeffer had moved with his family in 1948 to L’Abri, Switzerland.²⁴⁵ He began his career in religious publishing in 1976 with *How Shall We Then Live?: The Rise and Decline of Western Thought and Culture*.²⁴⁶ In 1979, Schaeffer’s son, Frank, made the book into a film series.²⁴⁷ Appearing as the narrator of the film, Schaeffer described the erosion of American culture that had resulted from the abandonment of Biblical principles and the rule of God.²⁴⁸

²³⁹ Linda Witt, *Man with a Mission: Joe Scheidler Pulls No Punches in His Crusade Against Abortion*, CHI. TRIB., Aug. 11, 1985, available at 1985 WLNR 911490.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See RISEN & THOMAS, *supra* note 121, at 212.

²⁴³ *Id.* at 217–18. For discussion of Terry’s life, see *id.* at 207–08, 218–23, 250–51.

²⁴⁴ *Id.* at 126, 223.

²⁴⁵ See WILLIAMS, *supra* note 57, at 140–44.

²⁴⁶ *Id.* at 140–41.

²⁴⁷ *Id.* at 140.

²⁴⁸ See *id.* at 140–41.

Judicial activism was both a cause and a symptom of secular humanism.²⁴⁹ Schaeffer argued that, in decisions like *Roe v. Wade*, “the Constitution of the United States can be made to say what the courts of the present want it to say—based a court’s decision as to what the court feels is sociologically helpful at the moment.”²⁵⁰ The justification for judicial activism—in Schaeffer’s words, the belief that “[l]aw has only a variable content”—came directly from man’s disastrous desire to be autonomous from God’s revelation.²⁵¹

In 1981, in *A Christian Manifesto*, Schaeffer elaborated on this theory.²⁵² There, he identified *Roe* as a key example of judicial activism.²⁵³ He echoed academic arguments that *Roe* had no constitutional foundation and that the Court had made an essentially political decision that should have been left to the elected representatives of the people.²⁵⁴ He also asserted that the *Roe* Court’s activism was ungodly. *Roe* had made secular humanism into a constitutional principle, holding that “[o]ne choice is as valid as another.”²⁵⁵

Influenced by Schaeffer, in 1984 Terry and his wife began protesting outside a local provider in Binghamton, New York, eventually leading boycotts.²⁵⁶ By 1986, he had made contact with Joseph Scheidler and the network of radical organizations he was in the process of building.²⁵⁷ A year later, Terry was well on his way to forming Operation Rescue.²⁵⁸

Operation Rescue specialized in large protests and attracted substantial media attention: for example, between 1987 and 1988, 211 protestors were arrested in front of a Cherry Hill, New Jersey, clinic, 503 in New York, and 753 in Atlanta.²⁵⁹ The controversy made Terry himself something of a celebrity and brought attention to Terry’s arguments about judicial tyranny.

In February 1989, for example, when Operation Rescue was sponsoring a four-day protest predicted to draw several thousand participants, Reverend Randy Aller, an ally of Terry’s, explained: “Abortion is legal, but it’s not

²⁴⁹ *Id.* at 142, 176.

²⁵⁰ FRANCIS A. SCHAEFFER, HOW SHOULD WE THEN LIVE?: THE RISE AND DECLINE OF WESTERN THOUGHT AND CULTURE 218 (1976).

²⁵¹ *Id.*

²⁵² FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO (1981).

²⁵³ *Id.* at 48–49.

²⁵⁴ *See id.* at 49.

²⁵⁵ *See, e.g., id.* at 47.

²⁵⁶ *See* RISEN & THOMAS, *supra* note 121, at 249–52.

²⁵⁷ *Id.* at 208.

²⁵⁸ *See, e.g., id.* at 115, 208.

²⁵⁹ *See, e.g., Anti-Abortion Protestors Close New Jersey Clinics*, CHI. TRIB., Nov. 30, 1987, at C4; Nadine Brozan, *503 Held in Abortion Protest on E. 85th St.*, N.Y. TIMES, May 3, 1988, at B1; Robert Di Veroli, *Abortion Foes Look to 1960s for Strategy*, SAN DIEGO EVENING TRIB., Nov. 16, 1988, at A1.

lawful—there’s a higher law.”²⁶⁰ In March, while fighting an injunction designed to block another protest, another ally echoed Terry’s claims that “[n]o judge . . . has the right to make it legal to kill children.”²⁶¹ Later in 1989, when Operation Rescue had scheduled ninety protests, Terry and several colleagues were arrested for violating state trespass laws.²⁶² Terry used the trial as a platform for his arguments about judicial overreaching.²⁶³

In September 1989, when facing a California jury, Terry defended himself by condemning *Roe*.²⁶⁴ In rejecting the Court’s illegitimate decision, he had been “[standing] up to . . . tyranny.”²⁶⁵ Condemning *Roe* was compatible with both the Constitution and with biblical principles. As he explained to the jury, voting against *Roe* was not voting for anarchy. It was “calling for . . . justice.”²⁶⁶ Like Scheidler, Terry combined conventional arguments against judicial activism with natural law claims about the natural or divine law.

Terry, Scheidler, and their organizations meant something very different by judicial activism or judicial restraint than did Edwin Meese or Robert Bork. In criticizing the sweeping decision of the *Roe* Court, Terry and Scheidler marshaled not only constitutional but also explicitly religious and moral arguments. They saw no tension between the two and even argued that judges and juries should respect the “higher law.”

Moreover, concern about the democratic legitimacy of *Roe* or decisions like it was, for Terry and Scheidler, only one issue among many. Each activist assumed that the “higher law” always dictated the right answer.²⁶⁷ In decisions like *Roe*, the Court could be faulted for ignoring the will of the people. However, if “the people” had themselves come up with the wrong answer on abortion, Terry and Scheidler would have been no less likely to protest.

These activists make clear that judicial activism arguments used by grassroots activists can mean something quite different than the contentions that are prominent in the academy. We have mostly missed these rich,

²⁶⁰ Lynn Smith, *All Sides Brace for Abortion Confrontation Saturday*, L.A. TIMES, Feb. 6, 1989, at 21.

²⁶¹ Karen E. Klein, *Anti-Abortion Protestors Say Court Order Won’t Stop Them*, L.A. DAILY NEWS, Mar. 3, 1989.

²⁶² See, e.g., Charisse Jones, *Terry Tells Jurors “I Have to Face God Someday,”* L.A. TIMES, Sept. 7, 1989, at 2; Tracy Wilkinson & Carol McGraw, *Police Gird for Confrontation Over Abortions*, L.A. TIMES, Mar. 23, 1989.

²⁶³ See, e.g., Jones, *supra* note 262.

²⁶⁴ See, e.g., *id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See *id.*; Witt, *supra* note 239.

alternative understandings because we have assumed that grassroots actors simply adopted the claims pioneered by academics and judges. The truth is much more complex.

III. CONCLUSION

Why has originalism acquired so much popular momentum? In the academy, studies have focused on the role of law professors, judges, and members of recent Republican presidential administrations.

The history of consequence-based justifications for overruling *Roe* offers a different perspective on important, legitimacy-based arguments for originalism. This history has several important implications. First, this Article raises questions about scholarship suggesting that *Roe* created the kind of crisis of legitimacy described by abortion opponents. Social-movement members, many of whom were active before *Roe*, popularized claims that the decision created the antiabortion movement and precipitated a crisis of judicial legitimacy. We should be careful about assuming the historical truth of claims that have so obvious a political and instrumental purpose.

Second, this Article highlights the extent to which important justifications for originalism were forged in a dialogue between social-movement members, elite and grassroots actors. Significantly, lay activists added arguments of their own to the discussion. This suggests that ordinary citizens are not simply consumers, students, or members of an audience. At least in the abortion context, they are also contributors and creators. This Article shows that too little is known about how grassroots actors understand and deploy the rhetoric of judicial restraint. To the extent that the history considered here is an example, lay advocates have been more influential, active, and inventive in this process than is currently thought.

Finally, studies asking how any judicial philosophy gains political currency may have obscured the history of important justifications for originalism and important arguments about judicial legitimacy. If we focus primarily on the ways that the elites inspire, educate, and mobilize citizens behind any interpretive method, we might miss important contributions made by grassroots actors. How will the politics of originalism evolve? In answering these questions, we would be wrong to deemphasize the role played by grassroots activists. As in the past, their influence may be hard to ignore.