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## Originalism Talk: A Legal History

Mary Ziegler\*

*Progressives have long recognized the tremendous political appeal of originalism. For many scholars, originalism appears to have succeeded because it achieves results consistent with conservative values but promises judicial neutrality to the public. By drawing on new historical research on anti-abortion constitutionalism, this Article argues for a radically different understanding of the originalist ascendancy. Contrary to what we often think, conservative social movements at times made significant sacrifices in joining an originalist coalition. These costs were built in to what this Article calls originalism talk—the use of arguments, terms, and objectives associated with conservative originalism.*

*Scholars have documented the costs confronted by social movements reliant on rights-based rhetoric, particularly when activists seek social change in the courts. Originalism talk was similarly constraining. By becoming part of an originalist coalition, abortion opponents increased their influence over the selection of federal judicial nominees. At the same time, in stressing originalist rhetoric, abortion opponents had to publically mute their longstanding constitutional commitments involving the right to life, the personhood of the fetus, and the existence of rights based in natural law or human-rights principles.*

*The story of anti-abortion constitutionalism offers insight into progressive attempts to create a doctrinally satisfying and politically resonant alternative to conservative originalism. Often the issue is how to create an interpretive method that accomplishes as much as originalism: advancing progressive constitutional beliefs while appealing to the public's interest in the rule of law. As this Article shows, however, it is not clear that the benefits of belonging to the originalist coalition outweigh its costs.*

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## INTRODUCTION

Progressives have long recognized the tremendous political appeal of originalism.<sup>1</sup> To a significant extent, the progressive constitutional project has been an effort to identify the salient features of popular originalism and to create an equally resonant and popular progressive alternative.<sup>2</sup> Generally, the story goes, conservative originalism was a political success because it offered a perfect fit between conservative ends and a seemingly impartial interpretive means.<sup>3</sup> Understood in this way, originalism represents a perfectly subtle and seemingly innocuous strategy to introduce conservative values into American constitutional law.

Drawing on new historical research on anti-abortion constitutionalism, this Article argues for a radically different understanding of the originalist ascendancy. For many of its constituents, belonging to the conservative originalist coalition involved a complex and painful set of tradeoffs—the sacrifice of cherished principles for immediate political gain.

Viewed as a constitutional movement, the early anti-abortion cause enjoyed at best an ambiguous relationship with originalism. Originalism's message of neutrality, respect for democratic values, and constitutional fidelity resonated with certain grassroots activists and academic commentators. However, in the late 1960s and early

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1. See, e.g., Jamal Greene, Nathaniel Persily, & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011) (offering an empirical explanation of popular support for originalism); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 681 (2009); Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century*, 1 HARV. L. & POL'Y REV. 239, 241 (2007); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1529–38 (2011) (documenting “the rise of conservative originalism during the Reagan era and . . . its success in shaping the conversation about the Constitution”).

2. See, e.g., Greene, *Selling Originalism*, *supra* note 1, at 661 (arguing “that an account of why originalism is successful is crucial to fundamentally non-originalist interpretive theories”); Simon Lazarus, *Hertz or Avis?: Progressives' Quest to Reclaim the Constitution and the Courts*, 72 OHIO ST. L.J. 1201, 1207–08 (2011).

3. See, e.g., Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 548 (2012); Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1689 (2012); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 572 (2006) (“Originalism is so powerfully appealing because conservatives have succeeded in fusing contemporary political concerns with authoritative constitutional narrative.”); Reva B. Siegel, Comment, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 201–36 (2008) (showing the rise of originalism as seen in the gun rights movement).

1970s, the anti-abortion movement—a key part of a later originalist coalition—defended a constitutional agenda based on the Declaration of Independence, human rights law, substantive due process precedents, biological evidence, and common-law opinions on fetal personhood.<sup>4</sup> This agenda enjoyed broad lay support across otherwise divided grassroots groups.

When anti-abortion constitutionalism took its place as part of a broader conservative constitutional agenda, movement leaders acted as much for strategic as for substantive reasons. In the early years of Ronald Reagan's first term, administration attorneys helped to transform originalism into a political practice—an effort “to forge a vibrant connection between the Constitution and contemporary conservative values.”<sup>5</sup> Becoming part of the originalist coalition allowed abortion opponents to influence the selection of judicial nominees and to increase the chances that *Roe v. Wade* would be overruled.<sup>6</sup> However, conservative originalism promised far less than the constitutional change abortion opponents had demanded. For decades, abortion opponents had fought to establish a right to life that would be protected from the vicissitudes of ordinary politics. At most, an originalist court would return the abortion issue to the states—an outcome long dreaded by anti-abortion constitutionalists.<sup>7</sup>

The story of anti-abortion constitutionalism offers an important new perspective on historical and theoretical works on originalism. Historians convincingly describe how originalism functions as a political practice. In short, the argument goes, social movements gravitate toward originalism because originalism articulates values that activists share and promises outcomes that movements want. The history of anti-abortion constitutionalism shows instead that social movements at times made significant sacrifices in joining an originalist coalition. These costs were built in to what this Article calls “originalism talk”—the use of arguments, reasoning, and objectives associated with first-generation originalism.

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4. These strategies are discussed in *infra* Part II.

5. Post & Siegel, *supra* note 3, at 569.

6. On the influence of originalism on federal judicial nominations, *see, e.g.*, Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 72 (2009); Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 743–44 (2011).

7. *See infra* note 134 and accompanying text.

Scholars have documented the costs confronted by social movements reliant on rights-based rhetoric, particularly when activists sought social change in the courts.<sup>8</sup> Originalism talk required similar tradeoffs. Originalist rhetoric helped rally members disheartened by the movement's lack of progress. It reformulated demands for social change in a way that seemed part of a respectable legal tradition. Originalism talk allowed abortion opponents to "raise consciousness, fundraise, and bargain with state decision makers."<sup>9</sup> At the same time, in stressing originalist rhetoric, abortion opponents had to publically mute their longstanding constitutional commitments involving the right to life, the personhood of the fetus, and the existence of rights based in natural law or human rights principles.

As Tomiko Brown-Nagin argues, the "hallmark" of effective social movement activism is an effort "to *directly* influence public policy by appealing *directly* to the public and a target audience of decisionmakers, such as governmental representatives."<sup>10</sup> Social movements succeed when they influence public attitudes and raise

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8. For an overview of this body of work, see, e.g., Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1862 (1987); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 369–74 (2012); Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 714–15, 719–21 (2011). Much of the scholarship on rights talk draws on Stuart Scheingold's work, demonstrating that rights claims were a political resource similar to "money, numbers, status, and so forth." STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 7 (2d ed. 2004). Some scholars argue that rights reasoning can empower social movements, helping them to "raise [public] consciousness, fundraise, and bargain with state decision makers." Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 668 (2012). For works in this vein, see, e.g., FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (Glenda Gilmore et al. eds., 2007); NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006); Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 LAW & HIST. REV. 577, 580 (2010). Other scholars stress the constraints imposed by rights talk. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 74 (1987) (in the context of sex equality, describing the way in which such rhetoric "perfectly obscures these collective realities behind the mask of recognition of individual rights"); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 276–77 (1994); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); cf. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991) (explaining how rights talk both accommodated an existing social order and represented a kind of emancipatory discourse for labor activists).

9. NeJaime, *supra* note 8, at 668.

10. Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1503 (2005).

the salience of the cause at issue.<sup>11</sup> Originalism talk limited the anti-abortion movement's ability to undertake this work in two ways: First, by suppressing alternative claims, the movement's allegiance to originalism limited the manner in which members could describe their grievances and goals.<sup>12</sup> Second, by focusing activists' efforts on interpretive methodology, originalism talk used up valuable resources that could have been directed to changing public attitudes.<sup>13</sup> For its constituents, originalism involved difficult tradeoffs. Historians tell a far simpler story about the ways in which originalism served as a site of social-movement mobilization. This Article begins to recapture the complexity surrounding the creation of the originalist coalition.

The story of anti-abortion constitutionalism also makes an important contribution to the theoretical literature, offering insight into progressive attempts to create a convincing alternative to conservative originalism. Often, the issue is how to create an interpretive method that accomplishes as much as originalism: advancing progressive constitutional beliefs while appealing to the public's interest in the rule of law. As this Article shows, however, it is not clear that the benefits of belonging to the originalist coalition outweigh its costs. We should study whether progressive social movements should forge an alternative to conservative originalism, not simply how they should do so.

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11. For a discussion of the relationship between social movements, public attitudes, and social change, see, e.g., PAUL BURSTEIN, *DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL* 90 (1998); JOSEPH E. LUDERS, *THE CIVIL RIGHTS MOVEMENT AND THE LOGIC OF SOCIAL CHANGE* 200 (2010) (noting "a general congruence between public opinion and policy outcomes" in social-movement politics, particularly when there is "mass attentiveness"); LAURA L. TOUSSAINT, *THE CONTEMPORARY US PEACE MOVEMENT* 74 (2009) (arguing that "social control must . . . be viewed by the general public as illegitimate in order to facilitate broad-based support for [a social] movement"); S. LAUREL WELDON, *PROTEST, POLICY, AND THE PROBLEM OF VIOLENCE AGAINST WOMEN: A CROSS-NATIONAL COMPARISON* 186 (2002) (contending that "[s]ocial movements are aimed primarily at social transformation" and work "by changing social meanings or values").

12. Cf. Mark Fathi Massoud, *Do Victims of War Need International Law? Human Rights Education Programs in Authoritarian Sudan*, 45 *LAW & SOC'Y REV.* 1, 17 (2011) (explaining that "rights talk tends to narrow or limit the discursive resources available to civil society groups by suppressing alternative claims").

13. Similar criticisms have been made in discussing litigation as a tool for social change. See, e.g., Scott Barclay et al., *Two Spinning Wheels: Studying Law and Social Movements*, 54 *STUD. L. POL. & SOC'Y* 1, 11 (2011) ("When lawyers appear in social movement studies, they are mostly characterized as hired guns who exhaust a movement's scarce resources . . .").

The Article proceeds in five parts. Part I situates the Article in the existing literature on conservative constitutionalism and the pro-life movement. To the extent that histories document the development of anti-abortion constitutionalism, scholars position it as part of a broader narrative about the rise of originalism. Part II begins to develop an alternative story about anti-abortion constitutionalism, focusing on the years between 1965 and 1981. The movement promoted a right to live based not on text, history, or the intentions of the framers of the Constitution, but rather on the Declaration of Independence and substantive due process. Part III charts the decline of this constitutional agenda in the 1980s as movement leaders identified practical reasons for endorsing the emerging originalist agenda. Part IV explores the stakes of this history, and Part V offers a brief conclusion.

#### I. CONSERVATIVE CONSTITUTIONAL HISTORIOGRAPHY

For most historians and legal theorists, conservative originalism is a success story. Generally speaking, “[o]riginalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”<sup>14</sup> Irrespective of any of its flaws or doctrinal inconsistencies, conservative originalism apparently enjoys meaningful popular support while delivering the constitutional results its constituents desire. Scholars across the ideological spectrum work to explain how to preserve or duplicate the influence that conservative originalism now enjoys. As this Section shows, however, current scholarship largely misses the deep costs incurred by the movements that have joined the originalist political coalition. Studying anti-abortion constitutionalism allows us to recover the lost history of conservative originalism’s tradeoffs.

Originalism often plays a part in larger histories of the political right. While the history of conservative constitutionalism remains understudied, a well-developed political history of the Republican Party and the grassroots Right has taken shape in recent decades.<sup>15</sup>

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14. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004).

15. On the history of the conservative movement, *see, e.g.*, DONALD T. CRITCHLOW, *THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY* (2007); DONALD T. CRITCHLOW & NANCY MACLEAN, *DEBATING THE AMERICAN CONSERVATIVE MOVEMENT, 1945 TO PRESENT* (2009); DAVID FARBER, *THE RISE AND FALL*

After World War II, some American scholars, activists, and politicians launched an attack on the progressive liberal order created during the rise of the New Deal.<sup>16</sup> For decades, the triumph of this conservative movement may have seemed improbable. In the 1940s and 1950s, the movement was bitterly divided between moderates concerned about alienating Republican Party centrists and activists convinced that the Party had forsaken its principles.<sup>17</sup> Grassroots advocates promoted strong positions on anti-communism and small government, while moderates urged their colleagues to back positions and candidates that would help the party win elections. Before the 1960s, as historian Donald Critchlow explains:

Conservatism had found a voice in a small group of intellectuals, but its influence was limited intellectually and politically. A strident anti-Communism had gained popular acceptance among grassroots activists, but its fervor was never shared by the majority of Americans.<sup>18</sup>

Some activists belonging to organizations like the John Birch Society, an ultra-right, anticommunist group, helped to fuel Democratic Party allegations that the Right was “racially prejudiced, xenophobic, and easily manipulated by demagogues . . . .”<sup>19</sup> Even within the Republican Party, tensions between movement conservatives and party veterans were high.<sup>20</sup> However, the failed nomination of conservative Barry Goldwater, a darling of those who despised the East Coast Republican Establishment, set the stage for later conservative successes.<sup>21</sup> During the Goldwater campaign,

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OF MODERN AMERICAN CONSERVATISM: A SHORT HISTORY (2010); KEVIN MATTSON, *REBELS ALL!: A SHORT HISTORY OF THE CONSERVATIVE MIND IN POSTWAR AMERICA* (2008); GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945* (3d ed. 2006); *RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970s* (Bruce J. Schulman & Julian E. Zelizer eds., 2008).

16. See, e.g., CRITCHLOW & MACLEAN, *supra* note 15, at 55–57; George Schneider, *The Old Right*, in *CONSERVATISM IN AMERICA SINCE 1930: A READER* 5 (Gregory L. Schneider ed., 2003).

17. On the divisions within the Republican Party in the 1940s and 1950s, see, e.g., MARY C. BRENNAN, *TURNING RIGHT IN THE SIXTIES: THE CONSERVATIVE CAPTURE OF THE GOP* 17 (1995); ROBERT MASON, *THE REPUBLICAN PARTY AND AMERICAN POLITICS FROM HOOVER TO REAGAN* 132 (2012); LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* 115 (2001).

18. CRITCHLOW & MACLEAN, *supra* note 15, at 40.

19. *Id.* at 65.

20. See *supra* note 17 and accompanying text.

21. On the influence of Goldwater’s failure, see, e.g., J. WILLIAM MIDDENDORF II, A



extremist activists channeled their efforts into grassroots political organizing, and after 1964, factional divisions gradually healed. Ronald Reagan's landslide 1980 victory represented the culmination of a revolution in American politics, as Democrats and Republicans voted overwhelmingly for a man who symbolized many of the conservative movement's beliefs.<sup>22</sup>

If the political history of the conservative movement is well developed, much of its legal and constitutional history remains to be unearthed. We can understand conservative constitutionalism partly as a network of foundations, educational institutions, and elite organizations. Steven Teles's path-breaking work in this vein frames legal conservatism partly as a system of influence.<sup>23</sup> In this account, conservatives worked to gain control of elite institutions as a way of influencing the courts and creating a supply of lawyers and potential judges.<sup>24</sup> Teles argues that legal mobilization took shape in response to the world created by liberal elites in the 1960s, a world that put a premium on knowledge and credentials.<sup>25</sup> Other scholars have taken a similar approach, studying the cardinal traits of attorneys advocating for right-wing causes or the creation of elite conservative

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GLORIOUS DISASTER: BARRY GOLDWATER'S PRESIDENTIAL CAMPAIGN AND THE ORIGINS OF THE CONSERVATIVE MOVEMENT xii (2006) ("The organization that [was] created to win the Republican nomination for Barry Goldwater . . . and the conservative vision that attracted so many supporters came to represent a new baseline for the Republican Party . . . [E]fforts to elect Barry Goldwater gave muscle to the embryonic conservative movement . . ."); Gillian Peele, *American Conservatism in Historical Perspective*, in *CRISIS OF CONSERVATISM?: THE REPUBLICAN PARTY, THE CONSERVATIVE MOVEMENT, & AMERICAN POLITICS AFTER BUSH 15*, 22 (Joel D. Aberbach & Gillian Peele eds., 2011) (arguing that Goldwater's defeat "signaled that the right could capture the Republican party," "dramatically broadened the conservative element in the Republican ranks," and made disparate factions "into a unified movement").

22. See, e.g., JEFFREY HOWISON, *RONALD REAGAN AND THE SHAPING OF THE AMERICAN CONSERVATIVE MOVEMENT* xviii (2014) ("[T]he victory of Ronald Reagan [in 1980] signaled the ascendancy of the conservative movement in American society"); Nancy MacLean, *Guardians of Privileges*, in *CRITCHLOW & MACLEAN, supra* note 15 at 162 ("[F]or conservative movement builders, [Reagan's] 1980 election was an epochal victory").

23. Steven M. Teles, *Conservative Mobilization Against Entrenched Liberalism*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 160 (Paul Pierson & Theda Skocpol eds., 2007); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008) [hereinafter TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT*].

24. See TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT, supra* note 23, at 4, 6, 9–10, 13.

25. See *id.*

institutions like the Federalist Society.<sup>26</sup> These new institutions created important opportunities for debate. In this vibrant intellectual environment, the ideas of original intent (and later original meaning) took shape.<sup>27</sup>

But as scholars recognize, conservative constitutionalism consists not only of a set of institutional arrangements but also a group of arguments.<sup>28</sup> Current scholarship identifies some forms of originalism as the defining feature of recent conservative constitutional thought and political action.<sup>29</sup>

The term originalism, of course, has a history of its own. While James Bradley Thayer had called for “judicial restraint” as early as 1893,<sup>30</sup> the promotion of a jurisprudence of original intent came later when, in the late 1960s and 1970s, conservative scholars developed powerful criticisms of the Warren Court. During the 1968 presidential election, Richard Nixon promised to nominate “strict constructionists” who, in Nixon’s words, would “interpret the Constitution . . . [and] not twist or bend the Constitution in order to perpetuate his personal political and social views.”<sup>31</sup> In 1971, when Nixon nominated William Rehnquist to the Supreme Court, the future Justice gave some content to the idea of strict constructionism, suggesting that judges should be limited by “the

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26. For further examples, see e.g., ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); George W. Hicks, Jr., *The Conservative Influence of the Federalist Society on the Harvard Law School Student Body*, 29 HARV. J.L. & PUB. POL’Y 623 (2006).

27. See, e.g., SOUTHWORTH, *supra* note 26, at 124, 130 (describing groups, like the Heritage Foundation and the American Conservative Union, that favor a jurisprudence of original constitutional intent); TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT*, *supra* note 23, at 145.

28. For analyses of the tenets of conservative constitutionalism, see, e.g., ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 211–212 (1994); Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 LAW & CONTEMP. PROBS. 53, 55–59 (2004); Johnsen, *supra* note 1, at 240.

29. See, e.g., Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 286 (2011) (“Two of the conservative intellectual movement’s central commitments make originalism its most compatible theory of constitutional interpretation.”); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 673 (1990) (“Judicial restraint and originalism constitute the core of a conservative theory of constitutional interpretation.”).

30. See, e.g., Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 522 (2012).

31. Whittington, *supra* note 14, at 600 (internal quotation marks omitted).

language used by the framers, [and] the historical materials available . . . .”<sup>32</sup> Throughout the 1970s, scholars like Robert Bork and Raoul Berger elaborated on the idea of a jurisprudence based on original intent.<sup>33</sup> By the mid-1980s, with the selection of Edwin Meese III as attorney general, Reagan administration officials and scholars christened the interpretive method championed by Warren Court critics as “originalism.”<sup>34</sup>

The kind of originalist thought pioneered in the 1970s and 1980s has become known as first-generation conservative originalism.<sup>35</sup> More recently, different schools of originalist theory have emerged: progressive, libertarian, and conservative, for example, or other theories based on original meaning versus original intent.<sup>36</sup> Outside of the academy, as Robert Post and Reva Siegel explain, conservative originalism is both an interpretive method and a political practice.<sup>37</sup> It is with this strand of originalist thought and practice that the history of anti-abortion constitutionalism intersects.

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32. *Noms. of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Comm. on the Judiciary United States S.*, 92d Cong. 55 (1971) (Statement of William Rehnquist, S. Ct. nominee).

33. *See, e.g.*, Whittington, *supra* note 14, at 600–03.

34. On coining of the term originalism and its embrace by Meese, *see, e.g., id.* at 599; TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT*, *supra* note 23, at 145 (suggesting that Meese “originated not the idea, but the nomenclature of original intent jurisprudence”).

35. For uses of the term “first-generation” originalist, *see, e.g.*, Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 *HARV. J.L. & PUB. POL’Y* 5, 13 (2011); Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 *UCLA L. REV.* 1399, 1401 (2009).

36. Some commentators prioritize the original expected application of the relevant constitutional text. *See, e.g.*, Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 135 (1997); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751, 758–72, 784–85 (2009). Other commentators focus on the original semantic meaning of the text, stated at the level of generality found in the text. *See, e.g.*, Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 33 (Grant Huscroft & Bradley W. Miller eds., 2011); Whittington, *supra* note 14, at 599. On the difference between new and old originalism, *see, e.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 714–16 (2011). Randy Barnett’s libertarian originalism is one variety of new originalism, *see, e.g.*, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 118–130 (2004), as is Jack Balkin’s progressive originalism, *see, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291 (2007); JACK M. BALKIN, *LIVING ORIGINALISM* 3–4, 14–16, 23–34 (2011).

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

For progressives, the success of conservative originalism poses the most intriguing historical question. Many studies contend that first-generation originalism is intellectually incoherent, based on the problematic concept of collective intention and on subjective and shallow “law office history,”<sup>38</sup> but the success of conservative originalism outside of the academy matches any setbacks faced within it. Conservative originalist thought plays an important role in Supreme Court decision-making, federal judicial nominations, and conservative political mobilization.<sup>39</sup> Popular support for conservative originalism appears to reflect some level of substantive support for its basic tenets.<sup>40</sup> The issue, for progressives, is how to counter the surprising and persistent popularity of conservative originalism.

Uncovering the secret of conservative originalism’s success requires an understanding of what it promises both grassroots activists and the general public. According to Robin West, “conservative constitutionalists view private or social normative authority as the legitimate and best source of guidance for state action” and see “both the Constitution and constitutional adjudication as a means of preserving and protecting that authority.”<sup>41</sup> Erwin Chemerinsky identifies as defining traits of conservative constitutionalism a desire “to narrow . . . federal power . . . , to restrict access to the [federal] courts, . . . to expand [] aid to religion, . . . to limit the scope of individual rights, . . . [and to

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38. Saul Cornell, *The People’s Constitution vs. The Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 *YALE J.L. & HUMAN.* 295, 301 (2011) (suggesting that originalism relies on law office history); see also Laurence H. Tribe, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 36, at 68–72 (describing the impossibility of determining the level of abstraction at which constitutional clauses should be read and applied; Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 *IOWA L. REV.* 1, 6, 101–02 (1999) (describing the failure of originalists to adhere to the original meaning of “commerce”); Post & Siegel, *supra* note 3, at 548–49 (“In recent decades, a large scholarly literature has developed that is dedicated to exposing the analytic inconsistencies and theoretical deficiencies of originalism.”); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 *UCLA L. REV.* 217, 287 (2004) (describing “the vast body of primary historical materials . . . that support a spectrum of constitutional meaning” and the resulting failure of originalist methodology to restrain judicial interpretation).

39. See, e.g., Post & Siegel, *supra* note 3, at 545–46.

40. See, e.g., Greene, Persily & Ansolabehere, *Profiling Originalism*, *supra* note 1, at 417.

41. WEST, *supra* note 28, at 212.

limit the] scope of criminal defendants' rights."<sup>42</sup> Dawn Johnsen summarizes conservative constitutional principles as follows:

Judges should respect the rule of law. They should rule according to what the law says, not what they would prefer it to be. They should not legislate from the bench or impose their own social or political agenda. They should enforce the Constitution as written, including limits on federal power. . . . [These statements] have become the Right's mantra . . . . Through decades of remarkable discipline and repetition, conservatives have imbued these carefully chosen, innocuous-sounding phrases with deeply contested and radical ideological content.<sup>43</sup>

Generally, conservative social movements are thought to have gravitated toward originalism partly because it promised to deliver on their legal and social goals. As Katherine Bartlett explains: "originalism is less a coherent or compelling jurisprudence than a 'political practice' that seeks 'to forge a vibrant connection between the Constitution and contemporary conservative values.'"<sup>44</sup> Originalism is the quintessential conservative constitution project, since it "was tied to conservative political projects and cultural assumptions."<sup>45</sup> As Robert Post and Reva Siegel explain: "[o]riginalism remains even now a powerful vehicle for conservative mobilization."<sup>46</sup>

For members of the public, originalism promised neutrality, objectivity, and fidelity to the country's founding principles—values that would attract many who did not share the reform priorities of movement conservatives. In the words of Earl Maltz, it was "this potential for neutrality that account[ed] for the visceral appeal of originalism."<sup>47</sup> The failure of first-generation, conservative originalism in the academy makes all the more impressive the success of originalism in shaping the work of the Court and in retaining

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42. Chemerinsky, *supra* note 28, at 55–57.

43. Johnsen, *supra* note 1, at 240.

44. Bartlett, *supra* note 3, at 548 (quoting Post & Siegel, *supra* note 3, at 569).

45. Greene, *supra* note 6, at 1689.

46. Post & Siegel, *supra* note 3, at 546.

47. Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 794; *see also* Michael 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 . . . and not the political-moral principles of whomever happens to occupy the judicial office.").

popular support. As Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere have shown, public support for originalism “expresses a substantive legal, political, and cultural preference.”<sup>48</sup>

In these accounts, conservative originalism has been a strategic triumph. Conservative originalism proved tremendously attractive to a general public interested in rule-of-law values. At the same time, originalism proved to be an important weapon of movement conservatives. In originalism, activists identified an interpretive strategy that would forward their political values.

A careful study of groups composing the conservative originalist coalition paints a more complex picture. The coalition pro-lifers joined included a variety of movement organizations and actors, including those naturally attracted to originalism’s message of neutrality and constitutional fidelity. Others, like anti-abortion leaders did not endorse originalism because it reflected movement members’ deeply held constitutional principles. Nor did all the members of a conservative originalist coalition benefit equally from signing on to a new legal agenda. Instead, for abortion opponents, endorsing originalism represented a strategic, if ultimately unsatisfying, compromise. In this story, originalism was not simply a theory of interpretation or a sophisticated tactical move. Instead, originalism was a process of constitutional coalition-building with clear tradeoffs.

Other historians have studied the rise, fall, and mysterious staying power of conservative originalism. This project is unique, however, in demonstrating how originalism talk constrained the social movements that adopted it. Scholars have long demonstrated how rights talk limits the ways in which social movements imagine, describe, and demand social change.<sup>49</sup> Both rights talk and originalism talk are extraordinarily flexible, albeit in different ways. Because of the malleability of rights talk, grassroots movements can “endow rights with capacious political meanings as part of broad struggles for socioeconomic transformation.”<sup>50</sup> Given that constitutional text and history can support many different interpretations, conservative originalism similarly allows movements to “infuse the law of the Constitution with [diverse] contemporary

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48. Greene, Persily & Ansolabehere, *supra* note 1, at 417.

49. See *supra* nn.8–9 and accompanying text.

50. Dinner, *supra* note 8, at 580.

political meanings.”<sup>51</sup> Moreover, both rights and originalism-based contentions have mobilized social movements to challenge the status quo in the courts.<sup>52</sup> Like rights rhetoric, originalist arguments can affect every aspect of movement activity, as originalist rhetoric rallies activists during presidential elections, judicial nomination hearings, and litigation campaigns.<sup>53</sup>

Nonetheless, as we shall see, originalism talk imposes unique constraints not associated with the more capacious form of rights talk. Whereas social movements have appealed to a rich and varied set of sources in demanding rights,<sup>54</sup> originalist rhetoric identifies constitutional authenticity as authoritative.<sup>55</sup> Originalist arguments do not easily allow movements to turn to human rights law, international law, natural law, or any other “unconventional” source of a demand for change.<sup>56</sup> Moreover, it appears that, even outside of the courts, originalism talk has primarily mobilized social movements interested in change made through litigation. While movements using rights talk as part of a court-based strategy often find themselves constrained, social movements can, in other contexts, mold rights claims to reflect a wide variety of transformative demands.<sup>57</sup> By contrast, even in the political arena, the originalist coalition mainly privileges the election of candidates and the nomination of judges sympathetic to a particular interpretation of the Constitution in the courts.<sup>58</sup> For the most part, the end-game remains social change through litigation.

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51. Post & Siegel, *supra* note 3, at 560.

52. On originalism’s mobilizing potential, *see, e.g., id.* at 559, 568. On the potential of rights talk to mobilize grassroots activists, *see generally, e.g.,* KORNBLUH, *supra* note 8; MACLEAN, *supra* note 8; Dinner, *supra* note 8 (“[P]opular rights consciousness can mobilize social movements to challenge normative power structures.”).

53. On the way in which originalism shapes different parts of the conservative movement strategy, *see, e.g.,* Post & Siegel, *supra* note 3, at 560–68.

54. For example, as Kornbluh shows, the welfare-rights movement drew inspiration from civil-rights advocacy, human-rights rhetoric, and political critiques of capitalism in formulating its demands. *See* KORNBLUH, *supra* note 8, at 12, 49–50, 67, 175. For a similar use of a variety of sources of inspiration, *see* Dinner, *supra* note 8, at 590–95.

55. *See, e.g.,* Post & Siegel, *supra* note 3, at 560–61.

56. For example, conservative originalists have often refrained from using international sources, even when doing so might have been advantageous. *See, e.g.,* DAVID L. SLOSS, MICHAEL D. RAMSEY, & WILLIAM S. DODGE, INTERNATIONAL LAW IN THE U.S. SUPREME COURT 515 (2011).

57. *See supra* note 8 and accompanying text.

58. *Cf., Lazarus, supra* note 2, at 1203 (“Social conservative voters place a high enough

For this reason, originalism talk and rights talk have analogous costs and benefits, particularly when movements prioritize work in the courts. Originalist rhetoric allowed pro-lifers access to an influential coalition. It legitimated anti-abortion demands and framed them in a way that resonated with legal elites. At the same time, in order to fit within an existing originalist framework, abortion opponents had to downplay their most deeply held constitutional commitments. Instead of building support for their fundamental beliefs, abortion opponents turned to rhetoric that promised an immediate political payoff.

Certainly, in the short term, irrespective of the strategy chosen, abortion opponents would not have achieved constitutional protection (or social support) for the fetal rights they championed. Nonetheless, originalism talk used up resources and energy that could have advanced activists' efforts to reshape public attitudes toward fetal life. Historians have not fully captured what conservative originalism meant to its constituents. This Article recovers an important part of this lost history.

Moreover, this Article offers new foundation for efforts to create a progressive alternative to originalism. To create such an alternative would in theory allow progressives to influence the courts, federal court nominations, and popular attitudes as much as conservative originalism. As the Article shows, however, the conservative originalist alliance emerged at considerable cost to some of its members. The success of originalism as a political practice depended on the willingness of social movements to set aside important beliefs and goals in order to forge a politically influential alliance.

## II. MAKING A FUNDAMENTAL RIGHT TO LIVE, 1965–1981

Early anti-abortion constitutionalism could not easily be reconciled with the jurisprudence of original intent articulated by William Rehnquist, Robert Bork, and other first-generation originalists. These scholars demanded fidelity to the intentions of the framers and heavy reliance on the text of the Constitution.<sup>59</sup> Those

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priority on the federal courts to make credible to politicians the threat that their votes could turn on that issue.”).

59. On the history of first-generation originalism, see, e.g., Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 *FORDHAM L. REV.* 1997, 2003–05 (2012); Whittington, *supra* note 14, at 599–603.



who would later be seen as pioneering originalists attacked the freewheeling Fourteenth Amendment jurisprudence of the 1960s and 1970s that some commentators perceived as identifying fundamental rights to birth control or reproductive liberty without any obvious constitutional foundation.<sup>60</sup> Anti-abortion constitutionalists instead demanded that the courts recognize another implicit right—a right to life—by relying on unconventional legal sources. Contrary to what we might now expect of conservatives, abortion opponents envisioned a broad role for the judiciary and the State, and they endorsed a variety of unorthodox interpretive methods. The anti-abortion movement followed earlier social movements, like the antislavery campaign of the 1840s and 1850s, in turning to the Declaration of Independence to illuminate the meaning of the Constitution.<sup>61</sup> Moreover, in the 1960s and 1970s, the anti-abortion movement joined the pro-choice and welfare-rights movements, among others, in relying on an expansive vision of substantive due process, procedural due process, or state action.<sup>62</sup>

In the mid-1960s, anti-abortion constitutionalists assumed that the public would automatically support the right to life if they understood what abortion really was. For this reason, early anti-abortion constitutional theories served primarily as a vehicle for evidence of the personhood of the fetus. Relying predominantly on equal-protection or procedural due process reasoning, early anti-abortion constitutionalism assumed the existence of a fundamental right to life without explaining its precise constitutional foundation. Gradually, as the abortion-rights movement made headway in the lower courts, abortion opponents began to elaborate more fully on their constitutional beliefs.

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60. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 405, 409–10 (2d ed. 1997) (attacking the Fourteenth Amendment jurisprudence of the Warren and Burger Courts for discounting original intent); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 13 (1971) (arguing that *Brown* lacked a basis in the Fourteenth Amendment).

61. On abolitionists' use of the Declaration of Independence, see, e.g., HENRIETTA BUCKMASTER, *LET MY PEOPLE GO: THE STORY OF THE UNDERGROUND RAILROAD AND THE GROWTH OF THE ABOLITION MOVEMENT* 31 (1992); ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 86 (1999).

62. This Section later explores these parallels in greater depth.

*A. The Creation of Anti-abortion Constitutionalism, 1965–1973*

The contemporary anti-abortion movement emerged in response to efforts to reform or repeal bans on abortion in the 1960s and 1970s.<sup>63</sup> Because anti-abortion organizations depended on the conditions present in each state, groups adopted strikingly different tactics, beliefs, and priorities.<sup>64</sup> The movement found itself divided about substantive issues, like contraception and the Equal Rights Amendment, as well as tactical questions.<sup>65</sup> Just the same, elite and grassroots members of what was a fragmented movement shared profound constitutional convictions about the existence of a right to life. As attorneys initially framed many of the movement's constitutional arguments, movement lay persons and physicians enthusiastically adopted them.

Scholars have debated the source of these convictions, whether they stem from faith in traditionalist gender roles, subconscious disgust, or religious commitments.<sup>66</sup> It is not my purpose here to explain the origin of anti-abortion constitutional convictions. Just the same, it is worth taking these beliefs seriously. Abortion opponents framed their beliefs and goals in constitutional terms before the Supreme Court intervened in the debate.<sup>67</sup> This

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63. See, e.g., Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, in *THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE* 139 (Donald T. Critchlow ed., 1996).

64. See, e.g., LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 292 (1992).

65. On anti-abortion divisions about contraception and the Equal Rights Amendment, see, e.g., Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After Roe v. Wade*, 87 *CHI.-KENT L. REV.* 571, 574–76, 584–90 (2012). On the movement's tactical divisions, see, e.g., Cassidy, *supra* note 63, at 138–43.

66. For an argument showing subconscious disgust motivated some abortion opponents, see, e.g., Courtney Megan Cahill, *Abortion and Disgust*, 48 *HARV. C.R.-C.L. L. REV.* 409 (2013). For an explanation of the relationship between opposition to abortion and endorsement of a traditionalist vision of gender roles, see, e.g., KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 117–18, 199–201, 205 (1984). For an argument that some abortion opponents acted out of a sense of religious obligation, see, e.g., MICHAEL W. CUNEO, *THE SMOKE OF SATAN: CONSERVATIVE AND TRADITIONALIST DISSENT IN CONTEMPORARY AMERICAN CATHOLICISM* 64–66 (1999); Michael W. Cuneo, *Life Battles: The Rise of Catholic Militancy within the American Pro-Life Movement*, in *BEING RIGHT: CONSERVATIVE CATHOLICS IN AMERICA* 270–75, 284 (Mary Jo Weaver & R. Scott Appleby eds., 1995).

67. For examples of the use of constitutional arguments in the mid-1960s, see, e.g., William J. Kenealy, *Law and Morals*, 9 *CATH. LAW.* 200, 201–03 (1963); Robert M. Byrn, *Abortion in Perspective*, 5 *DUQ. L. REV.* 125, 134–35 (1966) [hereinafter *Abortion in*

constitutional framing began at a time when supporters of legal abortion described their own cause as one involving public health and population control as well as constitutional rights.<sup>68</sup> Moreover, abortion opponents continued to insist on the existence of a right to life long after it seemed possible to create any constitutional protection for the fetus.<sup>69</sup> The constitutionalism of the anti-abortion movement may reflect quite different subconscious motivations, but movement members' constitutional commitments have been remarkably consistent, persistent, and passionately promoted.

As early as the mid-1960s, non-lawyers in many pro-life groups, like many social movement members, used constitutional rhetoric to express their shared aspirations.<sup>70</sup> Groups chose names that referred to the "right to life" mentioned in the Declaration of Independence, including the Southern California Right to Life League, New York State Right to Life, and the Illinois Right to Life Committee.<sup>71</sup> Constitutional commitments defined the statements of purpose of several major pro-life organizations, including the National Right to Life Committee (NRLC), the largest national pro-life organization; American Citizens Concerned for Life (ACCL), a moderate pro-life group; and Americans United for Life (AUL), the group that would form the nation's leading pro-life public law firm. "Protecting the

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*Perspective*]; Note, *In Defense of the Right to Live: The Constitutionality of Therapeutic Abortion*, 1 GA. L. REV. 693, 697-700 (1967).

68. On the turn of the abortion-rights movement to the courts and to constitutional law in the late 1960s, see, e.g., DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 335-473 (1998).

69. While there appears to be no chance for ratification in the near term, abortion opponents continue to push for an endorsement of a fetal-rights amendment in the Republican Party platform. See, e.g., Sean Sullivan, *Republicans, Democrats spar over abortion language in GOP platform*, WASH. POST, Aug. 26, 2012, available at <http://www.washingtonpost.com/blogs/the-fix/wp/2012/08/26/republicans-democrats-spar-over-abortion-language-in-gop-platform/>.

70. For an articulation of this view of movements' use of constitutional rhetoric, see, e.g., Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All"*, 74 J. AM. HIST. 1013 (1987). This Section later discusses at greater length pro-lifers reliance on constitutional discourse.

71. On the naming of the Right to Life League of Southern California and New York State Right to Life, see, e.g., Fred C. Shapiro, *'Right to Life' has a message for New York State legislators*, N.Y. TIMES, Aug. 20, 1972, at SM10. On the early activity of the Right to Life League of Southern California, see, e.g., Keith Monroe, *How California's Abortion Law Isn't Working*, N.Y. TIMES, Dec. 29, 1968, at SM10. On the founding of the Illinois Right to Life Committee, see, e.g., SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 35 (1991).

right to life of the unborn child,” the NRLC Statement of Purpose asserted, “is a central issue to the National Right to Life Committee.”<sup>72</sup> A strategy memo drafted by ACCL leaders William Hunt and Joseph Lampe argued: “Our fundamental legal documents list life as an unalienable right.”<sup>73</sup> The AUL’s Declaration of Purpose similarly explained:

We believe, in the words of the Declaration of Independence, that “all men are created equal”; and thus that to be true to its heritage, this nation must guarantee to the least and most disadvantaged among us an equal share in the right to life.<sup>74</sup>

The anti-abortion movement emphasized constitutional arguments before the opposition did so. The movement to repeal bans on abortion made progress in state legislatures in the early 1960s, with Colorado, California, Maryland, North Carolina, and Georgia loosening bans on abortion before 1969.<sup>75</sup> In promoting these laws, abortion-rights advocates framed abortion as both an important medical procedure and the solution to an epidemic of botched, back-alley procedures.<sup>76</sup> Supporters of reform laws like the one in Colorado emphasized that abortion “was strictly a health matter.”<sup>77</sup>

In the 1960s, abortion opponents began to argue that these reform laws violated the Constitution. The attorneys who framed these constitutional claims played a vital role in the development of the movement. In the early years of its existence, movement leadership was surprisingly egalitarian, putting professionals and blue-collar activists, and men and women, in positions of equal

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72. Statement of Purpose from National Right to Life Committee (1972) (on file with the Gerald Ford Memorial Library, Univer. of Mich., The American Citizens Concerned for Life Papers, Box 4).

73. Memorandum from William C. Hunt & Joseph A. Lampe on Strategy Considerations for ACCL Involvement in Abortion and Related Issues 1–5 (1974), (on file with the Gerald Ford Memorial Library, Univer. of Mich., The American Citizens Concerned for Life Papers, Box 15).

74. Declaration of Purpose from Americans United for Life, (1971), (on file with the Concordia Seminary, Lutheran Church-Missouri Synod, St. Louis, Missouri, the Executive File).

75. See, e.g., RAYMOND TATALOVICH, *THE POLITICS OF ABORTION IN THE UNITED STATES AND CANADA: A COMPARATIVE STUDY* 38 (1997).

76. See, e.g., Mary Ziegler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 *LAW & HIST. REV.* 281, 282 (2009).

77. GARROW, *supra* note 68, at 324.

authority.<sup>78</sup> Attorneys were among the movement's leadership, but their influence reached beyond the formal role they played in the hierarchy. These lawyers formulated constitutional arguments that were to become the centerpiece of movement commitments, and attorneys helped to develop the legal strategies the movement would pursue both before and after *Roe*.

For example, Thomas L. Shaffer, a professor at Notre Dame, argued that abortion reform deprived the fetus of life without due process of law in violation of the Fourteenth Amendment. "If human life is involved, though, [in abortion]," Shaffer explained, "its destruction is a relatively grave matter. Abortion should at least, in that case, be surrounded with procedural protections as great as those given men convicted of [a] crime . . . ."<sup>79</sup>

While insisting that legal abortion violated the rights of the fetus, abortion opponents generally attributed liberalization bills to public ignorance about the nature of fetal personhood. As Shaffer explained: "the decision . . . to leave the life or death of unborn children in the hands of physicians and pregnant women [has] come . . . with too little consideration of the possibility that [abortion] involves millions of human lives."<sup>80</sup>

In the mid-1960s, anti-abortion activists viewed constitutional arguments as a way of popularizing their views about the fetus. In a 1965 article, Robert Byrn, a professor at Fordham School of Law, summarized a common view of the movement's mission: "The task, then, is to bring the public to a realization of the fact that pre-natal life is innocent human life and, like all such life, is inherently sacred."<sup>81</sup> By the mid-1960s, the Supreme Court had already developed an equal-protection jurisprudence targeting discrimination

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78. For example, New York State Right to Life counted among its leaders a law professor, a construction worker, and a homemaker. See Shapiro, *supra* note 71, at SM10, SM 34. Other state organizations, like Minnesota Citizens Concerned for Life, had a similarly diverse leadership, including supporters of family planning like Frederick Mecklenburg, an obstetrician-gynecologist, and his wife, Marjory, a home economics teacher and mother. See, e.g., *Pennsylvanians Concerned for Life*, "Biographies of Persons Attending Conference of National Importance in Right to Life Work" (n. d., c. 1972), in THE AMERICAN CITIZENS CONCERNED FOR LIFE PAPERS, BOX 4, 1972 NATIONAL RIGHT TO LIFE CONVENTION FILE. See also DONALD CRITCHLOW, INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT 137–38 (1999).

79. Thomas L. Shaffer, *Abortion, the Law, and Human Life*, 3 VAL. U. L. REV. 94, 106 (1967–1968).

80. *Id.* at 95.

81. Byrn, *supra* note 67, at 322.

on the basis of race and national origin.<sup>82</sup> The Court treated laws that classified on these bases as inherently suspect and subject to heightened judicial scrutiny.<sup>83</sup> An equal-protection argument used by anti-abortion activists compared fetuses to other discrete and insular minorities—fetuses were defenseless, subject to discrimination (in the form of abortion), and defined by a trait (age or residence in the womb) over which they had no control.<sup>84</sup>

In the 1960s, however, equal-protection claims worked primarily as a way to showcase the personhood of the fetus. Anti-abortion constitutionalists developed two central and interrelated definitions of personhood, based respectively on law and biology: “The progress of the law in the recognition of the fetus as a human person for all purposes has been strong and clearly and roughly proportional to the growth of knowledge of biology and embryology.”<sup>85</sup>

Legal definitions drew on property, criminal law, and tort precedents, in order to show that the law had already determined the fetus to be a person or was well on its way to doing so.<sup>86</sup> Medical contentions, by contrast, worked to persuade legislators and members of the public that “the unborn child [would] qualify as a person within the purview” of the Fourteenth Amendment.<sup>87</sup> Activists defined personhood partly as a matter of individuality, wholeness, and uniqueness. Science could demonstrate “factually that abortion destroys an individuated and unique human life.”<sup>88</sup> “Medical knowledge,” the argument went, “has progressed to such an extent that we now know that an embryo contains all the

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82. See *Romer v. Evans*, 517 U.S. 620, 628–29 (1996) (observing that “heightened scrutiny” applies to classifications involving sex, race, and ancestry); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004) (reconstructing how social movement conflict shaped modern understandings of discrimination on account of race).

83. See, e.g., *Romer*, 517 U.S. at 628–29.

84. See *Abortion in Perspective*, *supra* note 67, at 134. See also Robert Byrn, *Abortion on Demand: Whose Morality*, 46 NOTRE DAME L. REV. 5, 26–27 (1970–71) [hereinafter *Abortion on Demand*].

85. David Louisell, *The Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 234 (1968–1969).

86. See, e.g., *id.* at 235–44; *Abortion in Perspective*, *supra* note 67, at 129; A. James Quinn & James A. Griffin, *The Rights of the Unborn*, 3 JURIST 577, 578 (1971); Note, *The Unborn Child and the Constitutional Conception of Life*, 56 IOWA L. REV. 994, 997–1003 (1970–1971) [hereinafter *The Unborn Child*].

87. See *The Unborn Child*, *supra* note 86, at 996.

88. Byrn, *supra* note 84, at 16.

fundamental material necessary for the development and growth of every organ, system, and part of the human body.”<sup>89</sup>

Equal protection arguments offered one strategy for dramatizing these understandings of personhood. As one pro-life attorney explained, the Equal Protection Clause “applies only to persons.”<sup>90</sup> Litigating abortion cases would show that “the unborn child is a human being and it is difficult to conceive of a human being who is not a person.”<sup>91</sup>

In the late 1960s, Berkeley Law School Professor David Louisell offered an alternative technique for dramatizing fetal personhood. Like other anti-abortion scholars, Louisell assumed that the Constitution protected a fundamental right to life but did not explain its origin.<sup>92</sup> His focus was on the procedural protections due to a fetus before an abortion was performed. Under the Fourteenth Amendment, persons could not be deprived of life, liberty, or property without due process of law.<sup>93</sup> That abortion ended a life was obvious to Louisell.<sup>94</sup> A procedural due process claim, in turn, allowed pro-life attorneys to argue for fetal personhood. The process due to these persons, Louisell suggested, might involve the appointment of a guardian ad litem: “Appointment of a guardian [ad litem] to represent the fetus would seem feasible and would be the minimum starting point for any attempt at due process . . . .”<sup>95</sup>

By the early 1970s, the movement had developed an argument comparing abortion to the imprisonment or death sentence facing convicted criminals. Before the State could take a life, the argument went, the government had an obligation to appoint a guardian ad litem or provide other adequate procedural protections. Anti-abortion activists’ work mirrored the strategy of progressive social movements using procedural due process to change the understanding of what counted as a right (or a rights-holding individual). As the welfare-rights movement deployed procedural due process to build protection for “new property,” such as welfare

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89. Quinn & Griffin, *supra* note 87, at 577.

90. *Abortion in Perspective*, *supra* note 67, at 134.

91. *Id.*

92. *See* Louisell, *supra* note 85, at 248.

93. U.S. CONST. amend. XIV.

94. *See* Louisell, *supra* note 85, at 246.

95. *Id.* at 251.

benefits, the anti-abortion movement used procedural due process in an effort to change the constitutional status of the fetus.<sup>96</sup>

The procedural due-process strategy immediately attracted the interest of the NRLC. In a 1970 legal report, NRLC attorney Martin McKernan explained:

All in all, the law has consistently established certain procedural safeguards and fundamental rights to which the unborn was entitled. The most fundamental of rights—not to be deprived of life without due process—cannot be ignored. However, these arguments must be demonstrated to any court [. . .] through the intervention of interested state right-to-life groups. In one federal court challenge to a state abortion statute a doctor was allowed to enter the case as an intervenor on behalf of all unborn children in that state. This enabled attorneys to offer testimony [. . .] and call witnesses.<sup>97</sup>

McKernan suggested that a guardian ad litem could literally and figuratively represent the fetus, bringing forth evidence of fetal uniqueness, pain, and humanity.<sup>98</sup> The guardian could make both due-process and equal-protection arguments while demonstrating that the fetus was as human as anyone sitting in the courtroom.

As McKernan's argument suggested, many leading abortion opponents assumed that the Constitution already protected fetal rights, and movement leaders prioritized constitutional strategies based on this assumption. While some abortion opponents, like future Attorney General and Senator John Ashcroft, called for the introduction of a constitutional amendment protecting fetal life as early as 1972,<sup>99</sup> most movement members followed McKernan in insisting that the Constitution already protected fetal rights.

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96. See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). For cases considering innovative definitions of property in a procedural due process setting, see, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9–12 (1978) (gas and electric services); *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975) (public school attendance); *Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972) (government employment); *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (welfare benefits).

97. Martin McKernan, Legal Report: Court Cases (July 1972) (The NRLC Papers, Box 4, Gerald Ford Memorial Library, Univer. of Mich.).

98. See *id.*

99. See 144 CONG. REC. S5694-06 (1998). Indeed, the National Committee for a Human Life Amendment, Inc., an organization dedicated to the passage of the human life amendment, did not form until after *Roe*. See Robert Lynch, *The National Committee for a Human Life Amendment: Its Goals and Origins*, 20 CATH. LAW. 303, 304–06 (1974).



Before *Roe*, Byrn and New York State Right to Life tested out the strategy that Louisell and McKernan proposed. Those attracted to this strategy proved to be diverse, including blue-collar workers and homemakers as well as attorneys.<sup>100</sup> Members tended to be white residents of rural or suburban neighborhoods, most of whom were over thirty years old.<sup>101</sup> The *New York Times* described these activists as “average, middle-class ladies and gentlemen.”<sup>102</sup> As was the case with many anti-abortion organizations before *Roe*, New York State Right to Life counted lawyers and doctors among its members<sup>103</sup> but took some time to develop a sophisticated political or legal strategy.<sup>104</sup> In the first several years of its existence, the organization functioned primarily as a “letter-writing operation,” seeking to educate legislators and voters about what activists saw as the personhood of the fetus.<sup>105</sup> Over time, activists realized that they would have to promote their views in the legislature and the courts more actively. As part of this effort, these activists framed their goals in more explicitly constitutional terms, taking their organization’s name from the right to life mentioned in “the Declaration of Independence and . . . the United States Declaration of Human Rights . . . .”<sup>106</sup>

After New York had repealed all restrictions on abortion access, New York State Right to Life also pursued litigation to advance its view of fetal rights. Byrn petitioned to be named guardian ad litem for all of the unborn children scheduled to be aborted in city hospitals.<sup>107</sup> The case he brought, *Byrn v. New York City Health and Hospitals Corporation*, allowed his attorneys to speak for these fetuses, insisting that “hundreds of [their] clients [would] be

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100. See, e.g., Shapiro, *supra* note 71, at SM10, SM34.

101. See, e.g., *id.* at SM10.

102. *Id.* On the role of professionals in early anti-abortion organizations, see, e.g., LUKER, *supra* note 66, at 68–72, 145–46 (1984). By contrast, Ziad Munson’s recent work stresses the importance of relational ties in the mobilization of anti-abortion activists. See ZIAD MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS 52–53 (2010).

103. See, e.g., Shapiro, *supra* note 71, at SM10, SM34.

104. See, e.g., *id.*

105. *Id.*

106. *Id.*

107. See Robert Tomasson, *A Lawyer Challenges the Abortion Law*, N.Y. TIMES, Dec. 4, 1971, at 29.

murdered” unless the court intervened.<sup>108</sup> As guardian ad litem, Byrn argued that the scheduled abortions violated fetal rights to equal protection and due process of the law under the Fourteenth Amendment.<sup>109</sup> In January 1972, the trial court granted Byrn’s petition and issued an injunction preventing abortions in city hospitals.<sup>110</sup> The move seemed to signal that biological assertions of personhood were working. The court reasoned:

Credence must, therefore, be given to testimony given in affidavit form by plaintiff from accredited scientists that an unborn human infant has a pulsating human heart; that at that stage of development the child’s brain, spinal cord and nervous system has been established and that, as medical fact, the fetus is a living human being.<sup>111</sup>

However, the opinions of both the Appellate Division and the New York Court of Appeals called into question the wisdom of the existing, science-based strategy. In both instances, the courts assumed that biological evidence demonstrated the personhood of the fetus:

It is not effectively contradicted, if it was contradicted at all, that modern biological disciplines accept that upon conception a fetus has an independent genetic “package” with the potential to become a full-fledged human being and that it has an autonomy of development and character.<sup>112</sup>

However, biological evidence did not determine legal personhood, for personhood was “a policy question which in most instances devolves upon the Legislature.”<sup>113</sup>

The outcome of *Byrn* reflected a strategy devised by abortion-rights activists like Larry Lader and Garrett Hardin: the influence of contentions that the question of personhood depended on inherently subjective, often religious beliefs. As part of this strategy, in a 1968

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108. *Order Is Sought in Abortion Suit*, N.Y. TIMES, Dec. 10, 1971, at 32.

109. *See id.*

110. Murray Schumach, *Judge Acts to Stay Abortions in Municipal Hospitals*, N.Y. TIMES, Jan. 6, 1972, at A1.

111. *Id.*

112. *Byrn v. N.Y. City Health & Hosp. Corp.*, 286 N.E.2d 887, 888 (N.Y. 1972). *See also* *Byrn v. N.Y. City Health & Hosp. Corp.*, 38 A.D.2d 316, 324 (N.Y. App. Div. 1972) (assessing uncontested medical affidavits concerning fetal personhood).

113. *Byrn*, 286 N.E.2d at 889. *See also* *Byrn*, 38 A.D.2d at 326–31.

article published in the *Journal of Marriage and Family*, Hardin argued that medicine or science did not establish the meaning of fetal personhood.<sup>114</sup> Personhood, Hardin argued, was “a matter of definition, not fact; and we can define [it] any way we wish.”<sup>115</sup> Following a major television debate on abortion, Lader similarly advised pro-choice activists:

Have all your facts and material prepared on the issue of potential life versus a human person . . . Put your opponents on the defensive—their view of the human person represents a minority, religious view. It has no medical credence. They don’t have the right to force the majority to think as they do.<sup>116</sup>

The *Byrn* litigation suggested that the liberalization of abortion laws in the legislatures and courts depended on more than public ignorance about what the fetus was. Courts that assumed the truth of the anti-abortion movement’s biological assertions nonetheless concluded that fetuses had no constitutional rights. Consider, for example, the outcome of litigation in *Doe v. Scott*, a case concerning the constitutionality of an Illinois abortion ban.<sup>117</sup> Anti-abortion activists in Illinois, including Chicago attorney Dennis Horan and physician Brent Heffernan, used *Doe* as an opportunity to put on display their own arguments for personhood. Horan explained to the press that law in the state “recognizes that the unborn child has constitutional rights the same as any other individual.”<sup>118</sup> He viewed court decisions to appoint a guardian ad litem as the first step in the achievement of “complete protection of the child from the beginning of its life.”<sup>119</sup>

In spite of Horan and Heffernan’s best efforts, the Illinois District Court questioned whether the State’s interest truly involved fetal life at all since the government had ignored any concern about the quality of life and forced “the birth of every fetus, no matter how defective or how intensely unwanted by its parents.”<sup>120</sup> Even if the

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114. Garret Hardin, *Abortion—or Compulsory Pregnancy?*, 30 J. MARRIAGE & FAM. 246 (1968).

115. *Id.* at 250.

116. Strategy Memorandum, Larry Lader to NARAL Board Members et al. (Fall 1972) (The NARAL Papers, MC 313, Carton 8, Schlesinger Library, Harvard Univer.).

117. *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971).

118. *Abortion Foes Begin To Fight*, CHI. DEF., Feb. 13, 1971, at 21.

119. *Id.*

120. *Doe*, 321 F. Supp. at 1391.

fetus did have any constitutional interest, the court concluded, the “countervailing rights of pregnant women” trumped those interests.<sup>121</sup> In other instances, the courts rejected biological personhood claims altogether. *Abele v. Markle*, a Connecticut opinion, suggested that the biological evidence was at best unclear. Instead, personhood was a matter of religious belief: an effort to “impose [. . .] uniformity of thought” upon the woman and the abortion provider.<sup>122</sup>

The setbacks of the late 1960s and early 1970s made clear that the movement would have to do more to demonstrate the existence of a right to life. These initial failures would later push anti-abortion activists toward a sometimes costly originalist strategy. In the short term, however, movement members sought to identify a more effective way of arguing for a right to life—one based on the Due Process Clause of the Fourteenth Amendment. Anti-abortion law review articles began contending that “[a]lthough the Constitution contains no express reference to the right to life,” the Declaration of Independence, the Fourteenth Amendment, and international law protected that right.<sup>123</sup> Byrn summarized one argument of this kind:

The Declaration of Independence holds as self-evident the moral truths “that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” The fourteenth amendment institutionalized these principles [. . .] in the Constitution.<sup>124</sup>

By the 1970s, when Byrn was writing, scholars like Robert Bork and Raoul Berger had already begun to develop an interpretive theory that later came to be known as originalism.<sup>125</sup> Since these theorists privileged adherence to the intentions of the Framers of the Constitution, Bork and Berger urged judges to look only to the text and history of the Constitution itself.<sup>126</sup> Scholars like Rehnquist and Bork expressed particular skepticism about the Supreme Court’s

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121. *Id.*

122. 351 F. Supp. 224, 231 (D. Conn. 1972).

123. *The Unborn Child*, *supra* note 86, at 1004; *see also Abortion in Perspective*, *supra* note 67, at 128; *In Defense of the Right to Live*, *supra* note 67, at 697; Quinn & Griffin, *supra* note 86, at 579.

124. *Abortion on Demand*, *supra* note 84, at 19.

125. *See, e.g.*, Strang, *supra* note 59, at 2003–05; Whittington, *supra* note 14, at 601–03.

126. *See, e.g.*, Strang, *supra* note 59, at 2003–05; Whittington, *supra* note 14, at 601–03.

recent Fourteenth Amendment jurisprudence.<sup>127</sup> In opinions like *Griswold v. Connecticut*, the Court had recognized the existence of a fundamental right to privacy that was at most implicit in the constitutional text.<sup>128</sup> For anyone guided by a jurisprudence of “original intent,” these opinions appeared result-oriented, unprincipled, and incoherent.

For their part, Byrn and anti-abortion attorneys strongly believed that the Constitution protected fundamental, Fourteenth Amendment rights that did not appear in the text of the Constitution, and they often insisted that courts use unconventional legal sources in identifying the existence of such rights. The National Conference of Catholic Bishops relied on not only the Declaration of Independence, but also on natural law, as a source of the right to life: “The basic human rights guaranteed by our American laws are, therefore, unalienable because their source is not man-made legislation but the Creator of all mankind.”<sup>129</sup>

For the most part, however, abortion opponents developed a secular theory of constitutional rights that drew on reasoning similar to the *Griswold* Court’s. According to this theory, courts should endeavor to identify fundamental rights not spelled out in the text of the Constitution. Representing the AUL, Dennis Horan and his colleagues argued in 1976:

John Locke, whose influence on the thinking of the founders of this nation is well known, wrote in his Second Treatise of Civil Government of the natural rights to life and property. These basic ideas found their way into the Declaration of Independence of July 4, 1776 . . . . In speaking of the first official action of this nation, which declared the foundation of our government in those words, the United States Supreme Court has said that ‘. . . it is always safe to read the letter of the [C]onstitution in the spirit of the Declaration of Independence.’ . . . [T]he importance of the right to life in modern political and social theory has remained nearly unscathed as is evidenced not only by the Fourth Article of The Universal Declaration of Human Rights . . . but also by the Second Article of the European Human Rights Convention, and the movement to abolish capital punishment.<sup>130</sup>

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127. See, e.g., BERGER, *supra* note 60, at 409–10; Bork, *supra* note 60, at 13–14.

128. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

129. *Statements of National Conference of Catholic Bishops*, 19 CATH. LAW. 29, 30 (1973).

130. Motion and Brief for Dr. Eugene Diamond and Americans United for Life, Inc. as Amici Curiae Supporting Respondent at 35–36, *Planned Parenthood of Central Mo. v.*

The reliance on unconventional legal sources—particularly the Declaration of Independence and international law—distinguished anti-abortion constitutionalism from an emerging jurisprudence of original intent. Abortion opponents also endorsed a different vision of the judicial role, at times explicitly approving of the interpretive method used in substantive due process decisions like *Griswold*. As late as 1976, an amicus brief submitted by the United States Catholic Conference set forth this view:

The granting of legal personhood . . . is, we submit, properly the product of a constitutional analysis [sic] which recognizes the existence of rights which must be said to be implicit in other, more explicitly protected rights [sic] . . . . The process used to reach the penumbral rights enunciated in *Griswold v. Connecticut* is the self-same recognition of necessary implication. . . . It is ironic that the majority in *Roe* not only failed to use the penumbral process with respect to fetal life, but also misapplied it with respect to the pregnant woman.<sup>131</sup>

Anti-abortion use of *Griswold* and other substantive-due process reasoning seems surprising in light of contemporary criticisms by abortion opponents and conservatives of judicial overreaching. In the early 1970s, however, abortion opponents wanted to build on existing substantive due process jurisprudence in order to establish the existence of a fundamental right to life rooted in the Fourteenth Amendment. Indeed, before *Roe*, it was supporters of abortion rights who benefitted from concerns about judicial overreaching. In *Byrn*, for example, deference to the will of popular majorities convinced the courts to reject a claim of constitutional fetal rights: “[T]his court is not required to weigh and choose between the competing values urged by those who support the [abortion repeal] law and those who oppose it. The Legislature has made that determination . . . .”<sup>132</sup>

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Danforth, 428 U.S. 52 (1976) (Nos. 74-1151, 74-1419), 1976 WL 178721 (citations omitted).

131. Brief for United States Catholic Conference as Amicus Curiae Supporting Respondent at 16–17, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (Nos. 74-1151, 74-1419); cf. Robert Byrn, *Which Way for Judicial Imperialism*, 4 HUM. LIFE REV. 19 (1977) (arguing for neutrality on the question of judicial restraint or judicial activism); Harold O. J. Brown, *What Makes the Law the Law*, 4 HUM. LIFE REV. 68, 68–73 (Fall 1978) (endorsing a natural law interpretation of the Constitution).

132. *Byrn v. N.Y. City Health & Hosps. Corp.*, 38 A.D.2d 316, 331 (1972).

*B. Roe v. Wade, Constitutional Amendments, and the Quest for Perfection*

At least at first, *Roe v. Wade* reinforced movement members' interest in an implied-rights theory of constitutional interpretation. Initially, as we shall see, anti-abortion activists rallied around a proposed fetal-life amendment to the Constitution—a campaign to forever entrench the movement's beliefs in the Constitution. During this struggle, abortion opponents continued to elaborate on the constitutional theory that they developed before *Roe*. This theory stood in tension with interpretive theories centered on the idea of original intent. In particular, abortion opponents expressly rejected any amendment that would return the abortion question to democratic politics—the result in *Roe* that first-generation originalist jurists would later endorse.<sup>133</sup>

The campaign for a perfect constitutional amendment began with the startling defeat the movement suffered in *Roe*.<sup>134</sup> *Roe* and its companion case, *Doe v. Bolton*,<sup>135</sup> struck down the abortion laws applicable in forty-six states.<sup>136</sup> As importantly, *Roe* rejected anti-abortion arguments about fetal personhood. The Court made clear that it would “not resolve the difficult question of when life begins.”<sup>137</sup> Read against the backdrop of movement conflict in the period, however, *Roe* did take sides on this question, adopting the view that fetal personhood was a matter of individual belief.<sup>138</sup> In support of this conclusion, the Court stressed that “those trained in the respective disciplines of medicine, philosophy, and theology [were] unable to arrive at any consensus . . . .”<sup>139</sup>

The Court went further, questioning the value of medical evidence suggesting that life began at conception. “Substantial problems [with] this view are posed,” *Roe* explained, “by new embryological data that purport to indicate that conception is a ‘process’ . . . rather than an event, and by new medical techniques

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133. On the belief that originalists would overrule *Roe*, see, e.g., Joan Williams, *Abortion, Incommensurability, and Jurisprudence*, 63 TUL. L. REV. 1651, 1660 (1989).

134. *Roe v. Wade*, 410 U.S. 113 (1973).

135. *Doe v. Bolton*, 410 U.S. 179 (1973).

136. See Richard Pildes, *Is The Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 150–51.

137. *Roe*, 410 U.S. at 159.

138. See *id.*

139. *Id.*

such as menstrual extraction [and] the morning after pill . . . .”<sup>140</sup> The opinion treated personhood as a question of individual belief while insisting that medical evidence factually undermined a conclusion that life began at conception.

*Roe* made clear that biological evidence of fetal personhood would not establish the constitutional protection movement members desired. The Court had questioned the validity of the biological evidence on which abortion opponents so often relied. More importantly, *Roe* treated biological assertions as irrelevant, since personhood was truly a matter of individual conscience and subjective belief.

However, *Roe* did not convince abortion opponents to abandon their ambitious constitutional agenda. Far from setting aside arguments for a right to life, abortion opponents prioritized a constitutional amendment that would perfectly capture their beliefs, restoring what abortion opponents viewed as a longstanding constitutional tradition of protecting fetal life.<sup>141</sup> The push for an anti-abortion amendment began in February 1973, when many of the nation’s leading activists gathered to discuss post-*Roe* strategy.<sup>142</sup> Those present focused on the creation of a constitutional amendment that would reflect the movement’s foundational commitments, passing a resolution that stated: “State Right to Life groups and people pro-life everywhere unanimously support an effort to bring about an amendment to the United States Constitution that would guarantee the right to life for all humans.”<sup>143</sup>

In Congress, two fetal-life amendments were in circulation. The Buckley Amendment, proposed by Senator James Buckley (Conservative-NY), provided that: “With respect to the right to life, the word ‘person’ . . . applies to all human beings, including their unborn offspring at every stage of . . . development . . . .”<sup>144</sup> An alternative proposed by Representative Larry Hogan (R-MD) stated:

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140. *Id.* at 161.

141. *See, e.g.*, Cassidy, *supra* note 63, at 144.

142. *See* Meeting Minutes, NRLC Ad Hoc Strategy Meeting (Feb. 11, 1973) (The American Citizens Concerned for Life Papers, Box 4, Gerald Ford Memorial Library, University of Michigan).

143. *Id.* at 7.

144. Nat’l Comm. for a Human Life Amend., Human Life Amendment: Major Texts 1, available at <http://www.nchla.org/datasource/idocuments/HLAmajortexts.pdf> (last visited Feb. 14, 2013).



“Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law . . . .”<sup>145</sup>

Leading anti-abortion academics worried that neither proposal would fully protect fetal rights. For example, abortion opponent Joseph Witherspoon, a professor at the University of Texas, concluded that the Hogan Amendment’s vague reference to “the moment of conception” would open the door to Supreme Court interpretations permitting abortion in the first month of pregnancy.<sup>146</sup> For Witherspoon, the Buckley Amendment appeared clearer insofar as it protected fetuses “at any stage of biological development,” regardless of what the Justices believed “conception” to mean.<sup>147</sup> As importantly, the Buckley Amendment more clearly asserted that the Fourteenth Amendment had already protected fetal rights before *Roe* came down.<sup>148</sup> By contrast, Dennis Horan, a professor at the University of Chicago and leading anti-abortion litigator, argued that the Buckley Amendment did not include strong enough “actuating language,” “merely re-defin[ing] the word ‘person’” and leaving too much about the Amendment’s application open to reinterpretation.<sup>149</sup> On the other hand, Horan thought that judges could read the Hogan Amendment to allow for certain legal abortions—a problem many activists hoped to avoid.<sup>150</sup>

Generally, movement members found neither proposal fully satisfactory. As attorney Nellie Gray explained in attacking the existing proposals: “Now is not the time, if ever there is a time, for compromise.”<sup>151</sup> Movement members demanded an amendment that perfectly reflected their legal convictions. In framing an ideal

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145. *Id.* at 3.

146. *See, e.g.*, Memorandum, Joseph Witherspoon to the Nat’l Right to Life Comm. Exec. Comm. 2–3 (Aug. 14, 1973) (The American Citizens Concerned for Life Papers, Box 4, Gerald Ford Memorial Library, University of Michigan).

147. *Id.*

148. *See id.*

149. Memorandum, Dennis Horan to Nat’l Right to Life Comm. Policy Comm. 2–3 (Sep. 5, 1973) (The American Citizens Concerned for Life Papers, Box 4, Gerald Ford Memorial Library, University of Michigan) (finding that “more technical problems with the Buckley Amendment than with the Hogan Amendment would be incurred”).

150. *Id.*

151. Nellie Gray to NRLC Legal Advisory Committee (Sep. 24, 1973) (The American Citizens Concerned for Life Papers, Box 4, Gerald Ford Memorial Library, University of Michigan).

amendment, the NRLC polled a variety of anti-abortion attorneys and law professors.<sup>152</sup> The ensuing dialogue made clear that unorthodox and complicated views defined anti-abortion constitutionalism. Many of the attorneys polled demanded that a fetal-life amendment ban private as well as state action—something that neither congressional proposal did.<sup>153</sup> In constitutional law, the state-action doctrine provides that only government actors' violations of the Bill of Rights or the Fourteenth Amendment are actionable. The state-action doctrine had its fair share of critics, but its persistence stemmed from approval of limited state power to interfere with private beliefs or behaviors.<sup>154</sup> Abortion opponents endorsed a much broader view of state power. "We felt that we had to go to the same parameters as the U.S. Supreme Court did," Horan explained on behalf of the group of attorneys. "[S]ince they allowed private destruction of the unborn the amendment should explicitly prohibit private destruction of the unborn."<sup>155</sup> In contemporary politics, conservatives often favor use of the state action doctrine as a way of limiting government interference with private action.<sup>156</sup> In the 1970s, however, abortion opponents adopted a view of state action doctrine that more closely resembled the arguments made by liberal constitutional theorists today.<sup>157</sup>

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152. Dennis Horan to NRLC Board of Directors 1 (Jan. 19, 1974) (The American Citizens Concerned for Life Papers, Box 8, Gerald Ford Memorial Library, University of Michigan).

153. See *id.* at 2.

154. See, e.g., Lilian BeVier and John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010) (summarizing criticisms of the doctrine and offering a defense of its merits).

155. Horan to NRLC Board of Directors, *supra* note 152, at 2.

156. See, e.g., Terri Peretti, *Constructing the State Action Doctrine*, 35 LAW & SOC. INQUIRY 273 (2010) (analyzing the common view that proponents of a restrictive state action doctrine tend to be ideological conservatives); James Potter, Comment, *The NCAA as State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA. L. REV. 1269, 1295 (2007) (suggesting that "if conservative ideology does dominate the Court," then the justices will more likely adopt "a more restrictive state action doctrine"); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1383–84 (2006) (describing the conservative view of state action doctrine as a "barrier to governmental control of private parties").

157. For progressive arguments for a broad understanding of state action, see, e.g., LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 68–69 (1996); Liliya Abramchayev, *A Social Contract Argument for the State's Duty to Protect from Private Violence*, 18 ST. JOHN'S J. C.R. & ECON. DEV. 849, 863 (2004) ("State action is pervasive and its traces can be found in the background of any situation"); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO.

The group of attorneys wished not only to ban virtually all abortions, but also to clearly establish the existence of a right to life—something that existing proposals supposedly failed to do. In a March 1974 press release, the NRLC explained: “The proposed amendment is designed principally to deal with the constitutional guarantee of the civil right of unborn children which was destroyed by the decisions of the Supreme Court of the United States.”<sup>158</sup>

Activists prioritized the advancement of a fundamental, Fourteenth Amendment right to life and generally opposed alternative proposals designed primarily to curb judicial overreaching. Indeed, when Congress considered various amendments that would overturn *Roe* and return the abortion issue to democratic politics, leading activists like Byrn came out in opposition.<sup>159</sup> Because these proposals would not ban abortion in every state, they seemed more likely to succeed than did more absolutist personhood amendments, which some observers believed would also criminalize certain forms of contraception.<sup>160</sup>

Nonetheless, Byrn and the larger anti-abortion movement opposed a states’ rights amendment. He argued that such a proposal contradicted anti-abortion constitutional commitments. He explained: “A States Rights Amendment, in effect, recognizes that an unborn child is a human being, but denies that the child has a fundamental right to live.”<sup>161</sup> Offering similar objections, attorneys polled by the NRLC uniformly rejected a states-rights proposal.<sup>162</sup> The goal, it seemed, was the establishment of a fundamental right, not merely the overruling of *Roe*.

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L.J. 779, 789 (2004) (“There is no region of social life that even conceptually can be marked off as ‘private’ and free from governmental regulation.”); Cass Sunstein, *State Action Is Always Present*, 3 CHI. J. INT’L L. 465 (2002).

158. Press Release, NRLC, (Mar. 14, 1974) (on file with The American Citizens Concerned for Life Papers, Gerald Ford Memorial Library, University of Michigan).

159. See Nat’l Comm. for a Human Life Amend., *supra* note 144.

160. See, e.g., LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 163–66 (1992) (discussing the advantages of one such states-rights approach considered in 1980).

161. Robert Byrn, *A Human Life Amendment: What Would It Mean?* HUM. LIFE REV. 50, 51–52 (1975) (arguing that a majority of anti-abortion activists opposed a states-rights amendment). Some abortion opponents did endorse a states-rights amendment. See, e.g., *Abortion I: Hearing on S. 119 and S. 130 Before the Subcomm. on Const’l Amendments of the S. Judiciary Comm.*, 93d Cong. 354 (1974) (statement of Paul Ramsey); *Abortion Part I: Hearing on S. 119 and S. 130 Before the Subcomm. on Const’l Amends. of the S. Judiciary Comm.*, 93d Cong. 164–66 (1974) (statement of David Louisell).

162. Horan to NRLC Board of Directors, *supra* note 152.

On the surface, the amendment strategy seemed to acknowledge that the Constitution did not already protect a right to life. For movement members, however, the amendment represented a chance to legitimate claims that the Constitution—and the Fourteenth Amendment in particular—had always recognized that right. As anti-abortion activists explained, they wished not to create, but rather to “restore to unborn children of human parents the constitutional status and protection of persons with respect to their right to life.”<sup>163</sup> According to anti-abortion attorneys, the right to life emerged most clearly “during the nineteenth century, with the increased sensitivity to individual human values which is illustrated by the Fourteenth Amendment to the Constitution.”<sup>164</sup> March for Life, a new organization founded in 1974 by Nellie Gray, spread a similar message. “I believe in the right to privacy and certainly the right of each human being—male and female—to control one’s own body,” a March for Life brochure explained.<sup>165</sup> But “when man and woman have participated in the creation of another human being . . . their control over their bodies and demand for conveniences must be subordinated at least to the right to life of their child.”<sup>166</sup>

Between 1974 and 1979, anti-abortion constitutionalists continued to develop a complicated constitutional agenda. Activists argued that the right to life derived from the Declaration of Independence. The values shaping that document became part of the fabric of the Fourteenth Amendment and of international human rights law. Ideally, this right to life would be protected—whether by the courts or by a constitutional amendment—from the democratic process.

This constitutional vision had tremendous power for its proponents. Even as the prospects for ratification of a human life amendment dimmed, anti-abortion constitutionalists continued to prioritize it. Gradually, however, other movement members made progress in narrowing the Court’s interpretation of *Roe*. The movement’s litigation successes brought to the surface questions about the movement’s legal priorities. Did abortion opponents wish

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163. Press Release, NRLC, *supra* note 158, at 2.

164. *Id.*

165. Press Release, The National March for Life Committee (Jan. 22, 1974) (on file with The American Citizens Concern for Life Papers at the Gerald Ford Memorial Library at the University of Michigan).

166. *Id.*

primarily to defend a cherished set of constitutional values, or did they wish to make an immediate impact on the number of abortions performed? The process of answering this question was long and difficult, ultimately bringing abortion opponents into the originalist coalition.

### C. *Redefining Roe*, 1976–1981

For anti-abortion constitutionalists, prospects in the Supreme Court seemed bleak in the mid-1970s. Nonetheless, Horan and the AUL continued to participate in *amicus* advocacy. The AUL's influence was evident in a series of cases on state-level bans on the public funding of abortion: *Maher v. Roe*, *Poelker v. Doe*, and *Beal v. Doe*.<sup>167</sup> These laws had fared badly in the lower courts. In *Maher*, the district court had struck down a public-funding ban.<sup>168</sup> Under the Equal Protection Clause, the court held, the State could not choose to fund childbirth but not abortion, since abortion itself was a fundamental right.<sup>169</sup>

AUL attorneys responded that the abortion right in *Roe* simply did not apply in funding cases.<sup>170</sup> *Roe* protected only a freedom from state interference. By contrast, in a brief submitted in *Poelker*, a case on the constitutionality of a policy prohibiting all abortions in city hospitals, the AUL contended that “the abortifacient act [. . .] enjoys no constitutional protection in itself.”<sup>171</sup> By extension, the AUL brief asserted, physicians in public facilities could, under *Roe*, constitutionally refuse to perform abortion. As the brief framed it, *Roe* recognized a right belonging to a “woman in consultation with her physician, not demanding of her physician.”<sup>172</sup>

A second and ultimately more successful argument explored the idea that abortion rights protected only a woman's privacy. The definition of abortion as a privacy right did not necessarily foreclose a constitutional demand for government support, as many district

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167. *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

168. *Roe v. Norton*, 408 F. Supp. 660, 663–64 (D. Conn. 1975).

169. *See id.*

170. *See* Brief for Americans United for Life as Amicus Curiae Supporting Petitioner, *Poelker v. Doe*, 432 U.S. 519 (1977) (No. 75-442).

171. *Id.* at 15.

172. *Id.*

courts in the mid-1970s had concluded.<sup>173</sup> Nonetheless, the AUL managed to frame privacy rights as incompatible with any requirement of government support or participation. As the AUL LDEF brief explained: “If the abortion decision is so private [. . .] it follows that government shall not itself be compelled to respond to the demand of the exercise of that right.”<sup>174</sup> Under *Roe*, the state could not interfere with a woman’s decision making but had no obligation to fund abortion.<sup>175</sup>

The *Maheer* Court adopted reasoning that reflected the claims made by abortion opponents and attorneys representing the states defending the laws. The Court explained that *Roe* “did not declare an unqualified constitutional right to an abortion.”<sup>176</sup> Instead, *Roe* merely protected “the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.”<sup>177</sup> For this reason, the State was free to “make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.”<sup>178</sup>

In 1980, in *Harris v. McRae*, the Court upheld the Hyde Amendment, a federal ban on the Medicaid funding of abortion.<sup>179</sup> Horan and his colleagues believed that *Harris* marked an important change in the abortion debate:

Under *Harris*, the Constitution would not be violated even if, so long as the woman’s choice of abortion is not directly interdicted, she is effectively surrounded . . . by public pressure and inducements to abandon her decision to abort. This situation is far from the socially respectable status that would make abortion on demand sociologically, psychologically, and politically secure.<sup>180</sup>

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173. See, e.g., *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1975) (same) (holding that a funding ban violated the Equal Protection Clause since the State could not choose to fund childbirth while denying funding for the fundamental abortion right); *Doe v. Beal*, 523 F.2d 611 (3d Cir. 1975) (same); *Roe v. Ferguson*, 515 F.2d 279 (6th Cir. 1975) (same); *Friendship Med. Ctr., Ltd. v. Chi. Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974) (same); *Doe v. Hale Hosp.*, 500 F.2d 144 (1st Cir. 1974) (same); *Doe v. Rose*, 49 F.2d 1112 (10th Cir. 1974) (same).

174. Brief for Petitioner, *supra* note 170, at 15.

175. See *id.*

176. *Maheer v. Roe*, 432 U.S. 464, 473–74 (1977).

177. *Id.*

178. *Id.* at 474.

179. *Harris v. McRae*, 448 U.S. 297 (1980).

180. Dennis Horan & Thomas Marzen, *The Supreme Court on Abortion Funding: The*

Horan also believed it to be significant that the Court had sanctioned legislatures' interest in protecting fetal life.<sup>181</sup> As activists like Horan saw it, opinions like *Harris* might pave the way for the overruling of *Roe*. Decisions like *Maher* and *Harris* recognized a more expansive and legitimate state interest in fetal life. Significantly, *Maher* and *Harris* also narrowed the scope of the abortion right, giving legislators more latitude in regulating the procedure.

Abortion opponents' success in *Maher* and *Harris* stood in sharp contrast to the fate of fetal-life amendments, none of which had made significant progress.<sup>182</sup> These cases showed that anti-abortion activists could make progress in reinterpreting *Roe* rather than in promoting a fundamental right to life. Just the same, narrowing *Roe* fell short of the constitutional goals the movement had set. At most, the Court appeared willing to uphold restrictions that would reduce access to abortion.<sup>183</sup> The Justices took as a given that the Constitution protected a right to abortion, and nothing in abortion jurisprudence hinted at the existence of a constitutional right to life. Abortion opponents certainly welcomed any opinion that would make it harder to get an abortion, but their priority remained the ratification of an amendment protecting the right to life.<sup>184</sup>

The AUL's experience revealed an underlying tension in the anti-abortion constitutional project. While activists privileged the defense of certain shared constitutional values, members of the anti-abortion movement also demanded concrete evidence of progress. Over the course of the next several decades, anti-abortion constitutionalists had to choose between short-term success and the promotion of their basic constitutional values. Gradually, some activists came to the conclusion that at least in the foreseeable future, the movement could not have both.

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*Second Time Around*, in *NEW PERSPECTIVES ON HUMAN ABORTION* 229 (Thomas W. Hilgers et al. eds., 1981).

181. *See id.*

182. *See, e.g.*, EPSTEIN & KOBYLKA, *supra* note 64, at 210 (on the movement's difficulties in securing a human-life amendment).

183. *See, e.g.*, *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 56 (1976) (describing its holding as a "logical and anticipated corollary to *Roe v. Wade*" and the right it announced); *Maher v. Roe*, 432 U.S. 464, 475 (1977) (explaining that the Court's holding "signals no retreat from *Roe (v. Wade)* or the cases applying it").

184. *See, e.g.*, Cassidy, *supra* note 63, at 139–44 (on the emphasis put on a human life amendment).

### III. ORIGINALISM AND THE POLITICS OF *ROE*, 1980 TO THE PRESENT

The Reagan administration reshaped both anti-abortion constitutionalism and the political practice of originalism. At the time that Reagan's presidential campaign revived interest in a jurisprudence of original intent, it still seemed to clash with anti-abortion constitutional priorities. Nonetheless, Reagan suggested that the judges he selected would overrule *Roe*—not because they believed in the existence of constitutional fetal rights, but rather because they saw *Roe* as bad constitutional law. For abortion opponents in the 1980s, originalism came to seem a realistic compromise solution. If they could not guarantee constitutional recognition of the right to life, the argument went, abortion opponents could reasonably settle for the overruling of *Roe*. Conservative originalism promised to deliver this result.

In the mid-1980s, however, abortion opponents were divided about the importance of judicial nominations and about the value of originalism. Some movement members believed that only direct confrontation could change laws on abortion. After Robert Bork's failed 1987 bid to become a Supreme Court Justice, members of mainstream groups like the NRLC and Americans United for Life invested more in presidential politics and federal nominations. Bork emerged from the hearings as a symbol of the lost opportunity to overrule *Roe*—to abortion opponents, he represented the elusive fifth vote to overrule the 1973 decision. Convinced that Bork had been victimized by left-wing interest groups, abortion opponents concluded that they had not done enough to counter attacks on Reagan's nominee and his originalist arguments. In the coming years, abortion opponents vowed not to repeat this mistake. In the late 1980s and beyond, movement members put new emphasis on federal judicial nominations and on originalist attacks on the *Roe* decision. Whether or not it was a second-best solution, originalism became a powerful tool used to chip away at *Roe*.

#### *A. Framing the Conservative Originalist Coalition, 1981–1987*

In the 1980s, when the term “originalism” came into vogue, think tanks and attorneys associated with groups like the Federalist Society and the Heritage Foundation popularized first-generation



originalist arguments.<sup>185</sup> These theorists provided an intellectual framework for demands made by both abortion opponents and New Right groups intent on changing the laws governing issues from school prayer to sex education.<sup>186</sup> In turn, leading legal thinkers in the Reagan administration, like William French Smith and Edwin Meese III, drew on contentions forged by New Right lawyers.<sup>187</sup>

By 1987, originalism was both an interpretive method and the basis for a constitutional coalition that brought together a variety of right-leaning social movements.<sup>188</sup> Joining this alliance offered tangible benefits for abortion opponents. By uniting with the large and influential New Right and Religious Right movements, abortion opponents could more effectively pressure Congress and the Reagan administration. Moreover, in adopting originalist arguments, the anti-abortion movement could promote its agenda in a way that resonated with the legal mainstream.

What later came to be seen as conservative first-generation originalist scholarship had already developed a good deal by 1980, when the Republican Party platform proposed “the appointment of judges at all levels of the judiciary who respect traditional family values and the value of human life.”<sup>189</sup> The platform became instantly controversial, given Reagan’s apparent indifference to the value of impartiality or to the qualifications of judicial nominees.<sup>190</sup> The Reagan campaign quickly backtracked, explaining that Reagan would nominate qualified nominees who opposed judicial overreaching rather than committed abortion opponents. In early October 1980, Reagan told the press that the platform was not

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185. See, e.g., Amanda Hollis-Bruskey, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516, 523–24 (2011) (“[I]n the early 1980s, conservative movement patrons began forging alliances with the Federalist Society, from whose ranks several young, idealistic lawyers committed to conservative and libertarian principles were drawn into positions of leadership both in conservative [public interest law firms] and in the Reagan Justice Department”); SOUTHWORTH, *supra* note 26, at 23–25, 27–29 (on the coining of the term “originalism”). See, e.g., TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT*, *supra* note 23, at 145.

186. See, e.g., SOUTHWORTH, *supra* note 26, at 27; TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT*, *supra* note 23, at 139.

187. See, e.g., Hollis-Bruskey, *supra* note 185, at 524; SOUTHWORTH, *supra* note 26, at 23–25.

188. See, e.g., Siegel, *supra* note 3, at 215–26 (on originalism as an expression of the coalition politics of the New Right).

189. Stuart Taylor, Jr., *Politics of the Bench*, N.Y. TIMES, Oct. 28, 1980, at A23.

190. See *id.*

referring exclusively to abortion when it mentioned a respect for life.<sup>191</sup> The following month, William French Smith, a long-term Reagan ally and campaign manager, reframed Reagan's interest in anti-abortion judges as a desire to select only those judges who rejected what Smith saw as the judicial activism of the Warren and Burger Courts.<sup>192</sup> Smith explained, "In a nutshell, [Reagan's] political philosophy is the laws of this country should be interpreted by the legislature and construed by the judiciary, and to the extent possible, not made by the judiciary."<sup>193</sup> Given Reagan's prior commitment to anti-abortion judges and his need to address legal critics, abortion opponents could easily have understood Smith's statements as code for opposition to abortion. As importantly, Reagan's new commitment to judicial restraint helped to identify it as a constitutional strategy uniting otherwise diverse conservative social movements.

However, Reagan's first Supreme Court nominee, Sandra Day O'Connor, cast doubt on the connection between Reagan's commitment to a philosophy of strict constructionism and his anti-abortion credentials. 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.<sup>194</sup> O'Connor had also been an acquaintance of Dr. Carolyn Gerster, a recent president of the NRLC, the nation's largest anti-abortion group. After the nomination was announced, Gerster immediately informed the rest of the anti-abortion community that, during her time in the Arizona State Legislature, O'Connor had voted in favor of an abortion liberalization bill.<sup>195</sup>

Abortion opponents were outraged by the nomination. Dr. John Willke, then-president of the NRLC, threatened to attack O'Connor in the press if her nomination were not withdrawn.<sup>196</sup> In the late

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191. *See id.*

192. *See, e.g.,* Fred Barbesh & Mary Thornton, *Smith Outlines Strategy to Curb Court Activism*, WASH. POST, Nov. 30, 1981, at A1.

193. *Id.*

194. *See, e.g.,* CRITCHLOW, *supra* note 15, at 199.

195. *See, e.g.,* JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 95 (2005).

196. Memorandum from Marilee Melvin to Edwin Meese (July 6, 1981) (on file in

1970s, anti-abortion organizations like the NRLC began to partner with newly mobilized evangelical protestants and religious conservatives who formed groups like the Moral Majority and Christian Voice.<sup>197</sup> During the 1980 election, anti-abortion organizations had also worked with strategists like those who had founded the New Right, including veteran political operative Paul Weyrich and direct-mail guru Richard Viguerie.<sup>198</sup> Abortion opponents who were part of a united political front seemed likely to enjoy greater political influence and financial support.<sup>199</sup>

The backlash to O'Connor's nomination brought together abortion opponents and New Right activists who condemned the nominee's supposed support for abortion. However, only a handful of abortion opponents—some of them belonging to Religious Right or New Right organizations—expressed their opposition to O'Connor by referring to concerns about original intent or judicial activism. Gordon Jones of United Families for America, a Religious Right lobbying group that opposed abortion, gay rights and pornography, explained that O'Connor's supposed approval of *Roe v. Wade* proved her judicial philosophy to be irrevocably flawed. 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.”<sup>200</sup> 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.”<sup>201</sup>

In his congressional testimony, Dr. John Willke of the NRLC elaborated further on this argument: “The Supreme Court’s 1973 abortion decision had no authentic basis in the Constitution. Rather, it constituted the most extreme example of ‘judicial activism’ in this century.”<sup>202</sup> In testifying before Congress on O'Connor's nomination, he contended that O'Connor was, by definition, an activist if she regarded “the 1973 abortion decisions as constitutional.”<sup>203</sup>

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Reagan Presidential Library, Simi Valley, California).

197. See, e.g., Ziegler, *supra* note 65, at 587–89.

198. See, e.g., *id.*

199. See *id.*

200. *Confirmation of Sandra Day O'Connor to the Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 97th Cong. 378 (1981) (statement of Gordon Jones).

201. *Id.* at 380.

202. *Id.* at 282 (statement of Dr. John Willke).

203. *Id.*

Before the confirmation hearings began, the Reagan administration paid little attention publicly to the anti-abortion attacks. An anonymous aide told the *New York Times*: “there’s going to be a lot of sound and fury, but in the end, it’s going to end up signifying little or nothing.”<sup>204</sup> Less publicly, however, administration officials argued that more had to be done to convince the movement that originalism would spell the end for *Roe*.

In a memorandum to Edwin Meese III, a key Reagan advisor and future attorney general, an administration official claimed that anti-abortion advocates believed that the courts “had been engaged in a systematic effort to prevent the people from working their will on the subject of abortion.”<sup>205</sup> In fact, movement members had never emphasized such an argument. The White House—not activists—had stressed the subject of judicial overreaching.<sup>206</sup>

The memorandum continued, “Whatever one might 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.”<sup>207</sup> The memorandum proposed a nomination strategy that would cater to anti-abortion advocates without appearing partisan: “It does not follow that an abortion opponent should be nominated. It does follow, I think, that the nominee’s record on the issue be examined with special interest and that the nominee regard *Roe v. Wade* and its progeny as most unwise assertions of judicial power.”<sup>208</sup> 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

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204. Hedrick Smith, *Reagan’s Court Choice: A Deft Maneuver*, N.Y. TIMES, July 9, 1981, at A17.

205. Memorandum from Michael Uhlmann to Edwin Meese (July 6, 1981) (on file with the Reagan Presidential Library, Simi Valley, California).

206. Some arguments against judicial activism circulated within the anti-abortion 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 power.” Resolution by National Right to Life Committee Board of Directors (July 10, 1973) (on file with the Gerald Ford Memorial Library, University of Michigan). 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. Pamphlet by Celebrate Life Comm. and Women for the Unborn (1973) (on file with the Gerald Ford Memorial Library, University of Michigan). However, as this Article shows, concerns about judicial overreaching did not motivate a majority of movement members.

207. Memorandum from Michael Uhlmann to Edwin Meese, *supra* note 205.

208. *Id.*

outline of a strategy was in place: the Reagan administration could mobilize abortion opponents by criticizing the *Roe* Court's activism.

The O'Connor nomination revealed divisions between the legal theorists, who had crafted effective originalist rhetoric, and the abortion opponents, who had not fully identified with it. Over the course of a decade, an originalist constitutional coalition would bridge this gap as abortion opponents and social conservatives came to believe that originalist arguments had important strategic value.

*B. Anti-abortion Legalism Versus Direct Action, 1981–1987*

For many within the anti-abortion movement, however, O'Connor's nomination played one part in the movement's disillusionment with conventional legal strategies. After Reagan's election, abortion opponents believed that they had the votes to pass a statute recognizing the personhood of the fetus.<sup>209</sup> Alternatively, movement members believed they could pass a measure, the Hatch Amendment, that would return the abortion issue to the states.<sup>210</sup>

Debate about the Hatch Amendment confirmed that the movement remained committed to the idea of a fundamental right to life, although activists were divided about Hatch's proposal. Movement pragmatists like John Willke urged his colleagues to endorse the Hatch Amendment for strategic reasons.<sup>211</sup> If the Hatch Amendment were to pass, Willke suggested the movement could later pursue its true constitutional agenda—the protection of a fundamental right to life.<sup>212</sup> More absolutist activists viewed the proposed amendment as a “betrayal of all the [movement's] principles.”<sup>213</sup> The Hatch Amendment controversy demonstrated that the movement still prioritized the recognition of a constitutional

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209. On the campaign for the human life bill, see, e.g., Joan Beck, *The Pro-Life Groups Turn to Congress on Abortion*, CHI. TRIB., Jan. 30, 1981, at B2; *Abortion Foes Offer Bill*, CHI. TRIB., Feb. 11, 1981, at 8; Bernard Weinraub, *Abortion Becoming a Top Priority Issue in Congress*, N.Y. TIMES, Mar. 13, 1981, at A18.

210. See, e.g., TRIBE, *supra* note 160, at 160–66 (discussing the Hatch Amendment).

211. See, e.g., Leslie Bennetts, *Anti-Abortion Forces in Disarray a Year After Victories in Elections*, N.Y. TIMES, Sept. 22, 1981, at B2.

212. See, e.g., *id.*

213. *President's Column: Beware of False Friends*, ALL ABOUT ISSUES, Sept. 1981 (on file in the Wilcox Collection, University of Kansas).

right to life. Even supporters of the Amendment viewed the undoing of *Roe*—the most that conservative originalism could promise—as at best a temporary and partial solution.

By the spring of 1982, the progress of both the Human Life Bill and the Hatch Amendment had stalled, prompting a crisis of faith in the movement. Some angry abortion opponents called for a statute stripping the Supreme Court of jurisdiction in abortion cases.<sup>214</sup> Although Reagan had emphasized abortion and other social questions on the campaign trail, his administration prioritized economic issues, disappointing abortion opponents who had expected major legal changes from an ally in the White House.<sup>215</sup> In 1983, in *City of Akron v. Akron Center for Reproductive Services*, the Supreme Court reaffirmed *Roe* and struck down a model multi-restriction abortion statute that many abortion opponents had championed.<sup>216</sup>

One columnist explained the anti-abortion response to such rulings: “Unable to change the Constitution through the traditional political process, in the legislatures, the anti-abortion forces have either degenerated into terrorism or are patiently waiting for the next appointment to the Supreme Court.”<sup>217</sup> For some abortion opponents, the setbacks of the early 1980s revealed legal strategies to be counterproductive and hollow. Perhaps for this reason, the mid-1980s witnessed a dramatic increase in clinic protests.<sup>218</sup> Organizations such as Joseph Scheidler’s Pro-Life Action League and Randall Terry’s Operation Rescue mounted massive demonstrations outside of clinics, blocking entrances and increasing “sidewalk counseling” and other forms of contact with women approaching the clinics.<sup>219</sup> The same frustrations may underlie an alarming

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214. On proposals to strip the Court of jurisdiction over abortion cases, see, e.g., Fred Barbash et al., *In The Administration*, WASH. POST, Feb. 22, 1982, at A2.

215. See, e.g., Curtis Wilkie, *The Reagan Impact*, BOS. GLOBE, Aug. 21, 1983.

216. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), *overruled by* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

217. Ellen Goodman, *Abortion Politics*, BOS. GLOBE, Jul. 23, 1985, at 11.

218. See, e.g., STAGGENBORG, *supra* note 71, at 130; CAROL J. C. MAXWELL, PRO-LIFE ACTIVISTS IN AMERICA: MEANING, MOTIVATION, AND DIRECT ACTION 86 (2002).

219. On Scheidler, see, e.g., Linda Witt, *Man With a Mission: Joe Scheidler Pulls No Punches in the Campaign Against Abortion*, CHI. TRIB., Aug. 11, 1985, at 10; JAMES RISEN & JUDY THOMAS, THE WRATH OF ANGELS: THE AMERICAN ABORTION WAR 101–32 (1998); CUNEO, *supra* note 66, at 61–66. On Operation Rescue, see, e.g., *id.* at 217–314; Faye Ginsburg, *Rescuing the Nation: Operation Rescue and the Rise of Antiabortion Militancy*, in

increase in violence against abortion providers and clinics. By the mid-1980s, 62 clinics had been firebombed, and 24 attacks occurred in 1984 alone.<sup>220</sup> Clinics reported an additional 200 bomb scares.<sup>221</sup> The *Chicago Tribune* reported the following in 1985: “A growing number of activists on both sides of the abortion controversy predict that civil disorder growing out of the [abortion] issue will dwarf anything the nation endured during the civil rights and antiwar movements of the 1960s.”<sup>222</sup>

Other abortion opponents interpreted the setbacks of the 1980s as reason to work harder to guarantee the nomination of sympathetic (and presumably originalist) judges to the federal bench. In a dissenting opinion in *Akron*, Justice O’Connor criticized *Roe*’s trimester framework and asserted that most of the disputed abortion ordinance should be upheld.<sup>223</sup> O’Connor’s dissent reinforced some abortion opponents’ convictions about the importance of Supreme Court nominations. In a newsletter to AUL constituents, Northwestern Law professor Victor Rosenblum explained: “That means we are but two—maybe one—Justices away from a Court that would reverse *Roe* if given the right chance . . . . The pro-life movement must therefore get prepared immediately with optimal reversal strategies.”<sup>224</sup>

During the 1984 election season, conservative attorneys predicted that in his second term, Reagan could nominate as many as five justices to the Supreme Court.<sup>225</sup> The record of those nominated in his first term, O’Connor and William Rehnquist (a former associate Justice who had been made Chief Justice), suggested that constitutional law would change if Reagan added more like-minded justices.<sup>226</sup>

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ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000, at 227–37 (Rickie Solinger ed., 1998).

220. See Witt, *supra* note 219.

221. See *id.*

222. *Id.*

223. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453–73 (1983) (O’Connor, J., dissenting).

224. Marcia Chambers, *Advocates for the Right to Life*, N.Y. TIMES, Dec. 16, 1984, at SM94.

225. See, e.g., Walter Robinson, *2d Reagan Term Could Shift Course of Supreme Court*, BOS. GLOBE, Sept. 30, 1984.

226. Rehnquist had dissented in *Roe* and joined a dissenting opinion in *Danforth* favoring a narrow interpretation of *Roe*. *Roe v. Wade*, 410 U.S. 113, 171–77 (1973) (Rehnquist, J., dissenting); *Planned Parenthood v. Danforth*, 428 U.S. 52, 92–105 (1976) (Rehnquist, J., dissenting).

Between 1984 and 1986, moreover, an originalist constitutional coalition took shape, making conservative originalism more appealing to abortion opponents. After Reagan won the 1984 election, right-wing think tanks found themselves in a position of unprecedented influence. Some groups, like the Heritage Foundation and the Committee for the Survival of a Free Congress, had been active since the late 1970s.<sup>227</sup> Others had formed more recently, like the Center for Judicial Studies, founded by James R. McClellan, a former staffer for Senator Jesse Helms (R-NC).<sup>228</sup> In the mid-1980s, however, these groups gained influence, particularly after Edwin Meese became attorney general.<sup>229</sup> Meese consciously embraced what had become known as originalism.<sup>230</sup> Long an important ally of groups angry about existing policy on matters from racial discrimination to states' rights, Meese proved to be a brilliant popularizer of originalist rhetoric.<sup>231</sup>

As importantly, Meese popularized originalist arguments, clearly connecting them to political results like the overruling of *Roe*. In a widely reported July 1985 speech, Meese endorsed an "endeavor to resurrect the original meaning of the Constitution."<sup>232</sup> He urged courts to focus on discerning the motives of the Constitution's framers and, if necessary, looking to the history and context of particular constitutional provisions.<sup>233</sup> In the Supreme Court, Meese's Justice Department presented originalism as a solution for the problem identified by anti-abortion constitutionalists. In an amicus brief in *Thornburgh v. American College of Obstetricians and Gynecologists*, Meese's Justice Department emphasized "[t]here is no explicit textual warrant in the Constitution for a right to an

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227. On the Heritage Foundation, see, e.g., CRITCHLOW, *supra* note 15, at 122. On the Committee for the Survival of a Free Congress, see, e.g., *id.* at 129, 163, 201.

228. See, e.g., Anthony Podesta, *Court-Packing, Reagan Style*, N.Y. TIMES, July 26, 1985, at A27.

229. See, e.g., Al Kamen & Howard Kurtz, *Theorists on Right Find Fertile Ground*, WASH. POST, Aug. 9, 1985, at A1; *Ideas Move Nations: How Conservative Think Tanks Have Helped to Transform the Terms of Political Debate*, THE ATLANTIC, Jan. 1, 1986, at 7.

230. See, e.g., Whittington, *supra* note 14, at 599; TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT, *supra* note 23, at 145.

231. On Meese's role as an ally of social conservatives, see, e.g., SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974–2008, at 180 (2009).

232. *Meese's Legal Fundamentalism*, CHI. TRIB., July 15, 1985, at 8.

233. See *id.*



abortion.”<sup>234</sup> *Roe*, the brief contended, ignored the history of the framing of the Fourteenth Amendment and the likely intentions of its Framers.<sup>235</sup> The brief served as a reminder that any judge who prioritized the intentions of the Framers would overrule *Roe*. Meese also shared the commitment of abortion opponents and other grassroots activists to remaking the courts. At a time when Patrick McGuigan of the Free Congress Foundation and John Willke of the NRLC created projects to influence the Reagan Administration’s judicial nominations, Meese told the media that he hoped such nominations would be his greatest legacy as attorney general.<sup>236</sup>

For abortion opponents, conservative originalism emerged as the basis for an attractive constitutional coalition that united legal theorists, Religious Rights champions, free-market advocates, and members of the Reagan Administration. Certainly, some members of this alliance deeply believed in the values of rule of law, judicial humility, neutrality, and deference to democratic majorities expressed by conservative originalists.<sup>237</sup> For other members, however, conservative originalism did not perfectly reflect their constitutional beliefs. In particular, abortion opponents recognized that originalism would at most ensure that *Roe* was overruled. Originalist judges would be unlikely to recognize the existence of an implied right to life. Nonetheless, the concrete benefits of joining the originalist coalition were becoming evident. James McClellan put the point succinctly: “One or two more appointees to the Supreme Court, and one way or another, *Roe v. Wade* will fall.”<sup>238</sup>

Anti-abortion constitutionalists’ interest in judicial nominations again increased in 1986, when the Court decided *Thornburgh*, striking down a multi-restriction Pennsylvania statute. When the *Thornburgh* Court again confirmed the validity of *Roe*, anti-abortion constitutionalists noted that only five Justices joined the majority opinion. Doug Johnson of the NRLC insisted, “We’re just one vote

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234. Brief for the United States as Amicus Curiae Supporting Appellants, *Thornburgh v. Am. Coll. Of Obst. & Gynec.*, 476 U.S. 747 (1986) (No. 84-495), 1985 WL 669705, at \*24–25.

235. See *id.* at \*27–30.

236. See, e.g., William Johnson, *The Push to the Right*, GLOBE AND MAIL, Sept. 5, 1985, at 12 (on Meese and McGuigan’s statements). For the NRLC’s emphasis on nominations, see, e.g., Phil Gailey, *Abortion Knits Religious Right into GOP Fabric*, N.Y. TIMES, June 19, 1986, at B8.

237. See, e.g., Siegel, *supra* note 3, at 217–20.

238. Robinson, *supra* note 225.

away from a court which may be prepared to abandon *Roe vs. Wade*.”<sup>239</sup> Willke simply stated, “It will take new people on the Court to make a difference.”<sup>240</sup>

Nonetheless, as we shall see, some abortion opponents did not enthusiastically support the nomination of Robert Bork, a living symbol of originalism and a known opponent of *Roe*. Before his defeat, some abortion opponents still believed that Bork’s nomination and his promotion of originalism were “not [. . .] pro-life issue[s].”<sup>241</sup> With Bork’s failure, however, leading abortion opponents, Willke among them, began using originalist rhetoric as a rallying cry for the movement’s substantive demands. In defeat, Bork served as a reminder of the importance of federal court nominations. Abortion opponents set aside their foundational constitutional belief about the right to life in signing on to the originalist agenda. If originalist judges overruled *Roe*, the argument went, that was likely the best the anti-abortion movement could hope for.

### *1. The lesson of Robert Bork*

Robert Bork, Reagan’s 1987 nominee to the Supreme Court, was the most visible originalist opponent of *Roe*. During the 1981 hearing for his nomination to the D. C. Circuit Court of Appeals, Bork stated: “I am convinced . . . that *Roe v. Wade* is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority.”<sup>242</sup>

Although abortion opponents mobilized to support Bork, pro-choice opposition to the nomination was more intense, sustained, and organized. At the July 1987 National Convention of the National Abortion Rights Action League (NARAL), the organization prioritized Bork’s defeat and distributed “Bork Busters” buttons to all attendees.<sup>243</sup> Organizations like NARAL, the National Organization for Women, and the Planned Parenthood

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239. William K. Stevens, *Margin of Vote Is Called Key to Abortion Decision*, N.Y. TIMES, June 12, 1986, at B11.

240. *Id.*

241. Dan Hortsch, *Anti-Abortion Group Draws Lesson*, PORTLAND OREGONIAN, Oct. 18, 1987, at B4.

242. Aaron Epstein, *Nominee Could Be Pivotal Vote on a Number of Major Issues*, PHILA. INQ., Sept. 13, 1987, at E3.

243. *See, e.g., Pro-Choice Advocates Draft Anti-Bork Campaign*, DALL. MORNING NEWS, July 13, 1987, at A13.

Federation of America joined an alliance called the Block Bork Coalition, which was intended to derail the nomination.<sup>244</sup> The Block Bork Coalition tested strategies designed to present Bork as an extremist. 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. He would “provide the decisive vote to turn back the clock for a number of decisions,” including those on abortion.<sup>245</sup>

For its part, the Reagan administration framed the issue as “whether 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 law—the activist view.”<sup>246</sup> 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.”<sup>247</sup> In September 1987, the administration responded that “[i]deology should have no part” in Bork’s hearings.<sup>248</sup>

Abortion opponents endorsed Bork’s nomination. Doug Johnson of the NRLC explained, “We don’t know Bork’s views on abortion per se . . . . We support him on the basis of his judicial philosophy and his position on *Roe*.”<sup>249</sup> Willke was much more insistent, writing in 1987 that the Bork nomination involved “the most crucial prolife [sic] vote in 14 years.”<sup>250</sup> Abortion opponents held sporadic rallies in favor of the nomination, and attendees of the NRLC Convention applauded when a speaker predicted that Bork would soon join the Court.<sup>251</sup> Generally, however, abortion

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244. See, e.g., MICHAEL PERTSCHUK & WENDY SCHATZEL, PEOPLE RISING: THE CAMPAIGN AGAINST ROBERT BORK 36–61 (1989).

245. *Id.* at 138.

246. Judge Robert H. Bork, The President’s Nominee to the Supreme Court: Overview (July 28, 1987) (on file with the Ronald Reagan Presidential Library).

247. Memorandum from Tom Gibson to Patrick Buchanan Re: Judicial Appointments Theme (Feb. 24, 1986) (on file with the Ronald Reagan Presidential Library).

248. Judge Robert H. Bork, *supra* note 246, at 1.

249. *Abortion Is Hot Political Issue Again*, HOUS. CHRON., Sept. 11, 1987, at 2.

250. Eileen McNamara, *If Permitted Many States Would Ban Most Abortions*, BOS. GLOBE, Apr. 2, 1989, at 1.

251. For examples of the rallies held by abortion opponents, see, e.g., Carol Trujillo, *Abortion Foes Rally in Support of Bork*, DALL. MORNING NEWS, Oct. 4, 1987, at 30A; *Anti-*

opponents were not fully convinced that Bork's originalism was deserving of passionate support. As Kay C. James, the NRLC Public Affairs Director, explained after the failure of the Bork nomination: "The first time out you didn't see the pressure or the wrath or intensity of the pro-life movement because we didn't really see the Bork nomination as a pro-life issue."<sup>252</sup>

Ironically, it was the failure of Bork's nomination that finally made originalism more alluring to pro-life constitutionalists. In attacking Bork, pro-choice advocates made it increasingly clear that he represented the vote that would overturn *Roe*. After his defeat was unavoidable, Bork publicly denounced *Roe*, attributing anti-abortion "demonstrations, marches, television advertisements, [and] mass mailings" to the *Roe* Court's activism.<sup>253</sup> Because the Court had not relied on constitutional text or history, as Bork portrayed it, the *Roe* Court was "perceived, correctly, as political."<sup>254</sup> He described a threat to the Supreme Court's legitimacy and "integrity" that was no longer abstract but evident in social and political events.<sup>255</sup>

Originalism still seemed unlikely to deliver the constitutional changes abortion opponents had long desired. The stated position of Bork and other originalists was not that the Constitution protected a right to life but rather that the Constitution did not protect a right to abortion. An originalist Court would overrule *Roe* and return the issue to democratic politics. From the standpoint of anti-abortion leaders, overruling *Roe* would be a tremendous achievement. Just the same, movement members had long condemned "states' rights" amendments that would have once again made abortion an issue of ordinary politics. Anti-abortion constitutionalists deeply believed that the Constitution protected the right to life from the vicissitudes of popular politics. An originalist Court would leave the right to life vulnerable to public majorities in just the way abortion opponents had feared.

Choosing to join the originalist coalition, then, involved a distinct set of tradeoffs. Endorsing originalism made abortion

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*Abortion Organizer Urges Bork Support*, SUN SENT., Aug. 23, 1987, at 8A.

252. Hortsch, *supra* note 241, at B4.

253. ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 116 (1990).

254. *Id.*

255. *See id.*

opponents a part of an influential coalition with the power to shape nominations to the federal bench. If the movement could impact Supreme Court nominations, in turn, abortion opponents believed that they could rid themselves of *Roe*. In 1990, James Bopp, Jr., the general counsel for the NRLC, summarized the importance attached to the nomination process: “We’ve already won the war on abortion . . . . The only question, I suppose, is whether the decisions will be 5–4 or 6–3, and frankly, it doesn’t matter as long as you have a majority.”<sup>256</sup>

Beginning in 1990, primarily for strategic reasons, anti-abortion leaders framed their constitutional vision as an originalist one, joining conservatives on the courts and in other movements. When Justice William Brennan retired from the Court in July 1990, for example, Burke Balch, the NRLC Legislative Director, stated the following: “We regret that Justice Brennan’s decisions in the area of abortion did not conform to the Constitution as it is written.”<sup>257</sup> Doug Johnson, another NRLC leader, agreed that *Roe* was “judicial legislation at its most extreme.”<sup>258</sup> “Any justice who meets the president’s criteria of faithfulness to the real Constitution could not vote to reaffirm *Roe v. Wade*,” he asserted.<sup>259</sup>

When President George H.W. Bush nominated David Souter to replace Brennan,<sup>260</sup> Bopp explained that his colleagues were “pleased” that Bush had nominated “a justice who will interpret the Constitution according to its text.”<sup>261</sup> Johnson similarly stated, “As far as we know, he has not expressed a judgment on abortion, but the president has described him as a strict constructionist . . . . We think *Roe* has no basis in the Constitution, so the appointment of a strict constructionist will construe the erosion of *Roe*.”<sup>262</sup>

In the following years, Supreme Court nominations and the

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256. Steve McGonigle, *Liberals Lose Key Voice on High Court*, WIS. STATE L. J., July 21, 1990, at 2A.

257. Robin Toner, *Court Vacancy to Challenge President on Volatile Issues: Court Vacancy Will Challenge Bush*, N.Y. TIMES, July 21, 1990, at 1.

258. Ann Devroy & Ruth Marcus, *Court Nomination Is Expected Soon*, WASH. POST, July 22, 1990, at A1.

259. *Id.*

260. *See Anti-Abortionists Warm Up to Bush’s Nominee for Court*, HOUS. CHRON., July 24, 1990, at A1.

261. *Id.*

262. Dawn Weyrich, *Souter Surprise Selection for Court*, WASH. TIMES, July 24, 1990, at A1.

movement's ability to influence sitting Justices remained a priority for abortion opponents. By signing on to the conservative originalist agenda, abortion opponents made themselves part of a powerful coalition that included New Right attorneys, evangelical protestants, religious traditionalists, libertarians, and free-marketers. Originalist rhetoric allowed these groups to speak with a single voice. As importantly, conservative originalism proved to be an effective weapon in the struggle to build popular support. Because conservative originalism appeared neutral and committed to the rule of law, originalism also resonated with the broader public.

Nevertheless, originalism remains only a second-best solution for abortion opponents—something signaled by activists' ongoing, internal commitment to fetal rights approaches. In scholarship, proliferators still sometimes play up the due-process and equal-protection arguments for fetal rights that once inspired the movement.<sup>263</sup> In every election since 1987, abortion opponents have pushed a plank in the Republican Party platform endorsing a constitutional amendment protecting the fetus's right to live.<sup>264</sup> In anti-abortion publications, activists continue to argue for the existence of a fundamental right to life based on the Declaration of Independence and the Fourteenth Amendment.<sup>265</sup>

In speaking to outsiders, however, members of the mainstream movement more often claim the mantle of a broader originalist cause. Americans United for Life has conducted and publicized polls to establish that “majorities of all parties oppose judicial activism” and favor the regulation of abortion.<sup>266</sup> In 2012, the group hosted a

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263. For a sample of this scholarship, see, e.g., Jack Wade Nowlin, *Roe v. Wade Inverted: How the Supreme Court Decision on Abortion Might Have Privileged Fetal Rights Over Reproductive Theory*, 63 *MERCER L. REV.* 639, 644–50 (2011); Francis A. Beckwith, *The Supreme Court, Roe v. Wade, and Abortion Law*, 1 *LIBERTY U. L. REV.* 37, 46–54 (2006); Paolo Torzilli, *Reconciling the Sanctity of Human Life, the Declaration of Independence, and the Constitution*, 40 *CATH. LAW.* 197, 211, 216–17, 222–25 (2000).

264. See, e.g., DOROTHY MCBRIDE, *ABORTION IN THE UNITED STATES: A REFERENCE HANDBOOK* 73 (2008) (“We see, then, that despite 30 years of supporting a Human Life Amendment, no Republican president has put his political capital into a campaign to pass it.”).

265. For examples of internal writings about the existence of a constitutional right to life, see, e.g., Mary Meehan, *Why Liberals Should Defend the Unborn*, *HUM. LIFE REV.*, Summer 2011, at 18 (“The right to life underlies and sustains every other right we have.”); Patrick Mullaney, *Principles and Practicalities*, *HUM. LIFE REV.*, Summer 2010, at 97–98; Patrick Mullaney, *Unborn Life's Protection: Exactly What Does Constitute Us?*, *HUM. LIFE REV.*, Summer 2004, at 50–52.

266. See, e.g., Americans United for Life, Press Release, *Americans United for Life Urges*

conference spotlighting the activism of *Roe* and its progeny, insisting that the abortion right “has no basis in the text, structure, or history of the Constitution.”<sup>267</sup> The AUL has recently promoted a book, *Abuse of Discretion*, penned by organization leader Clarke Forsythe that highlights the *Roe* Court’s departure from original intent.<sup>268</sup> As Forsythe contends: “At the core of *Roe* is not the Constitution, nor values deeply rooted in American history and culture, but a short-sighted view of America and of human liberty.”<sup>269</sup> Similarly, the National Right to Life Education Trust Fund, the public relations arm of the NRLC, continues to play up arguments that *Roe* counts as “an exercise of raw judicial power.”<sup>270</sup>

Notwithstanding abortion opponents’ commitment to the originalist coalition, that dedication has not fully paid off. *Roe* has been weakened but remains good law. Nominees once thought to be originalists—Anthony Kennedy, David Souter, and Sandra Day O’Connor—have voted to preserve *Roe*.<sup>271</sup> Any advance has come at significant cost. Conservative originalism constrains the way activists

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*Senators to Consider New Abortion Polling Data Showing Majorities of All Political Parties Oppose Judicial Activism, Support Abortion Regulation* (May 21, 2009) (capitalization omitted), available at <http://www.aul.org/2009/05/may-21-americans-united-for-life-memo-urges-senators-to-consider-new-abortion-polling-data-showing-majorities-of-all-parties-oppose-judicial-activism-support-abortion-regulations/> (last visited Sept. 4, 2014).

267. Americans United for Life, Press Release, *AUL Presents Legal Experts Detailing the Judicial Violence of Planned Parenthood v. Casey* (May 31, 2012), available at <http://www.aul.org/2012/05/aul-presents-legal-experts-detailing-the-%E2%80%9Cjudicial-violence%E2%80%9D-of-planned-parenthood-v-casey/> (last visited Sept. 4, 2014).

268. See generally CLARKE FORSYTHE, *ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE* (2013).

269. Kathryn Jean Lopez, *Booknotes: Abuse of Discretion: The Inside Story of Roe v. Wade* (Jan. 3, 2014), available at <http://www.humanlifereview.com/booknotes-the-inside-story-of-roe-v-wade/> (last visited Sept. 4, 2014) (citing FORSYTHE, *ABUSE OF DISCRETION*).

270. Brochure, National Right to Life Educational Trust Fund, *Roe v. Wade: An Exercise of Raw Judicial Power* (2006), in *The Mildred F. Jefferson Papers*, Box 8, Folder 4, Schlesinger Library, Harvard University. The NRLC made similar arguments in opposing Sonia Sotomayor’s nomination to the Supreme Court, contending: “*Roe* was an exercise in judicial legislation, aptly branded ‘an exercise of raw judicial power.’” Letter to U.S. Senate on the Nomination of Sonia Sotomayor (July 27, 2009), available at <http://www.nrlc.org/federal/judicial/letter-to-u-s-senate-on-nomination-of-sonia-sotomayor/> (last visited Sept. 4, 2014).

271. See, e.g., Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 83 (Sanford Levinson ed., 1995) (noting that in *Casey*, “Reagan-Bush nominees cast the decisive votes to preserve *Roe*”); see also Dawn Johnsen, *Abortion: A Mixed and Unsettled Legacy*, in *THE REHNQUIST LEGACY* 304 (Craig Bradley ed., 2006).

describe their grievances and aspirations. Abortion opponents have downplayed arguments for a right to life that many activists still endorse, instead of prioritizing what are believed to be more immediately impactful originalist rhetoric. In the process, abortion opponents have done less to popularize the constitutional values central to the movement's agenda: arguments about the humanity of the fetus and the constitutional pedigree of the right to life. Instead of building support for these constitutional commitments, movement members remade their arguments in order to fit the relatively narrow parameters of conservative originalist rhetoric. Rights talk has become famous for limiting social-movement members' ability to articulate, demand, or build support for important forms of social change.<sup>272</sup> As abortion opponents have realized all too well, originalism talk can be just as restrictive.

#### IV. RETHINKING THE PROGRESSIVE ALTERNATIVE

The evolution of anti-abortion constitutionalism offers valuable new perspective on theoretical and historical work on originalism. Historians describe conservative originalism as a site of mobilization for a wide range of right-leaning activists.<sup>273</sup> Some of these movement members are seen to have responded to the values of judicial restraint and fidelity to the rule of law that first-generation originalist theorists articulated. Other activists supposedly viewed originalism as a perfect vehicle for guaranteeing conservative constitutional outcomes.

However, by focusing on the benefits of originalism talk, current studies obscure its substantial costs for the social movements endorsing it. Scholars have long documented the difficulties faced by social movements forced to rely on law or the Constitution in demanding social change.<sup>274</sup> When a movement focuses on litigation,

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272. For discussion of the disadvantages and benefits of rights talk, see *supra* note 8 and accompanying text.

273. See *supra* note 3 and accompanying text.

274. On the ways in which lawyers reshaped and ultimately narrowed the demands of social movements, see, e.g., RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 755–839 (2004). For further discussion, see, e.g., MCCANN, *supra* note 8, at 276 (“Taking rights talk seriously [can] clearly shape[] activist[s]’ perspectives into familiar forms and delimit[] their tactical options”); Robert Post, *The Supreme Court 2002—Foreword: Fashioning The Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7 (2003) (offering an example of how rights talk can regulate and constrain politics, creating a



activists have to use narrow, legalistic, and rights-based language that poorly captures the wide variety of grievances, aspirations, and beliefs of movements seeking to remake society.<sup>275</sup> By turning to law, social movements often find themselves constrained. Of course, rights talk has also had tremendous value to social-change causes, moving new activists to action, legitimating movement demands, and framing them in a way that policymakers are more likely to dignify.<sup>276</sup> Just the same, the story of rights talk is often one about the difficult choices made by social movements, especially when activists seek social change in the courts.

So too is the history of originalism talk. In the story of anti-abortion constitutionalism, originalism represented an imperfect strategic compromise. On the one hand, joining an originalist coalition allowed abortion opponents to make a difference in the selection of judicial nominees. Expressing the movement's views in originalist terms made abortion opponents part of an influential and savvy constitutional coalition. Moreover, originalism allowed activists to speak in a way that made sense to legal and political elites and to formulate arguments in a way that the public was prepared to recognize as moderate, rational, and legal. Originalist rhetoric legitimated anti-abortion claims, lending them a legal and political respectability they might not otherwise have enjoyed. Signing on to the originalist agenda also had a significant mobilizing effect, providing much needed successes that sustained activists frustrated by the lack of progress the movement confronted in promoting a human life amendment.

On the other hand, originalism talk constrained abortion opponents, putting off-limits many of the movement's longstanding contentions about a constitutional right to life. Abortion opponents had to tailor their claims to fit an existing originalist framework. Activists used time, money, and energy to promote the idea of originalism that could have been used to popularize foundational beliefs about the fetus and its role in the American constitutional tradition. For this reason, originalist reasoning had significant opportunity costs. Abortion opponents could not as easily publicize

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body of law "categorically autonomous from the beliefs and values of nonjudicial actors").

275. See *supra* note 8 and accompanying text.

276. NeJaime, *supra* note 8, at 668. For more works in this vein, see, e.g., KORNBLUH, *supra* note 8; MACLEAN, *supra* note 8; Dinner, *supra* note 8, at 580.

their beliefs or demand that policymakers take those convictions seriously. Instead of seeking to change public attitudes about fetal life, the movement used scarce resources to publicize an interpretive method with no meaningful connection to activists' constitutional commitments.

The history of anti-abortion constitutionalism also makes an important contribution to theoretical scholarship on originalism and its alternatives. Scholarly understandings of originalism as a political practice explore its appeal to both conservative social movements and to the general public. The attraction of originalism to movement conservatives seems obvious: originalism has proven to be a remarkably effective tool in the promotion of conservative values and outcomes. Progressive scholars seek to understand conservative originalism's appeal in order to create a compelling theoretical alternative to it.

The history of anti-abortion constitutionalism offers a different perspective on what it would mean to create a successful progressive theory that would replicate the success of originalism. In the story of anti-abortion constitutionalism, originalism represented an imperfect tactical decision. Creating a progressive alternative to conservative originalism would involve a willingness to subordinate important goals, commitments, and arguments, in the name of short-term political gain. It is possible to imagine a progressive interpretive method that would approximate the ideal described by scholars—a method that would vindicate a social movement's beliefs while appearing neutral to the public. The story of anti-abortion constitutionalism, however, makes clear that conservative originalism did not represent this ideal for some of those who endorsed it. To the extent that this history offers any example, creating a progressive alternative to conservative originalism would involve a tactical decision to set aside particular constitutional goals or arguments in order to forge an effective constitutional and political coalition.

## V. CONCLUSION

Conservative originalism has had considerable allure. It resonates with the public and has shaped the constitutional politics of several Republican administrations and sitting Justices. Since the 1980s, scholars have experimented with alternatives that would advance progressive commitments while respecting the will of the people and the rule of law.

However, social movement members and attorneys should not try to replicate the success of conservative originalism without understanding what it has meant to its constituents. For abortion opponents, the story of conservative originalism has been one of coalition-building, difficult constraints, and promises half-fulfilled. It is worth asking whether that is the kind of success social movements should pursue.