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## Why the Right Embraced Rights

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## BOOK REVIEW

### WHY THE RIGHT EMBRACED RIGHTS

THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND  
THE REMAKING OF AMERICAN GOVERNMENT. JEFFERSON  
DECKER. OXFORD UNIVERSITY PRESS (2016)

LOGAN E. SAWYER, III\*

#### INTRODUCTION

Justice Scalia's untimely death prompted an outpouring of popular and academic comment on his remarkable contributions, both to the law and to the conservative movement in American politics. Newspaper obituaries, magazines, and special editions of scholarly journals analyzed the Justice's contribution to reshaping theories of constitutional and statutory interpretation, changing central doctrines of constitutional law, and altering norms of Supreme Court oral advocacy and opinion writing.<sup>1</sup> They also regularly emphasized how both his votes and his voice helped advance conservative causes.<sup>2</sup>

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\* Associate Professor of Law, University of Georgia School of Law. Thanks to Chris Schmidt and Laura Phillips Sawyer for comments on earlier drafts.

1. See, e.g., Robert Barnes, *Supreme Court Justice Antonin Scalia dies at 79*, WASH. POST (Feb. 13, 2016), [https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c\\_story.html](https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html) [<https://perma.cc/E576-A7WW>]; Adam Liptak, *Justice Scalia, Who Led Court's Conservative Renaissance, Dies At 79*, N.Y. TIMES, Feb. 14, 2016, at A1; Jonathan H. Adler, *The Passing of a Legal Giant—Antonin Scalia, R.I.P.*, WASH. POST: VOLOKH CONSPIRACY (Feb. 13, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/13/the-passing-of-a-legal-giant-antonin-scalia-rip> [<https://perma.cc/7GTC-8UX6>]; Jack Balkin, *Antonin Scalia, Rest in Peace*, BALKINIZATION (Feb. 13, 2016, 6:01 PM), <http://balkin.blogspot.com/2016/02/antonin-scalia-rest-in-peace.html>, [<https://perma.cc/N8YP-5Z66>]; David Cole, *Scalia: The Constitution in Politics*, N.Y. REV. BOOKS: NYR DAILY (Feb. 15, 2016), <http://www.nybooks.com/daily/2016/02/15/justice-antonin-scalia-constitution-in-politics> [<https://perma.cc/N2G6-288L>].

2. See Barnes, *supra* note 1; Liptak, *supra* note 1; Adler, *supra* note 1; Balkin, *supra* note 1; Cole, *supra* note 1.

That recognition is undoubtedly deserved, but the credit—or blame, depending on one’s perspective—ought to be shared, as the Justice himself undoubtedly would have recognized.<sup>3</sup> As a Supreme Court Justice, Scalia’s voice and vote had considerable influence on American law and politics.<sup>4</sup> But, like all judges, that influence depended on the opportunity to hear new arguments and decide new cases. And many of the arguments and cases most important to Scalia’s legacy were produced by a loose but effective network of conservative litigators, lower court judges, law clerks, and academics.<sup>5</sup> Consider that *United States v. Lopez*,<sup>6</sup> *Citizens United v. FEC*,<sup>7</sup> *District of Columbia v. Heller*,<sup>8</sup> and *NIFB v. Sebelius*<sup>9</sup> were all cases supported by conservative public interest law firms that deployed arguments developed by academics associated with the Federalist Society.<sup>10</sup>

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3. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (noting that the Court can make no ruling “when there are no adverse parties with personal interest in the matter” who bring the case before it).

4. For just a few of his seminal works, see, for example, ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

5. For the assertion that such “support structures” are required in order to allow a court to focus attention on a particular set of issues, see Charles R. Epp, *The Support Structure as a Necessary Condition for Sustained Judicial Attention to Rights: A Response*, 73 J. POL. 406 (2011). For a description of the workings of the modern American conservative support structure, see AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015).

6. 514 U.S. 549 (1995); see also HOLLIS-BRUSKY, *supra* note 5, at 108 (noting that “Federalist Society participant” Carter Phillips litigated this case).

7. 558 U.S. 310 (2010); see also HOLLIS-BRUSKY, *supra* note 5, at 82–83 (noting that one member of the three-judge District Court panel, the appellate counsel for Citizens United, and thirteen separate amici curiae for this case were all members of the Federalist Society).

8. 554 U.S. 570 (2008); see also HOLLIS-BRUSKY, *supra* note 5, at 45 (noting that in this case, “[s]ix-time Federalist Society National Conference presenter Judge Laurence Silberman wrote the Circuit Court decision,” “three of the lawyers involved in masterminding the litigation strategy . . . ha[d] active ties to the Federalist Society network,” and “an impressive 21 members of the Federalist Society network signed on to eight different *amicus curiae* briefs . . .”).

9. 567 U.S. 519 (2012); see also HOLLIS-BRUSKY, *supra* note 5, at 135–136 (noting that eight of the litigators and twenty-four of the amici curiae in this case were members of the Federal Society network).

10. See, e.g., HOLLIS-BRUSKY, *supra* note 5, at 46–48.

Remarkably, when Scalia entered public service in 1971,<sup>11</sup> that network of conservative lawyers did not exist. At that time, public interest law firms were nearly universally dedicated to advancing liberal or progressive policies.<sup>12</sup> There was no Federalist Society.<sup>13</sup> Many of the ideas that are today associated with the conservative movement—like law and economics and originalism—had no meaningful support in legal academia.<sup>14</sup> By 2015, however, the landscape had been transformed. A remarkable array of public interest law firms pursued conservative goals, including the Pacific Legal Foundation, the Capital Legal Foundation, and the Institute for Justice, to name only a few.<sup>15</sup> In fact, by the 1990s, conservative public interest firms were filing more Supreme Court amicus briefs than their liberal and progressive counterparts.<sup>16</sup> The academy was different as well. With the support of the Olin Foundation and other conservative nonprofit groups, it became common for scholars to use economic analysis to justify conservative policy goals.<sup>17</sup> Academics with similar support used textualist and originalist

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11. Though he did not completely leave academia until 1974, Scalia began serving as General Counsel for the Office of Telecommunications Policy in 1971. See Brian P. Smentkowski, *Scalia, Antonin*, in BRITANNICA BIOGRAPHIES (2012).

12. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 23, 267 (2008) (noting that “liberal public interest law exploded in the early 1970s” and that “for almost twenty years conservative public interest law was treated as an oxymoron”).

13. See *id.* at 138 (noting that the Federalist Society was founded in 1982).

14. See JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS* 5, 10 (2005) (noting that originalism has been “present in American constitutional law and thought since the country’s founding, but by the 1930s its conceptions of constitutional authority and legitimate interpretation had been marginalized” and would not again “set the terms of the jurisprudential debate” until the 1980s); TELES, *supra* note 12, at 307 n.1 (noting that the academy was “nonreceptive” to law and economics “from the 1930s to the 1960s”).

15. For an argument that firms with a conservative agenda can still be “public interest” organizations, see Ann Southworth, *Conservative Lawyers and the Meaning of “Public Interest Law”*, 52 UCLA L. REV. 1223 (2005).

16. See Ann Southworth, *What is Public Interest Law: Empirical Perspectives on an Old Question*, 62 DEPAUL L. REV. 493, 506 fig. 1 (2013).

17. See TELES, *supra* note 12, at 182 (noting that the Olin Foundation promoted law and economics because Olin saw it was “a rare crack in the liberal legal network, a beachhead for conservatives otherwise locked out of the elite legal academy” and that this discipline owes much of the credit for its becoming a “dominant presence in legal academia” to the “strategic patronage” of organizations like the Olin Foundation).

arguments to the same effect.<sup>18</sup> All of those efforts were loosely coordinated by a network of conservative lawyers centered primarily, but not exclusively, on the Federalist Society.<sup>19</sup> In multiple high profile cases, including those listed above, Federalist Society academics generated theories that were presented in court by Federalist Society litigators, analyzed by Federalist Society law clerks, and adopted by Federalist Society judges and Justices.<sup>20</sup> By 2005, that network had developed enough political muscle to sink President Bush's nomination of Harriet Miers to the Supreme Court and help push one of its own, Justice Alito, onto the Court.<sup>21</sup>

This network, commonly called the conservative legal movement, has recently received the sustained attention of scholars in a variety of fields. Political scientists,<sup>22</sup> historians,<sup>23</sup> and academic lawyers<sup>24</sup> have sought to explain how this network has advanced conservative policies in the law so successfully. Jefferson Decker's *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government*<sup>25</sup> makes an original and important contribution to this literature by asking a new question. Rather than asking how a relatively small number of lawyers helped conservatives alter legal and constitutional norms, as have most scholars, he asked how the constitutional and legal norms developed by that network went on to alter the political ideology of conservatives.

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18. See Erin Cady, *The John M. Olin Fellowships and the Advancement of Conservatism in Legal Academia*, 39 HARV. J.L. & PUB. POL'Y 917 (2016).

19. See HOLLIS-BRUSKY, *supra* note 5, at 9–10. Hollis-Brusky observes that the Federalist Society is not a public interest law firm, an interest group, or a think tank, but is instead a network that “educate[s] and train[s] its members through sponsored events and conferences, to shape and socialize them intellectually and professionally in a particular way, and to encourage them to draw on this training as they carry out their work as legal professionals, academics, judges, government officials, and civic leaders,” and “[t]here are thousands of ‘untold ways’ in which these individuals go on to shape legal doctrine and policy in accord with organizational principles and priorities.” *Id.*; see also Southworth, *supra* note 15; Southworth, *supra* note 16.

20. See *supra* notes 6–9 and accompanying text.

21. See JAN CRAWFORD GREENBURG, SUPREME CONFLICT 282–84 (2007) (noting that a “conservative revolt” sabotaged Bush’s nomination of Miers).

22. See, e.g., HOLLIS-BRUSKY, *supra* note 5; TELES, *supra* note 12.

23. See, e.g., O’NEILL, *supra* note 14.

24. See, e.g., Southworth, *supra* note 15; Southworth, *supra* note 16.

25. JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT (2016).

Conservatives in the 1970s and 80s, Decker argues, believed in the effective use of government authority when exercised by democratically elected branches, but were dubious about judicial policy-making. In particular, they opposed the legal and constitutional “rights revolution” that allowed liberal and progressive public interest lawyers to push courts to extend judicial authority over contested social and economic issues.<sup>26</sup> Things are different today. Conservative lawyers, politicians, activists, and voters have made “rights talk” and an associated suspicion of government authority core tenants of contemporary conservatism.<sup>27</sup> Decker’s most striking claim is that this transition was led by lawyers. He thus suggests that the recent scholarship on the conservative legal movement may have missed its most important impact: its redefinition of what it means to be conservative.

Decker makes this claim as a historian. That is, he emphasizes attention to archival evidence and narrative coherence over theory and commentary. But Scalia’s passing invites us to consider how his insights might be both generalized and extended. This review turns to those questions after it summarizes Decker’s arguments in Section I. Section II identifies some of the limits of his argument, and places his claims in context of our existing understanding of the conservative legal movement. Section III supports Decker’s insight by explaining how legal arguments can alter not just what political movements think is possible, but what they think is desirable. To elucidate that explanation, Section III examines how the contemporary conservative movement has been shaped by the legal campaign against the Affordable Care Act.<sup>28</sup> Through their efforts, conservative lawyers transformed the debate over the ACA from one that emphasized policy consequences to one that emphasized liberty and individual rights. By doing so, they both inspired and legitimated the Tea Party movement, which, in turn helped transform the contemporary Republican Party. Section IV asserts that it is not just Decker’s argument, but his broader approach that ought to be extended. By tying Decker’s work to a broader set of studies it calls for more attention to the role

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26. *Id.* at 2–5.

27. *Id.* at 3–5.

28. *Id.* at 211–13.

that lawyers have played in defining and re-defining conservatism. That greater focus on the influence of lawyers is particularly needed today, as convulsions in contemporary politics offer new opportunities to define conservatism for the next generation. Lawyers need to know how much influence they have had in the past so they can recognize how many responsibilities they have in the present.

### I. *THE OTHER RIGHTS REVOLUTION*

Decker organizes his argument as historical narrative. After an introduction outlining his argument, he turns to the origins of the contemporary network of conservative public interest law firms. Those firms were not started, as one might expect today, to enlist the judiciary in the fight against excessive government regulation. Rather, they hoped to do the opposite: to free government from such legal entanglements.

Business leaders and other conservatives were concerned that the aggressive enforcement of new rights by liberal and progressive lawyers was interfering with orderly, democratic government. Their concern grew from the explosion of new rights of actions created by Lyndon Johnson's Great Society programs,<sup>29</sup> which combined with looser standing rules<sup>30</sup> and the explosion of fee shifting statutes to encourage liberal and progressive public interest lawyers and law firms<sup>31</sup>—including consumer advocates like Ralph Nader and environmental organizations like the Sierra Club—to bring suit against the government in hopes of advancing their preferred policies.<sup>32</sup>

Conservatives in general, and the business community in particular, responded by funding and organizing their own lawyers to fight back. Future Supreme Court Justice Lewis Powell, acting as a consultant for the Chamber of Commerce, urged business leaders to learn from the success of liberal public interest litigation. "Other organizations and groups have been far more astute in exploiting judicial action than Ameri-

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29. *Id.* at 17–25.

30. *Id.* at 31–32.

31. *Id.* at 32–33.

32. *Id.* at 13–15, 25–30.

can business," he wrote.<sup>33</sup> This was, Powell wrote, "a vast area of opportunity for the Chamber."<sup>34</sup>

The result of those efforts was the early conservative public interest firms, like the Pacific Legal Foundation and the Mountain States Legal Foundation, which looked for opportunities to defend government authority from interference from the liberal legal network. As the President of the PLF complained to his board of directors in 1973: "Faced with the dilemma of countering numerous lawsuits for temporary restraining orders, injunctions and damages, public attorneys have become hopelessly outmanned."<sup>35</sup> Without an effective conservative legal counter-mobilization, he continued, "governmental functions may well be without adequate defense."<sup>36</sup>

Decker then turns to the lawyers who formed that counter-mobilization and the lessons they drew from their experiences, first in the American West, and then in the Reagan Administration. At a time when most political and legal conservatives were calling for judicial deference that would help re-establish "law and order" and protect the interests of the "silent majority," those conservative public interest firms, working primarily in the West, began to see how courts, litigation, and rights claims could advance conservative interests.<sup>37</sup> The Pacific Legal Foundation, for example, quickly learned it could use the tools liberal public interest lawyers had developed to protect property owners.<sup>38</sup> It used the same environmental statutes that it had formerly opposed, for instance, as a way to slow or stop expensive government infrastructure projects.<sup>39</sup> Property rights and litigation surrounding the Takings Clause, they also found, could be useful.<sup>40</sup>

Similar developments occurred in Colorado, where Lewis Powell's memorandum to the Chamber of Commerce inspired

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33. *Id.* at 45 (quoting Memorandum from Lewis F. Powell to Eugene B. Snyder, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), <https://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf> [<https://perma.cc/8ATY-572C>] [hereinafter Powell Memo]).

34. *Id.* (quoting Powell Memo, *supra* note 33).

35. *Id.* at 1.

36. *Id.*

37. *Id.* at 55–57.

38. *Id.* at 61.

39. *Id.* at 61–63.

40. *Id.* at 63–71.

beer magnate Joseph Coors to create the Mountain States Legal Foundation.<sup>41</sup> Mountain States developed a version of conservatism heavily influenced by the concerns of the West, where the federal government was the largest landowner. It sought to protect Western businesses from the excesses of the growing environmental movement.<sup>42</sup> By the end of the decade, this campaign led Mountain States's controversial leader James Watt to proudly call himself an activist who used the courtroom as a tool to protect individual rights. "It is there," he told an audience at the University of Wyoming, "that I practice my profession as a public-interest lawyer championing individual rights and economic freedom."<sup>43</sup>

That turn to rights claims and litigation, however, did not fit easily with the dominant conservative view of the courts in the 1970s, which still strongly opposed "judicial activism."<sup>44</sup> Conservative public interest lawyers originally papered over the conflict by arguing that the rights revolution they were pursuing differed from its liberal counterpart because it advanced the interests of a silent majority of Americans, rather than special interests.<sup>45</sup> These lawyers argued they were thus fighting for the same goal as the supporters of judicial deference: majoritarian democracy.<sup>46</sup> These arguments were unconvincing to some conservatives,<sup>47</sup> but they were enough to allow conservative public interest firms to retain their alliances with conservative political interests while they slowly expanded their campaigns for judicial protection of individual rights.<sup>48</sup> The Great Plains Legal Foundation and the Washington Legal Foundation's attention to matters of religious liberty in the 1970s, particularly under the Free Exercise Clause, were important new extensions.<sup>49</sup>

The lawyers that made up the conservative legal movement abandoned that uneasy compromise in response to a surprising cause: the Reagan Revolution. Hopeful that Reagan's election

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41. *Id.* at 74.

42. *Id.* at 75, 79–80.

43. *Id.* at 92.

44. *Id.* at 96–97.

45. *Id.* at 97–104, 114.

46. *Id.* at 97.

47. *Id.* at 109–111, 121.

48. *Id.* at 121–22.

49. *Id.* at 104–106.

would allow them to advance conservative policies, many members of these firms eagerly took positions in the administration, some that were quite important.<sup>50</sup> Leading members of conservative public interest law firms became the Secretary of the Interior<sup>51</sup> and the Solicitor General,<sup>52</sup> and others took important White House posts. They hoped to use their new authority to increase cooperation between business and government by, for example, opening more federal lands to mining and drilling,<sup>53</sup> and by undermining the government programs and statutes that funded a large portion of liberal public interest litigation.<sup>54</sup> But Democratic strength in the House of Representatives, astute political maneuvering by members of the liberal legal network, missteps by conservative leaders, and conflict between lawyers from the conservative public interest firms and more traditional conservatives limited their accomplishments.<sup>55</sup> Efforts to cap attorneys' fees in fee-shifting suits failed in Congress,<sup>56</sup> for example, and litigation by the Sierra Club and other liberal litigation firms slowed the opening of western lands until after the Reagan's term ended.<sup>57</sup>

The opportunities presented by the Reagan Administration did not end litigation by the public interest right, but it did curtail and narrow it in ways that pushed its lawyers even closer to a full embrace of individual rights.<sup>58</sup> Reagan's victory lured talented lawyers from conservative public interest firms into the administration and turned donors' attention from litigation to more traditional methods of shaping public policy.<sup>59</sup> With fewer resources, the public interest right narrowed its agenda. Its only real successes were in lawsuits that used rights based claims to call on judicial protection for property interests. The highest profile example produced Justice Scalia's 1987 majority opinion in *Nollan v. California Coastal Commission*,<sup>60</sup> which pro-

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50. *Id.* at 124–25.

51. *Id.* at 126.

52. *Id.* at 147.

53. *Id.* at 128.

54. *Id.* at 138–47.

55. *Id.* at 152.

56. *Id.* at 143–46.

57. *Id.* at 131–38.

58. *Id.* at 154–55.

59. *Id.* at 153–54.

60. 483 U.S. 825 (1987).

tected private property by expanding the category of regulatory takings.<sup>61</sup> Those successes further encouraged conservative lawyers to see rights and courts as an important way to advance conservative policies.<sup>62</sup>

Those lessons combined with continued frustrations in Reagan's second term to push conservative public interest lawyers to fully embrace the turn from traditional politics to courts and rights. Here, Decker focuses on what conservative attorneys inside the Reagan administration learned from efforts to expand takings jurisprudence. Former Mountain States Legal Foundation attorneys, for example, hoped to support the efforts of private litigants to expand the reach of the Takings Clause in both *Nollan* and in *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>63</sup> where they saw an opportunity to establish that landowners should be compensated for regulatory takings even if such takings were temporary.<sup>64</sup> But moderates within the administration provided mixed support. Solicitor General Charles Fried opposed compensation for temporary regulatory takings so strenuously that the administration declined to fully support the argument at the Supreme Court.<sup>65</sup> When the Court ruled in favor of compensation for temporary regulatory takings anyway, the lesson for many conservative lawyers was clear: rights arguments and courts could advance their interests more effectively than traditional politics.<sup>66</sup>

As a result, leading members of the conservative public interest network fully embraced a new rights- and court-based strategy for political change, a strategy that was close to, if not identical to, the approach conservative public interest firms were created to challenge. A particularly poignant example—which also demonstrates Decker's careful archival research—is the handwritten notes Decker found scrawled on a copy of the *Slaughter-House Cases*<sup>67</sup> by Clint Bolick, later a founder of the Institute for Justice, but at the time a lawyer in the Civil Rights

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61. DECKER, *supra* note 25, at 174–82.

62. *Id.* at 181–82.

63. 482 U.S. 304 (1987).

64. DECKER, *supra* note 25, at 191–94.

65. *Id.* at 194–95.

66. *Id.* at 195–97.

67. 83 U.S. 36 (1873).

Division at the Department of Justice.<sup>68</sup> Those notes anticipate Bolick and I.J.'s litigation campaign to re-establish judicial protection for economic liberty<sup>69</sup> and help confirm the transition Bolick and other conservative lawyers made between the 1970s and the 1990s. A network of lawyers that was created to free government from meddling lawyers, judges, and individual rights claims had come to embrace those tools as the defining characteristic of their movement.<sup>70</sup>

Decker's suggestive epilogue connects these changes to contemporary politics. He traces links between the history of the conservative legal movement and the embrace of rights claims, rights talk, and judicial power by political conservatives. He points to *Kelo v. City of New London*,<sup>71</sup> the political backlash it created,<sup>72</sup> the challenges to the Affordable Care Act,<sup>73</sup> and other examples. By embracing rights talk and judicial action, Decker argues, the conservative legal movement helped make questions of regulatory policy deeply, and unnecessarily, ideological issues.<sup>74</sup> Our political debate, he indicates, could emphasize policy rather than rights, and practical implications rather than political ideology.<sup>75</sup> That it does not, he argues, demonstrates the remarkable influence of lawyers and legal argument on twenty-first century American politics.

## II. *THE OTHER RIGHTS REVOLUTION* AND THE CONSERVATIVE LEGAL MOVEMENT

This is an important story, well told. It explains how a set of lawyers organized to free government from legal entanglements came to dedicate themselves to creating very similar kinds of entanglements. In doing so, Decker recognizes that this transition was not easy, even if it seems a pragmatic choice in retrospect. He confirms previous work by Steve Teles and others when he shows conservative lawyers embraced rights claims

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68. DECKER, *supra* note 25, at 202–09.

69. *Id.* at 208–09.

70. *Id.* at 210.

71. 545 U.S. 469 (2005).

72. DECKER, *supra* note 25, at 215–20.

73. *Id.* at 211–13.

74. *Id.* at 220–24.

75. *Id.* at 223–27.

and judicial authority to achieve particular policy goals.<sup>76</sup> But, Decker also recognizes that he has described not just a tactical shift, but an intellectual transformation. His study, he writes, is of an “intellectual revolution and the legal activism that inspired it.”<sup>77</sup> In that context, his emphasis on the lessons conservative lawyers learned from the West and the Reagan Administration is an important insight. Those twin experiences provided the raw materials conservative lawyers used to generate a new conservative approach to governing, an approach that is more focused on first principles and individual rights, more welcoming of judicial action, less concerned with legislative compromise, and that has helped produced our deeply ideological contemporary disputes over the regulatory state.

But more important than identifying those raw materials is Decker’s claim that this ideological vision radiated out from those lawyers to the define the modern conservative movement. In the last half of the twentieth century, being conservative meant opposing rights claims and interference with effective government. Consider the position of conservatives on *Roe v. Wade*,<sup>78</sup> *Miranda v. Arizona*,<sup>79</sup> and *Brown v. Board of Education*,<sup>80</sup> or their approach to prayer in public schools, judicially-enforced busing to achieve racial integration in schools, and the extension of civil and voting rights acts. In each area, conservatives opposed judicial interference with policy-making by more democratic bodies. Conservatives embraced originalism in the 1980s because it encouraged judicial deference to the elected branches of government.<sup>81</sup> Even in the 1990s, conservatives opposed the health care reform led by Hillary Clinton not because it interfered with individual rights or violated constitutional norms, but for policy reasons. In the early twenty-first century, however, conservatism has changed. The conservative challenge to the Affordable Care Act in court and outside it focused

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76. See ERWIN CHERMERSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010); MARK W. SMITH, *DISROBED: THE NEW BATTLE PLAN TO BREAK THE LEFT’S STRANGLEHOLD ON THE COURTS* (2006); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); TELES, *supra* note 12.

77. DECKER, *supra*, note 25, at 9.

78. 410 U.S. 113 (1973).

79. 384 U.S. 436 (1966).

80. 347 U.S. 483 (1954).

81. O’NEILL, *supra* note 14.

on constitutional and individual rights. Conservatives celebrated the decision in *Hobby Lobby* and rebelled when rights claims failed in *Kelo*.<sup>82</sup> Leading advocates of originalism now call for “judicial engagement” rather than “judicial deference.”<sup>83</sup>

Scholars have recognized that there are disagreements between the conservative legal movement and the broader conservative movement.<sup>84</sup> But Decker pushes farther. He claims that conservative lawyers have been more than a tool of conservative interests, they have been leaders in defining conservatism.<sup>85</sup> With this claim, Decker turns our understanding of the conservative legal movement on its head. Before Decker, scholars looked to the conservative legal movement with one core question: how did conservative political interests build a network of lawyers that so successfully altered legal and constitutional norms?<sup>86</sup> Decker urges us to consider also how that network has shaped the larger conservative movement.

This is an important contribution, but no book is perfect, and this one, too, has weaknesses. One is that Decker’s investigation heavily emphasizes the libertarian-leaning wing of the conservative legal movement. The first half of his book, for example, focuses on Lewis Powell’s 1971 memorandum to the Chamber of Commerce, the Pacific Legal Foundation, and the Mountain States Legal Foundation.<sup>87</sup> Each of those organizations were primarily concerned with economic policy. They hoped to counter declining trust in the free market, the growth of the regulatory state, and the expansion of environmental

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82. Hillel Y. Levin, *Rethinking Religious Minorities’ Political Power*, 48 U.C. DAVIS L. REV. 1617, 1677 (2015); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109–11 (2009).

83. Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L. & PUB. POL’Y 925, 930–31 (2013).

84. SMITH, *supra* note 76, at 234; TELES, *supra* note 12, at 221; William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1772 n.79 (2009). It has also been disputed. See, e.g., Reva Siegel & Robert Post, *Originalism as Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2006) (arguing that originalism as practiced by conservative judges connects them with, and helps mobilize, the broader conservative political movement).

85. SMITH *supra* note 76, at 10–15; TELES *supra* note 12, at 221.

86. HOLLIS-BRUSKY, *supra* note 5; TELES, *supra* note 12; Comment, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 201–36 (2008).

87. DECKER, *supra* note 25, at 39–94.

regulation. They were undoubtedly important to the birth of the public interest right,<sup>88</sup> and continue to have considerable influence on the movement.<sup>89</sup> But they are not the only conservative lawyers. Gun rights advocates have achieved remarkable success and visibility in *District of Columbia v. Heller*<sup>90</sup> and *McDonald v. Chicago*.<sup>91</sup> Lawyers associated with the Christian Right in the 1990s spent millions of dollars, employed hundreds of lawyers, and aggressively filed myriad lawsuits and amicus briefs.<sup>92</sup>

In the end, Decker may be correct that lawyers concerned with economic liberty have had the greatest impact the right's embrace of rights, but the issue is not without doubt.<sup>93</sup> To provide a confident answer, we need to know more about how religious conservatives shifted from opposing judicial power in school prayer decisions and *Roe v. Wade* to embracing judicial action in *Hobby Lobby*, and what effect that shift had.<sup>94</sup> We also need to know more about the links between Second Amendment activism, the Republican Party, and the litigation campaign that led to *Heller*.<sup>95</sup> Decker has made a prima facie case, but more work needs to be done.

A second weakness in Decker's work is that its most creative insight is its least well documented. *The Other Rights Revolution* demonstrates the importance of the West and the Reagan Administration with a careful, largely continuous narrative of people, ideas, politics, and policy, but its claims about the spread of this new conservatism from lawyers to politicians are primarily made in his epilogue, which jumps forward from the late 1980s to well into the twenty-first century. There, Decker argues *NFIB* and *Kelo* demonstrate that the contemporary conservative movement has followed the public interest right into an embrace of rights claims.<sup>96</sup> That shift undoubtedly occurred, but Decker does not

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88. TELES, *supra* note 12, at 7–11.

89. *Id.* at 211–12, 225–27.

90. 554 U.S. 570 (2008).

91. 561 U.S. 742 (2010).

92. STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS 5–10 (2002).

93. DECKER, *supra* note 25, at 5.

94. Compare *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), with *Roe v. Wade*, 410 U.S. 113 (1973), and *Engel v. Vitale*, 370 U.S. 421 (1962).

95. 544 U.S. 570 (2008).

96. DECKER, *supra* note 25, at 211–27.

explain how legal arguments can shape political debate or trace the shift of rights talk from conservative lawyers to mainstream conservative discourse. Some readers may thus rush too quickly past what is potentially his most important contribution.

### III. FROM CONSERVATIVE LAWYERS TO CONSERVATIVE POLITICS

Any reader tempted to do so should resist, because there are good reasons to believe Decker got it right. True to his historical training, Decker does not provide a generalized theory to explain how legal activism can shape a political movement. But social scientists have catalogued a variety of ways that the law—and the lawyers who are experts at manipulating it—can influence the political and social movements they ostensibly serve.<sup>97</sup> Litigation, those social scientists have noted, can shape political debate by attracting public attention.<sup>98</sup> *Roe v. Wade* transformed the political debate over abortion, for example.<sup>99</sup> Litigation can also inspire political action when it convinces activists that change is possible.<sup>100</sup> *Brown v. Board of Education* was surely unnecessary to convince African Americans that the Jim Crow regime was unjust.<sup>101</sup> But that victory showed change was possible, which helped inspire protests that forced Congress to pass the 1964 Civil Rights Act and other critical civil rights legislation.<sup>102</sup> Litigation and legal argument can also legitimate a political movement and its claims.<sup>103</sup> Court victories make it harder for opponents to dismiss calls for change. And even without litigation, legal arguments made by the right

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97. Michael McCann, *Law and Social Movements*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 506, 510–11 (Austin Sarat ed. 2004).

98. *Id.* at 515–16.

99. Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028 (2011); Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After Roe v. Wade, 1973–1980*, 87 *CHI.-KENT L. REV.* 571 (2012).

100. See Michael McCann, *Law and Social Movements*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY*, *supra* note 97, at 506.

101. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 363–84 (2004); GERALD N. ROSENBERG, *HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 64–65 (2008).

102. See Michael McCann, *Law and Social Movements*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY*, *supra* note 97, at 506.

103. *Id.* at 513–15.

people can legitimate political claims.<sup>104</sup> When law professors from prestigious universities or other legal leaders support a claim, it becomes more difficult to dismiss.<sup>105</sup>

Ken Kersch has pointed out another way law can shape political movements. Politics, he notes, is not a simple exercise of splitting the difference between conflicting interests or picking a winner when compromise is impossible.<sup>106</sup> Which compromises are arranged and which winners are chosen depends on the relative power of the political coalitions that take part in the negotiations. And creating an effective political coalition out of a diffuse set of interests is no easy matter, particularly in a complex and layered political system like the United States. Political entrepreneurs try to solve these problems with institutional structures like political parties and congressional caucuses, but political ideology is also an effective tool. Political ideology can produce and protect effective coalitions by making some alliances seem natural and others illegitimate. Before the 1980s, the alliance between white Southern conservatives and the other parts of the Democratic coalition seemed a natural alliance. By the 1990s, it no longer seemed so. Intellectual entrepreneurs, who reformulated various strands of the American political tradition, caused that change.<sup>107</sup> One of the most important resources for that kind of ideology building, Kersch points out, was constitutional argument.<sup>108</sup> The conservative lawyers Decker examines have influenced politics in all these ways: they have won litigation victories that have generated attention, inspired political action, legitimated their policy goals, and provided an ideological framework that has helped produce and maintain a new conservative coalition. Consider the vignette that opens Decker's epilogue, the litigation campaign against the Affordable Care Act, and the emergence, spread, and impact of

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104. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 181 (2011)

105. *Id.* at 178; GARRET EPPS, *AMERICAN EPIC: READING THE U.S. CONSTITUTION* (2013); TELES, *supra* note 12.

106. Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 B.U. L. REV. 1083 (2014).

107. *Id.* at 1091.

108. *Id.* at 1090–92; see also Victoria Hattam & Joseph Lowndes, *The Ground Beneath Our Feet: Language, Culture, and Political Change*, in *FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING* 199 (Stephen Skowronek & Matthew Glassmen eds., 2007).

what became known as the “broccoli horrible.”<sup>109</sup> The broccoli horrible highlighted concerns that the ACA marked a sharp break with a longstanding American political tradition that valued individual liberty by suggesting that a government that could mandate the purchase of health insurance could also require private individuals to purchase healthy, green vegetables.<sup>110</sup> That hypothetical provides a case study of the influence of the conservative legal movement on contemporary conservatism. It originated with lawyers associated with the conservative legal movement, spread to supporters of the Tea Party, was adopted by judges at the urging of conservative lawyers and academics, legitimated and inspired the Tea Party, and ultimately helped reform contemporary conservative politics.<sup>111</sup>

Diet-based hypotheticals were first used to critique healthcare reform by Federalist Society expert David B. Rivkin in an attack on President Clinton’s proposals.<sup>112</sup> Rivkin revived those arguments in 2009 to attack the constitutionality of the ACA.<sup>113</sup> The hypothetical was then refined by Terence Jeffrey, the editor of a conservative news outlet, who focused it on broccoli.<sup>114</sup> It was then picked up by Reason TV, part of a conservative public interest organization that has received large donations from the David H. Koch Charitable Foundation and the Sarah Scaife Foundation. Reason TV saw the opportunity to spread their libertarian perspective. “Part of the idea for Reason is we’re ideological and we’re trying to articulate and popularize our worldview and have some influence,” said a

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109. James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, (June 13, 2012), <http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-the-health-care-debate.html> [https://perma.cc/4PND-T63N].

110. Christopher Schmidt & Mark Rosen, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013); see also Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Case a Slippery Slope?* 75 L. & CONTEMP. PROBS. 75 (2012).

111. Schmidt & Rosen, *supra* note 110, at 114; Adam Gopnik, “The Broccoli Horrible”: A Culinary-Legal Dissent, NEW YORKER (June 28, 2012), <http://www.newyorker.com/news/news-desk/the-broccoli-horrible-a-culinary-legal-dissent> [https://perma.cc/VC3S-YPDW].

112. David B. Rivkin Jr., *Health Care Reform v. the Founders*, WALL ST. J., Sept. 29, 1993, at A19, *quoted in* Schmidt & Rosen, *supra* note 110, at 101.

113. See *infra* notes 123–24.

114. Stewart, *supra* note 109; Terence P. Jeffrey, *Can Obama and Congress Order You to Buy Broccoli?*, CNS NEWS (Oct. 21, 2009, 4:43 AM), <http://www.cnsnews.com/blog/terence-p-jeffrey/can-obama-and-congress-order-you-buy-broccoli> [https://perma.cc/XL3B-8CNW].

spokesman.<sup>115</sup> Their video featured Professor John Eastman, another expert for of the Federalist Society, criticizing the constitutionality of the law.<sup>116</sup>

That video resonated with conservative voters, and particularly Tea Party activists, but it remained largely within those circles until Judge Roger Vinson of the Northern District of Florida mentioned the hypothetical in his 2011 opinion invalidating the law. His opinion, called by some a “Tea Party Manifesto,”<sup>117</sup> emphasized that the hypothetical was “not an irrelevant and fanciful ‘parade of horrors,’” but was rather a matter of “serious concern[]” that was being “debated by legal scholars.”<sup>118</sup> Randy Barnett, Ilya Somin, and other prominent academics associated with the Federalist Society continued to defend the broccoli hypothetical in public and professional publications.<sup>119</sup> Soon thereafter, the hypothetical “quickly became the defining symbol for the debate,” wrote Chris Schmidt, a leading expert on the Tea Party and its constitutional arguments.<sup>120</sup> “The image of government forcing individuals to purchase, and perhaps even eat, their vegetables,” he argued, “served as a politically and culturally resonant way in

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115. ReasonTV, *Wheat, Weed, and ObamaCare: How the Commerce Clause Made Congress All-Powerful*, YOUTUBE (Aug. 25, 2010), [https://www.youtube.com/watch?v=6SDF5\\_Thqsk&feature=youtu.be](https://www.youtube.com/watch?v=6SDF5_Thqsk&feature=youtu.be) [<https://perma.cc/7H6L-SPJB>].

116. Stewart, *supra* note 109; ReasonTV, *supra* note 115.

117. Mark Hall, *Judge Vinson’s Tea Party Manifesto*, CONCURRING OPINIONS (Jan. 31, 2011), <https://concurringopinions.com/archives/2011/01/judge-vinsons-tea-party-manifesto.html> [<https://perma.cc/3GK5-PY26>]; see also Timothy Jost, *Analyzing Judge Vinson’s Opinion Invalidating the ACA*, HEALTH AFFS. BLOG (Feb. 1, 2011), <http://healthaffairs.org/blog/2011/02/01/analyzing-judge-vinsons-opinion-invalidating-the-aca> [<https://perma.cc/VY73-TWWW>] (“This is a radical decision. Judge Vinson has a clear vision of the limited federal government the founders intended that is very much in line with that espoused by the Tea Party Movement.”). Judge Vinson specifically mentioned the broccoli hypothetical, *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011), the first time a court had embraced the so-called broccoli horrible, see Schmidt & Rosen, *supra* note 110, at 106.

118. *Bondi*, 780 F. Supp. 2d at 1289.

119. Randy E. Barnett, *Congress Has No Power to Mandate Purchases*, BOS. GLOBE (Apr. 3, 2011), [http://archive.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2011/04/03/congress\\_has\\_no\\_power\\_to\\_mandate\\_purchases/?page=full](http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2011/04/03/congress_has_no_power_to_mandate_purchases/?page=full) [<https://perma.cc/2V7P-JYPE>]; Ilya Somin, *Why the Individual Health Care Mandate is Unconstitutional*, JURIST (May 4, 2011, 8:00 AM), <http://www.jurist.org/forum/2011/05/ilya-somin-mandate-is-unconstitutional.php> [<https://perma.cc/Q5E9-5NDA>]. See generally Somin, *supra* note 109.

120. Schmidt & Rosen, *supra* note 110, at 109 (quoting Stewart, *supra* note 109).

which to ensure that concerns with personal liberty remained at the forefront of the debate.”<sup>121</sup> It helped “convince broad swaths of the American public, in breathtakingly short order, that the law’s individual mandate posed a fundamental assault on personal liberty.”<sup>122</sup>

The broccoli horrible’s journey from conservative lawyers to conservative politics exemplifies both the influence of the conservative legal movement over the litigation against the ACA and the impact of that litigation on contemporary conservative politics. The lawsuits against the ACA were conceived, executed, and supported by members of the conservative legal movement. The constitutional argument against the bill originated with David Rivkin and Lee Casey, who are both experts for the Federalist Society and served in important legal roles in Republican administrations.<sup>123</sup> They wrote editorials in the *Washington Post* and the *Wall Street Journal* in the fall of 2009, months before the bill passed, criticizing the bill on constitutional grounds.<sup>124</sup> Soon after, leading academics associated with the conservative movement began to debate the constitutionality of the bill and craft legal arguments against it.<sup>125</sup> By December, those arguments were sufficiently developed for law professors Ilya Somin and Jonathan Adler to deny Senator Max Baucus’s claim that there was a consensus among experts that the ACA was constitutional.<sup>126</sup> By the time the bill

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121. *Id.* at 114.

122. *Id.*

123. See David B. Rivkin Jr., FEDERALIST SOC’Y, <http://www.fed-soc.org/experts/detail/david-b-rivkin-jr> [https://perma.cc/K9BL-GEBP] (last accessed May 19, 2017); Lee A. Casey, FEDERALIST SOC’Y, <http://www.fed-soc.org/experts/detail/lee-a-casey> [https://perma.cc/2B8W-DNMY] (last accessed May 19, 2017).

124. See David B. Rivkin, Jr. & Lee A. Casey, *Illegal Health Reform*, WASH. POST, Aug. 22, 2009, at A15; David B. Rivkin, Jr. & Lee A. Casey, *Mandatory Insurance is Unconstitutional*, WALL ST. J., Sept. 18, 2009, at A23.

125. See Randy Barnett, *Healthcare: Is “Mandatory Insurance” Unconstitutional?*, POLITICO (Sept. 18, 2009), [http://www.politico.com/arena/perm/Randy\\_Barnett\\_8256A4EF-01E6-4207-B4E8-C761F2FDB5BF.html](http://www.politico.com/arena/perm/Randy_Barnett_8256A4EF-01E6-4207-B4E8-C761F2FDB5BF.html) [https://perma.cc/2QAL-87V3]; Stephen B. Presser, *Law Prof.: Expect SCOTUS to Kill Obamacare*, NEWSMAX (Oct. 5, 2011), <http://www.newsmax.com/US/SCOTUS-Obamacare-unconstitutional-mandate/2011/10/05/id/413429> [https://perma.cc/6PTK-LKQ2].

126. Jonathan H. Adler, *The Constitutionality of an Individual Mandate: A Reply to Senator Baucus*, VOLOKH CONSPIRACY (Dec. 23, 2009), reprinted in *A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE 20* (Trevon Burrus ed., 2013); Ilya Somin, *The Myth of an Expert Consensus on the Constitutionality of an Individual Health Insurance Mandate*, VOLOKH CONSPIRACY (Dec. 23, 2009), reprinted in *A CONSPIRACY AGAINST OBAMACARE*, *supra*, at 22. For post-

was ready for the President's signature, those arguments were strong enough for the Attorneys General from Florida, Virginia, and South Carolina to pledge to bring a constitutional challenge to the bill.<sup>127</sup>

Some of the same conservative lawyers who helped generate the arguments against the law, including Randy Barnett, Ilya Somin, and David Rivkin, then took part in litigation which was much more successful than many expected. By October of 2010, two district court judges had denied motions to dismiss those constitutional challenges,<sup>128</sup> one of which would reach the Supreme Court as *NFIB v. Sebelius*.<sup>129</sup> There, Rivkin, Somin, Barnett, and others associated with the Federalist Society and the conservative legal network participated in drafting briefs for the parties and amici.<sup>130</sup> That first suit, of course, upheld the law,<sup>131</sup> but legal challenges continued, again supported by lawyers associated with the Federalist Society and the conservative legal movement.

That litigation both inspired Tea Party activists and legitimated the Tea Party for mainstream conservatives. The litigation against the ACA and the support it received from respected academic commentators were constant companions to the Tea Party, as it grew from a small, grass-roots protest move-

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enactment analysis of the ACA's constitutionality, see Ilya Somin, *Why The Health Care Reform Law is Unconstitutional*, CNN (Mar. 26, 2012, 3:56 PM), <http://www.cnn.com/2012/03/26/opinion/somin-health-supremes> [<https://perma.cc/M8FW-VX2P>].

127. See Randy E. Barnett, *Is Health-Care Reform Constitutional?*, WASH. POST (Mar. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031901470.html> [<https://perma.cc/7ZUA-R7JA>].

128. See *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N. D. Fla. 2010) (Vinson, J.); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010) (Hudson, J.).

129. *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011), and *aff'd in part, rev'd in part sub nom. Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

130. Brief of the Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Respondents (Individual Mandate Issue), *U.S. Dep't of Health & Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398), 2012 WL 1680857; Brief for Private Respondents on the Individual Mandate, *U.S. Dep't of Health & Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398), 2012 WL 379586; Reply Brief for State Petitioners On Severability, *NFIB*, 567 U.S. 519 (2012) (Nos. 11-393 & 11-400) 2012 WL 888995.

131. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

ment to an important and institutionalized part of the Republican Party. To be sure, the Tea Party emerged before the ACA passed,<sup>132</sup> but the contest over the law's constitutionality was a central concern of the Tea Party. A core motivating story for Tea Party members was Speaker Nancy Pelosi's dismissal of a question about the constitutionality of the act.<sup>133</sup> Her response, "Are you serious? Are you serious?" was woven into a Tea Party narrative, along with an assumption that the legislation was clearly unconstitutional<sup>134</sup> and that President Obama had a particular irreverence for the Constitution.<sup>135</sup> "Of the many issues around which the Tea Party has mobilized," Chris Schmidt wrote, "none has been so effective a rallying cry as opposition to the health care law that President Obama signed into law."<sup>136</sup>

As the litigation continued, the Tea Party's claim that the ACA was unconstitutional came to be embraced by mainstream Republicans. When the bill was being considered in Congress, policy arguments were the core ground of opposition.<sup>137</sup> Congress held forty-four hearings on the ACA, none of which were aimed at its constitutionality.<sup>138</sup> But by the time the President was preparing to sign the bill, the GOP had begun to embrace what had been a fringe argument. Since its passage, opposition to the ACA on constitutional grounds has been a core Republican commitment. Not only did the GOP-led house vote more than 50 times to eliminate or mortally damage the law,<sup>139</sup> "Repeal and Replace" is currently a top legislative priority of both the current President and the Republican Party more broadly.<sup>140</sup> Throughout this period of intense opposition,

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132. See generally Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193 (2011).

133. *Id.* at 233–34.

134. THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 61 (2012).

135. *Id.* at 52–53.

136. Schmidt, *supra* note 132, at 237.

137. *Id.*

138. Neal Devins, *Party Polarization and Judicial Review: Lessons from the Affordable Care Act*, 106 NW. U. L. REV. 1821, 1828 (2012).

139. Jennifer Steinhauer, *House Bill Undoing Health Law Makes It To Obama*, N.Y. TIMES (Jan. 7, 2016), [https://www.nytimes.com/2016/01/07/us/politics/house-votes-to-send-bill-to-repeal-health-law-to-obamas-desk.html?\\_r=0](https://www.nytimes.com/2016/01/07/us/politics/house-votes-to-send-bill-to-repeal-health-law-to-obamas-desk.html?_r=0) [https://perma.cc/M3MU-PEVU].

140. See, e.g., Thomas Kaplan & Robert Pear, *House Passes Measure to Repeal and Replace the Affordable Care Act*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/2017/05/04/us/politics/house-passes-repeal-replace-aca.html>.

constitutional arguments have been cited regularly by GOP leaders as grounds for opposition.<sup>141</sup> The Party's response to the outcome in *NFIB* is further evidence of the Party's embrace of those constitutional arguments.<sup>142</sup>

By legitimating the Tea Party and its arguments to the larger GOP, the lawsuits against the ACA have helped reshape the party itself. The Tea Party originated as a fringe grassroots movement, but quickly came to transform the contemporary GOP. The Tea Party began with a call by a CNBC television reporter for a series of protests to oppose bailouts of the auto and banking industries, the economic stimulus bill, and other efforts to stem the tide of the recession.<sup>143</sup> That call led to a large rally in Washington, D.C., in September of 2009, by which time the grassroots organizations had won the support of conservative media sources like Fox News,<sup>144</sup> and major conservative public policy organizations, including FreedomWorks and Americans for Prosperity, hoped the Tea Party would advance their agenda of limited government and lower taxes.<sup>145</sup> Together, that network aimed to push the Republican Party in a more conservative direction through electoral mobilization and legislative action. They were especially active in the 2010 elections,<sup>146</sup> for example, and the Congressional Tea Party Caucus has worked hard to push their colleagues to the right.<sup>147</sup>

These actions helped bring the GOP back to power and pushed it to the right. When the Tea Party arose, the Republican Party was in a poor position. Following Barack Obama's

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com/2017/05/04/us/politics/health-care-bill-vote.html [https://perma.cc/ZPX3-4AHQ].

141. Jesse J. Holland & Mark Sherman, *Supreme Court Will Hear Health Care Case*, MPR NEWS (Nov. 14, 2011), <http://www.mprnews.org/story/2011/11/14/supreme-court-health-care-case> [https://perma.cc/7W2Q-WUA9].

142. See Rachel Roubein & Caitlin Owens, *How the Obamacare Decision Reinforces the GOP's 2016 Calculus*, ATLANTIC (June 25, 2015), <https://www.theatlantic.com/politics/archive/2015/06/how-the-obamacare-decision-reinforces-the-gops-2016-calculus/452058> [https://perma.cc/B8HG-SCWA].

143. See SKOCPOL & WILLIAMSON, *supra* note 134, at 156.

144. *Id.* at 8.

145. *Id.* at 9–10.

146. Schmidt, *supra* note 132, at 227–28.

147. SKOCPOL & WILLIAMSON, *supra* note 134, at 9. The Freedom Caucus in the House is the primary group responsible for pushing forward what once were identified as Tea Party issues. Katy O'Donnell, *The Right Recalibrates*, ROLL CALL (Mar. 9, 2015, 6:15 AM), <http://www.rollcall.com/news/The-Right-Recalibrates-240566-1.html> [https://perma.cc/65PN-U5RL].

election in 2008, Democratic control of both houses of Congress and the presidency had led pundits to ask if there would be a permanent Democratic majority.<sup>148</sup> The Republican Party's brand was heavily tainted. The President's stimulus plan produced some opposition by Republicans, but this opposition was hardly an effective long-term tool to rebuild the party. Tea Party conservatism, however, provided a "perfect rallying point," wrote Tea Party experts Theda Skocpol and Vanessa Williamson.<sup>149</sup> Following its warm embrace of the Tea Party movement, the GOP had roared back to life. In the 2010 election, it took 63 seats in the House and six seats in the Senate.<sup>150</sup> Although it is unclear how much those electoral victories were driven by Tea Party supporters going to the polls, or by Tea Party endorsements of particular candidates,<sup>151</sup> the movement, at the very least, provided a marketing opportunity for conservatives that neither President Bush nor Senator John McCain could provide. As Skocpol and Williamson wrote, "tea parties and their adoring media surely helped to re-inspire grassroots conservatives, set a national agenda for the election, and claim a Republican wave election as a vindication for a particular, extreme conservative ideology."<sup>152</sup>

Those electoral victories were not immediately followed by further victories in 2012, but Tea Party organizations continue to have important influence. Their efforts may have cost the Republican Party seats in 2012 by producing the nominations of Christine O'Donnell in Delaware, Sharron Angle in Nevada, and Ken Buck in Colorado.<sup>153</sup> But those nominations pushed Republican politicians rightward to ward off primary challenges by more conservative candidates. The Freedom Caucus, which is heavily influenced by the network of voters, donors,

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148. Nate Cohn, *The 'Emerging Democratic Majority' Isn't Assured—Unless the GOP Refuses to Change*, NEW REPUBLIC (Apr. 10, 2013), <https://newrepublic.com/article/112870/emerging-democratic-majority-isnt-certainty-gop-change> [https://perma.cc/67LU-RYTT].

149. SKOCPOL & WILLIAMSON, *supra* note 134, at 7.

150. Steve Peoples, *Final House Race Decided; GOP Net Gain: 63 Seats*, ROLL CALL (Dec. 8, 2010, 4:05 AM), <http://www.rollcall.com/news/-201279-1.html> [https://perma.cc/ML4N-HKYR]; *Barack Obama: Campaigns and Elections*, MILLER CTR., <https://millercenter.org/president/obama/campaigns-and-elections> [https://perma.cc/Q8K6-R592] (last accessed May 19, 2017).

151. SKOCPOL & WILLIAMSON, *supra* note 134, at 159.

152. *Id.* at 163.

153. *Id.* at 167.

and public policy organizations that were brought together by the Tea Party, has also pushed the Republican House and Senate leadership to the right.<sup>154</sup> Although it is hard to know with certainty, there do seem to be important continuities between the Tea Party movement and the campaign of the current President. Certainly, the tone of the Tea Party, their deep suspicion of President Obama, their opposition to immigration, and even their calls to “take our country back” echoed in his campaign.<sup>155</sup> The Tea Party name has fallen out of favor, but the movement has had an important influence on American politics.<sup>156</sup>

That influence was, in important ways, possible because of the conservative legal movement.<sup>157</sup> Lawyers closely associated with the conservative legal movement helped produce and execute the lawsuits against the ACA. That lawsuit generated hope among Tea Party advocates that change was possible and helped legitimate not just legal arguments but an approach to governing that had begun as off-the-wall claims of a fringe political movement. When the lawsuit found success in the courts, first at the district court level,<sup>158</sup> then at the circuit court,<sup>159</sup> then at the Supreme Court,<sup>160</sup> both the legal arguments and that approach to governing gained even broader appeal, ultimately reshaping the GOP. Without David Rivkin, Randy Barnett, Ilya Somin, and others, the contemporary conservative movement and recent political history would have been quite different.

#### IV. BEYOND RIGHTS ON THE RIGHT

Turning the history of the conservative legal movement on its head by showing that lawyers in the conservative legal movement

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154. O'Donnell, *supra* note 147.

155. See SKOCPOL & WILLIAMSON, *supra* note 134, at 209, 216; Elizabeth A. Yates, *How the Tea Party Learned to Love Donald Trump*, WASH. POST (Dec. 1, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/01/how-the-tea-party-learned-to-love-donald-trump/?utm\\_term=.25fe710cd880](https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/01/how-the-tea-party-learned-to-love-donald-trump/?utm_term=.25fe710cd880) [<https://perma.cc/RRE9-7VZ9>].

156. SKOCPOL & WILLIAMSON, *supra* note 134, at 208.

157. DECKER, *supra* note 25, at 211–17.

158. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1295 (N.D. Fla. 2011).

159. See *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1285–86 (11th Cir. 2011).

160. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012).

not only responded to the larger conservative coalition, but also pushed it towards an approach to governing that emphasized rights claims and judicial action, is an important insight. This most arresting of Decker's claims may not yet be fully proven, but it is full of promise, and not just because of how it contributes to our understanding of conservatives' embrace of rights. Decker's approach might also help revise our understanding of the conservative movement as a whole. The best pathway towards that broader revision might combine Decker's emphasis on the agency of lawyers with two other research projects: one which has elucidated how lawyers can leverage their legal expertise into political influence, and another which has considered how law and legal institutions have contributed to the emergence and success of the modern conservative movement.

While Decker's focus on the agency of conservative lawyers is new, he is not alone in arguing that law can shape, as well as respond to, political and social structures. Leading scholars have shown how litigation and legal argument has shaped liberal and progressive politics.<sup>161</sup> More recently, some scholars have begun to argue that law and legal argument has provided resources to create and support the contemporary conservative coalition. One example is Ken Kersch's claim that a common commitment to constitutionalism helped forge the post-war conservative movement.<sup>162</sup> The conservative movement was and remains an alliance between once scattered groups of traditionalists, libertarians, neo-conservatives, free-marketers, religious voters, and anti-communist hawks.<sup>163</sup> Those groups disagreed over fundamental issues like America's proper role in the world, the state's authority to enforce morality, and a host of other questions.<sup>164</sup> Such disagreements did not, however, prevent them from forming a unified movement in part, Kersch claims, because they all believed

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161. See, e.g., TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011); RISA GOLUBOFF, *VAGRANT NATION* (2016); KLARMAN, *supra* note 101; JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (2004).

162. See Ken I. Kersch, *Beyond Originalism: Constitutional Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229 (2011); Ken I. Kersch, *Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in National Review, 1955–1980*, 25 STUD. AM. POL. DEV. 86 (2011).

163. See generally GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945* (2006).

164. Kersch, *Ecumenicalism through Constitutionalism*, *supra* note 162, at 89–93.

the American constitutional tradition should play a central role in contemporary politics.<sup>165</sup> They did not agree on the implications of that tradition, but their commitment to its central role in our politics helped a diverse group of interests and ideologies forged a powerful political movement.<sup>166</sup>

Reuel Schiller has shown how law paved the way for the rise of that conservative coalition by weakening its primary rival, the Democratic New Deal coalition. The law, Schiller argues, exacerbated divisions within two core parts of that coalition: African Americans and the labor movement.<sup>167</sup> A wide variety of economic, institutional, and intellectual developments caused those divisions.<sup>168</sup> But law, he insists, also was central.<sup>169</sup> Schiller showed that the legal regime that protected the interests of unions, labor law, and the regime that came to protect African Americans, employment law and other anti-discrimination law, were opposed in both ideology and institutional structure.<sup>170</sup> While labor law was pluralist, majoritarian, and supportive of bureaucratic governance, anti-discrimination law was anti-majoritarian, critical of pluralism, and supportive of judicial involvement.<sup>171</sup> As African Americans, frustrated by the failure of labor to include them and address their concerns, turned away from labor law, white workers grew increasingly frustrated with what they saw as African Americans undermining the strength of the labor movement.<sup>172</sup> By exacerbating that conflict, law helped weaken the New Deal coalition in ways that opened the door for the rise of conservatism.<sup>173</sup>

Schiller, and Kersch do not deny the important impact of political concerns on the law, but together with Decker, they show how legal arguments and ideas have shaped the growth and success of conservative movement. What Decker adds is an emphasis on the lawyers themselves. By focusing on the ways lawyers can parley that legal expertise into political influence

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165. *Id.* at 87.

166. *Id.* at 87, 89–93.

167. REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* (2015).

168. *Id.* at 3–4.

169. *Id.* at 3.

170. *Id.*

171. *Id.* at 7–8.

172. *Id.* at 9–12.

173. *See id.* at 11–12.

outside the courts, Decker also builds on recent scholarship that has emphasized the influence lawyers have had on the emergence and development of the administrative state.

Exemplary is Dan Ernst's study of the central role lawyers played in shaping the modern administrative state at its origins.<sup>174</sup> The United States has an administrative state that is both largely free of judicial intervention, he notes, but still heavily governed by legalistic processes and norms.<sup>175</sup> It has that character, he claims, because lawyers inside the government generated political influence by leveraging the practical reality that the administrative state needed approval from courts.<sup>176</sup> Lawyers then used that influence to create an administrative state that receives largely deferential review from the judiciary, but which also follows a host of legalistic procedures and norms that lawyers themselves valued.<sup>177</sup> Sophia Lee, Karen Tani, and others have applied similar insights to show how lawyers leveraged their constitutional expertise into policy-making authority within those agencies after their legitimacy was established.<sup>178</sup>

Decker's work offers a model of how these different approaches can be pulled together with our growing knowledge of the conservative legal movement to revise our understanding of the conservative movement more broadly. In helping us to see that lawyers can leverage their legal expertise into influence over political parties and other political institutions whose configurations do much to determine the outcome of political contests, Decker's work does not deny that political concerns influence the way lawyers develop and deploy legal arguments. But his work does suggest that conservative lawyers have had a special influence on American politics. Their agency, like that of politically involved lawyers more broadly, justifies—even requires—the kind of careful attention Decker has paid to understanding why those lawyers have made the choices they made. If we are to understand how the modern

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174. DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2016).

175. *Id.* at 5.

176. *Id.* at 5–6.

177. *Id.* at 5.

178. SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014); KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972* (2016).

conservative movement defined itself, achieved its successes, and found its limits, we need to understand its lawyers.

There are myriad areas that could benefit from such an investigation. We could certainly benefit from applying Decker's approach to the relationship between gun rights advocates, Second Amendment litigation, and the modern Republican Party. Originalism, too, might benefit from being seen as more than an academic enterprise or a tool of conservative political actors.<sup>179</sup> We might better understand the contemporary conservative movement if we consider how the Republican Party's embrace of originalism has not only advanced their interests,<sup>180</sup> but also shaped their goals. We know, for example, that many who are now conservatives were unwilling to fully embrace conservatism until it received the approval of Raoul Berger, Robert Bork, and other leading academics.<sup>181</sup> We might consider whether a similar influence has been exercised by the conservative lawyers who have helped oversee originalism's development.

## V. CONCLUSION

*NFIB v. Sebelius* was grounded in structural federalism, *King v. Burwell*<sup>182</sup> focused on technical questions of statutory interpretation, and neither litigation succeeded in their primary goals. They nevertheless had an enormous impact on American politics. They produced a conservative critique of the Affordable Care Act in court, in Congress, in Tea Party rallies, and elsewhere that emphasized the Affordable Care Act's interference with the liberty of individual Americans and the necessity for judicial action to protect that liberty. Ubiquitous broccoli horrors highlighted the critique. That emphasis on individual rights and the need for an active judiciary surprised no one in a political and legal culture which had seen conservative lawyers, judges, and politicians follow similar scripts in the debates surrounding *Kelo v. City of New*

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179. Logan E. Sawyer, III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. (forthcoming 2017).

180. Post & Siegel, *supra* note 84.

181. O'NEILL, *supra* note 14; Kersch, *Ecumenicalism through Constitutionalism*, *supra* note 162.

182. 135 S. Ct. 2480 (2015).

*London*,<sup>183</sup> *Citizens United v. FEC*,<sup>184</sup> *District of Columbia v. Heller*,<sup>185</sup> and *Burwell v. Hobby Lobby Stores, Inc.*<sup>186</sup>

Jefferson Decker's *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* first reminds us that not too long ago these conservative appeals to courts, litigation, and individual rights would have been surprising indeed.<sup>187</sup> It then offers a striking and original explanation for the transformation. While most scholars have seen the loose network of conservative lawyers, academics, and judges connected mainly through the Federalist Society as a tool of conservative political interests,<sup>188</sup> Decker argues it was those conservative lawyers who redefined conservatism for the twenty-first century. More than tools, the lawyers were leaders. Their experience in the American West and their frustrations with the Reagan administration pushed them to embrace a new understanding of what it means to be a conservative, an understanding that is now shared by the larger conservative movement and much of the Republican Party.

As with any claim so original, Decker will hardly have the final word, but he has illuminated the vital role lawyers played in shaping the modern conservative movement. That insight is a significant contribution to an already sophisticated literature. It is also remarkably timely. His work should impress upon contemporary lawyers the significant opportunity they have to influence the nation's political future. In doing so, it might also remind them of their corresponding duty to use that influence wisely. Given the convulsions conservatism is currently undergoing—convulsions that have included challenges to long established political, legal, and constitutional norms—now is a particularly appropriate time for such a reminder.

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183. 545 U.S. 469 (2005).

184. 558 U.S. 310 (2010).

185. 554 U.S. 570 (2008).

186. 134 S. Ct. 2751 (2014).

187. DECKER, *supra* note 25.

188. HOLLIS-BRUSKY, *supra* note 5; TELES, *supra* note 12; Comment, *supra* note 86.

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