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"Clocks Must Always Be Turned Back": *Brown v. Board of Education* and the Racial Origins of Constitutional Originalism

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The Republican Party has adopted constitutional "originalism" as its touchstone. Existing accounts of this development tell either a teleological story, with legal academics as the progenitors, or deracialized accounts of conservatives arguing first principles. Exploiting untapped archival data, this paper argues otherwise. Empirically, the paper shows that the realigning GOP's originalism grew directly out of political resistance to Brown v. Board of Education *by conservative governing elites, intellectuals, and activists in the 1950s and 1960s. Building on this updated empirical understanding, the theoretical claim is that ideologically charged elite legal academics and attorneys in Departments of Justice serve more of a* legitimating *rather than an* originating *role for American constitutional politics upon a long coalition's electoral success. Finally, by showing the importance of race to constitutional conservatism's development, this article posits that the received understanding of a "three-corner stool" of social, economic, and foreign policy conservatism needs revision.*

After oral argument in December 1952, Justice Felix Frankfurter became increasingly concerned about how and when the Supreme Court would resolve the consolidated school segregation cases now known as *Brown v. Board of Education.* As Alexander Bickel, his then law clerk and future Yale law professor, recalled, Frankfurter's "main concern during the '52 term was to prevent a premature vote" on *Brown.* The Court, Frankfurter worried, might speak with a fractured and thus institutionally delegitimizing voice.[1] As a delaying tactic, then, at the justice's behest the Court asked the parties and the Eisenhower administration to brief on reargument a historical question: did the framers of the Fourteenth Amendment intend or contemplate school desegregation to fall within the scope of the equal protection clause? The parties responded with a deep excavation of Reconstruction era constitutional history. The State of Kansas's brief—one of the consolidated cases (Linda Brown's) originated in Topeka—insisted the "intent of the framers" and the "framers' intent" did not necessitate desegregation. The NAACP's brief argued the "separate but equal" standard set forth in *Plessy v. Ferguson* (1896) ran afoul of "the intent of the framers." Other litigants argued the amendment's "original intent was to abolish segregation." The Eisenhower Department of Justice also worked to divine the historical actors' intent while substantively coming down on the side of desegregation.[2]

But all the historical advocacy the Court demanded seemed for naught when Chief Justice Earl Warren's opinion dismissed the idea of "turn[ing] back the clock to 1868." Warren further found the parties' cache of historical evidence regarding the original intent of the Fourteenth Amendment "inconclusive." Instead, relying in part on "modern authority"—Footnote 11 cited six social science articles and Gunnar Myrdal's influential *An American Dilemma* (1944)—the Warren Court held segregated schools violated the Fourteenth Amendment's equal protection clause.

It is well known that Southern conservatives were deeply shaken by *Brown* (Bloch Rubin and Elinson 2018). But stiff resistance to *Brown* was hardly confined to the South. The conservative *movement*—prominently, the high-brow conservatism of *National Review* (NR)—viewed *Brown* as an affront to their developing ideology (Noel 2013). The intellectual core of the resistance was a turn to constitutional history that first privileged revivified antebellum constitutional theories of interposition and nullification.[3] When Virginia's massive resisters submitted to token public school integration, NR was disappointed: "With Mr. Kilpatrick, we'd have preferred a bolder constitutional approach in the first instance, i.e., interposition" (1958b, 4). "If the American people and their representative institutions will passively accept *Brown v. Board of Education*," the conservative intellectuals warned, "they apparently will accept anything" (NR 1957b, 5). In short, these arguments were within the mainstream, not the fringes, of intellectual conservative thought post-*Brown* (Lowndes 2008).

But after President Eisenhower sent federal troops to Little Rock's Central High School and JFK's

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[1] Richard Kluger, "Interview with Alexander Bickel," Box 1, Folder Alexander M. Bickel, *Brown v. Board of Education* Collection, Yale University.

[2] Brief for the State of Kansas on Reargument, 1953 U.S. Supreme Court Briefs LEXIS 3, 16; Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument, 1953 U.S. Supreme Court Briefs LEXIS 3, 105; *Gebhart v. Belton*, 1953 U.S. Supreme Court Briefs LEXIS 9, 34; *Brown v. Board of Education*, 1953 U.S. Supreme Court Briefs LEXIS 2, 77; Supplemental Brief for the United States on Reargument, 1953 U.S. Supreme Court Briefs LEXIS 4.

[3] Interposition envisions state constitutional decision makers acting to stop the implementation of federal law in their states. Nullification presupposes that each state is sovereign and thus the final arbiter of constitutionality within state lines.

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victorious 1962 "Battle of Oxford" with Governor Ross Barnett, most conservatives abandoned antebellum constitutional arguments and angry schoolhouse-cum-campus protests. The valence of these attacks was too obviously racialized. Thus, the burgeoning coalition of Southern Democrats and conservative Republicans turned to a proactive project of constitutional history purporting to demonstrate what Warren's opinion did not: the original intent of the Fourteenth Amendment. Warren's strategy of writing an opinion with the legal analysis and authority relegated to the footnotes such that it would be "readable by the lay public, nonrhetorical, unemotional and, above all, non-accusatory," was quickly exploited.[4] As the influential conservative journalist James Kilpatrick retorted to Warren in a letter to William F. Buckley, in "constitutional cases clocks must always be turned back"—we must take "the Constitution as we find it."[5]

Relying on untapped archival and primary sources, this article makes two claims. Empirically, it argues that scholars have not sufficiently reckoned with the racial politics of postwar constitutional conservatism. This is surprising. The development of constitutional originalism was part and parcel of the parties' secular realignment on race as Southern conservatives joined coalitional forces with movement conservatives across the nation (Lowndes 2008; Schickler 2016). The archival and primary source evidence delineated here shows that non-legal actors set upon the *intent construct* as an ostensibly non-racialized first constitutional principle to delegitimize *Brown.* The intent construct is defined here as the invocation of "framer's" or "original" intent—the movement cohered around "original" intent in the Reagan era—as the foundational commitment of conservative constitutionalism. Invoking the intent construct, movement conservatives would wield it as a sword against *Brown* and then the whole of the Warren Court's programmatic liberalism. Thus, *Brown* also spurred *political originalism.* Political originalism was the collective work of, among many others, Barry Goldwater, *National Review*, James Kilpatrick, and conservative media impresarios Dan Smoot and Clarence Manion. It was *these* actors and institutions who first devised the content of what conservative legal elites in the Department of Justice and legal academy would call "originalism." Parallel to legal elites' legitimization of originalism as a jurisprudential and academic theory, it was institutionalized by the GOP in the Supreme Court, Departments of Justice, Solicitors General, lower federal and state court judges, presidents and agency heads, and federal and state legislators. Originalism has been invoked in every Republican Party platform from 1992 to 2016 (save for 2004), and the "original meaning" of the Constitution and the "original intent" of statutes as interpretational command is referenced at least five times in the 2016 GOP platform (GOP Platform 2016, 10, 21, 35). It, too, serves as the de facto official theory of the Federalist Society, conservative academics, and the elite conservative bar (Hollis-Brusky 2015; Teles 2009).[6] Even with the 2016 death of Justice Scalia, Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett all currently identify as originalists.

The empirics here are built on 14 different archival collections, particularly the American Liberty League, and Buckley's, Bork's, and Kilpatrick's papers; a review of every issue of *Constitutional Review* from 1917–1929; the *Wall Street Journal* from 1923–1938; *National Review* from 1955–1971; academic law reviews; and little used primary sources. This is the empirical foundation for an "observable implications" methodological approach. Geddes gets to the pith of this approach: "If this were true, what would I see in the real world?" (2003, 38–39). To that end, in order to determine the potential effect of *Brown* on the development of constitutional conservatism, we need to first understand the content of the ideology prior to 1954. The first empirical section is devoted to that task. The article then takes up the development of political originalism in the years after *Brown.* Finally, the paper turns to legal academia to better grasp how first a non-elite law professor, and then Robert Bork, began to develop the content of academic originalism. This was the nascent originalism that was institutionalized in Reagan's Department of Justice. Indeed, as Attorney General Edwin Meese noted in recounting his intellectual influences, "On the originalism point, the most influential person initially was Robert Bork, his Indiana Law Journal piece in 1971."[7]

These observable implications lead inductively to the theoretical claim: while justices and judges play an important part in constitutional politics, their roles recede in some importance once we appreciate that constitutional ideologies (like originalism) are first created by a combination of identifiably influential interest groups, governing elites, intellectuals, and engaged citizens. The professoriate in elite law schools, the elite bar, and Departments of Justice serve more of a *legitimating* rather than an *originating* role for the content of constitutional politics upon electoral success. Put differently, the basic political claims and anxieties of a coalition are first worked out, *then* legal elites complete the bricolage by rewriting a successful coalition's constitutional vision in the policy language of law.[8]

This has implications for scholars of judicial politics, constitutional law, and postwar conservatism and party politics. Much public law scholarship focuses on a circumscribed set of institutions (the Supreme Court

[4] Earl Warren, Memorandum, May 5, 1954, Box 571, Folder 3, Earl Warren Papers, Library of Congress, Washington, D.C.
[5] Kilpatrick to Buckley, January 6, 1957, Part I: Box 6, Folder James J. Kilpatrick (1958), William F. Buckley Papers, Manuscripts and Archives, Yale University.

[6] Most legal academics and judges now couch originalism as a search for the original meaning rather than intent. Other than being a source of endless debate in the law reviews, there is no political distinction—and little theoretical payoff—between the two (Gienapp, Forthcoming).
[7] Author interview with Edwin Meese, July 11, 2019.
[8] Once there is a working ideological majority on the Court, the justices will do as much as they can to expand the rights of those groups with which they are ideologically sympathetic—or beat back encroachments.

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and interbranch relations) and ideas (the relative conservatism or liberalism of judicial votes, presidents, and senators). Indeed, for public law scholars, ideas about constitutional politics are many times simply *assumed* to originate with legal actors. In no small part this is due to the relegation of extra-judicial institutions to "political context" rather than sustained scholarly attention (Frymer 2008, 781). This cabined focus also helps explain why even the most sophisticated quantitative models of judicial behavior do not see a "distinct preference dimension" for race in the postwar era (Clark 2019, 137). The implications for legal academics and constitutional lawyers reach deeper. Their collective debate about constitutional interpretation has been premised on the faulty notions that originalism has no racial valence and is an apolitical theory of constitutional interpretation. Finally, despite much scholarship to the contrary (e.g., Lowndes 2008), some scholars still insist that race played little role in the development of postwar conservatism and Republican party politics. As a recent influential political science account argues, "The building of the modern conservative movement in the 1950s was not primarily motivated by racial animus, and its battles with moderates over control of the Republican Party did not principally involve racial disagreements" (Grossman and Hopkins 2016, 126).

The conclusion explores the limitations of this case study and potential paths for future research.

THEORIES OF POSTWAR CONSTITUTIONAL CONSERVATISM

Political scientists, historians, and academic lawyers have developed distinct but overlapping accounts of postwar constitutional conservatism. Legal academics—many of whom were clerks to conservative justices or Reagan and Bush Departments of Justice alumni (Barnett and Bernick 2018, 9–10; Hollis-Brusky 2015)—have a now standard account. Yale law professor Robert Bork's 1971 *Indiana Law Journal* article and Harvard law professor Raoul Berger's *Government by Judiciary* (1977) constituted "Proto-originalism" (Solum 2013, 462). On this account, Bork and Berger laid the theoretical groundwork for (conservative) law clerks and government attorneys, once they migrated to the law schools, to devise "originalism." Today, originalists in the legal academy "hold that: (1) the meaning of a provision of the Constitution was fixed at the time it was enacted (the 'Fixation Thesis'); and (2) that fixed meaning ought to constrain constitutional decisionmakers today (the 'Constraint Principle')" (Barnett and Bernick 2018, 3–4).

This differs little from Bork's 1971 academic talk-turned-journal article. Bork grounded his vision of constitutional law in text, history, and the intent construct. "The judge," he insisted, "must stick close to text and history, and their fair implications, and not construct new rights." Highlighting the centrality of the "framer's intent," Bork argued that judges must rely on what "the men who put the amendment in the Constitution intended." A judge could not be "constrained" if he is "mak[ing] up his own principles." To properly interpret the Constitution, he continued, we must "take from the document [the] rather specific values that text or history" reveal (Bork 1971, 3, 8, 13–18). Bork also argued that the result in *Brown* could be saved from the Warren Court. But a new "a purely juridical rule" would have to be substituted for Warren's "consideration of psychological test results." According to this "juridical rule," the amendment was "intended to enforce a core idea of [B]lack equality against governmental discrimination," but little else. The Court "cannot write the detailed code the framers omitted, requiring equality in [one] case but not in another" (Bork 1971, 14, 15, 18). However, if *Brown* could be saved, the "principle of one man, one vote" could not—that principle ran "counter to the text of the fourteenth amendment" and "the history surrounding its adoption and ratification" (Bork 1971, 18).

Six years after Bork's article, Berger published the most influential of the "proto-originalism" texts: *Government by Judiciary*. A thick polemic deploying a significant amount of historical evidence, the book excited movement conservatives (Buckley 1977, 1320; Kilpatrick 1977, 13). Berger's book purported to demonstrate the Warren Court's infidelity to the "original intention" of the Fourteenth Amendment. Professing to find segregation problematic, the book nevertheless attacked *Brown* repeatedly (e.g., "a prime example of how the Justices imposed their will on the people") and found flaw in "one man, one vote" (Berger 1977, 8, 328). Berger appeared on Buckley's PBS show *Firing Line* to promote his book. Suggesting the influence of Berger's "original intent" formulation Buckley prompted Berger, "You make a great deal in your book on the whole question of 'original intention.'" Berger responded by insisting that "the intention of the [Fourteenth Amendment's] framers" was "to create separate schools for [Black Americans]." Berger did not argue that *Brown* must be overturned: "I think—particularly talking about segregation—the expectations have been aroused in the breasts of the [B]lacks," Berger surmised, "and legitimately because segregation is a blight, to frustrate them now, after all that's gone before it seems grossly more than impractical than to say you've got to leave well enough alone" (*Firing Line* 1977).

The only sustained historical account of originalism tracks the intellectual history set forth in the law reviews. Asserting Bork's 1971 article well illustrates "the core originalist proposition," one historian argues that "the new conservative movement opened space for originalism to have influence again" (O'Neill 2005, 10, 23). On this account, Reagan's 1980 election simply allowed originalism to return to its rightful theoretical pride of place after being displaced by New Deal and Warren Court era legal liberalism.

These accounts are empirically narrow. The history of originalism presented is largely limited to debates internal to the legal academy, the judiciary, and elite government lawyers. Moreover, as late as December 1984, Bork himself did not recognize the existence of

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"originalism." Then-Judge Bork gave a speech at the American Enterprise Institute one month after Reagan's reelection. "Now we need theory," Bork told his think tank audience, "theory that relates the framers' values to today's world… . It is necessary to establish the proposition that the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed" (Bork 1984). This highlights the conceptual difficulty in reading back into American constitutional development a "theory" of originalism. Playing fast and loose with concepts and their application to historical actors who would have ill-understood such labels distorts constitutional development (Skinner 2002). Indeed, as Gillman shows, it did not occur to modern constitutional conservatives to resort to an intent-based "theory"—that is, originalism as an "ism"—until faced with the dominance of Progressive and New Deal divined living constitutionalism (Gillman 1994; 1997).

Political scientists have analyzed originalism from theoretical and historical perspectives. One theoretical defense of an "original intent" approach discusses *Brown* only in passing, contending the decision threatened "southern institutions" rather than conservatism as a whole (Whittington 2001, 170). Kersch's work focuses on not only originalism but also the whole of postwar conservatism (2011; 2019). Employing a "constructivist" approach, he reinterprets three "stories"—religious, economic, and those about anti-communism—conservatives have told themselves not just about the Constitution but the nature of conservative ideology (2019, xi–xvii). Yet, by adopting historian George Nash's framework—a "three-cornered [or 'legged'] stool" of conservatism—racial politics are treated as ancillary to its development (Nash [1976] 2008, 144, 204, 285). Following Nash, on Kersch's interpretation, "What didn't appear in [*National Review*'s] pages was as significant as what did. Buckley's ground rules forbade overt racism, proud neo-confederatism, and anti-Semitic or John Birch Society rants alleging Jewish or Communist plots" (Kersch 2011, 105). Indeed, on this account, conservatives' arguments affirmatively rejected racialized arguments: "Following the passage of the Civil Rights Act of 1964, the passage of the Voting Rights Act of 1965, and the success of the civil rights movement more generally, neo-confederate constitutional arguments were increasingly driven to the fringes" as movement conservatism developed "to understand itself, at least, as the polity's most fervent champions of the twin causes of constitutional liberty and equality" (Kersch 2019, xiii, 364).

But if we take seriously the scholarly and contemporaneous evidence on the importance of race to conservatism's development (e.g., Hess 1967, 198–223; Karol 2009; King and Smith 2011; Lowndes 2008; Novak 1965), we might question continued reliance on "three-corner stool" accounts. In public and private, NR and Buckley were racially regressive. Beyond Buckley's well-known "advanced race" editorial (NR 1957a, 148), in 1960 the magazine defended white supremacy: "The white man's claims in the South to political and social pre-eminence rest on economic and cultural advantages which are indisputably his. His also is the right to associate with whom he pleases" (NR 1960, 193). As late as 1963, Buckley defended Jim Crow in print. Worried about what desegregation would do "to the ideal of local government and the sense of community," he was "not ready to abandon" those ideals, "not even to kill Jim Crow" (Buckley 1963, 126). Buckley, too, believed in race science. In 1962, one of NR's contributors wrote to Buckley regarding his views on race and IQ. The final sentence read, "I believe fewer Negroes than whites or Mongolians measure up to average or high intellectual standards, but that some do and some are my equals and perhaps others my betters." Buckley responded, "I agree with every single thing in your letter—from beginning to end."[9]

More examples could be marshalled here, and more are delineated below. What is worth emphasizing is that pre-, post-, and contemporaneous with the Civil Rights movement racial regressiveness pervaded not simply the South but the conservative movement.

BEFORE *BROWN V. BOARD OF EDUCATION*

If not during the Founding era, during the nineteenth century an organizing interpretive principle of legal elites was the nonmalleability of the Constitution (Gienapp 2018; Gillman 1997).[10] Thus, it is no surprise that the first generation of modern constitutional conservatives privileged a fixed rendering of the Constitution during the Progressive era. As Lienesch shows, these were the first such actors who self-consciously saw themselves as constitutional conservatives—and they are treated as such by their ideological descendants (Lienesch 2016; Postell and O'Neill 2013). Rocked by the growth of the administrative state and the spate of Progressive constitutional amendments (income tax, direct election of senators, women's suffrage), groups like the National Association for Constitutional Government and the Sentinels of the Republic formed to defend the Constitution.[11] The NACG's vision was worked out in *Constitutional Review*. Prefiguring and then reflecting the valence of the conservative 1920s Court, the *Review* became a favored venue for conservative elites such as the soon-to-be Justice George Sutherland, federal judges, and members of the bar (e.g., Sutherland 1918).

[9] Weyl to Buckley, January 27, 1962, Box 23, Folder Weyl; Buckley to Weyl, February 1, 1962, Box 23, Folder Weyl. Both located in Part I of the Buckley Papers.

[10] Importantly, though, this nineteenth century conception of the Constitution maps poorly onto modern originalism (Gillman 1997).

[11] The Sentinels formed "To maintain the fundamental principles of the American Constitution" and "To prevent the concentration of power in Washington through multiplication of administrative bureaus." Application for Incorporation, August 21, 1922, Vol. 1, Sentinels of the Republic Papers, Special Collections, Williams College.

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Unlike their ideological descendants, however, these actors did not understand themselves as self-consciously setting forth a "theory." Such as it was, the intent construct was invoked at a high level of generality. In an essay defending judicial supremacy, a Colorado federal judge averred, "[i]t was the great intent and high purpose of the framers" to protect "the minority by a written Constitution" (Constitutional Review 1926, 252). A prominent diplomat asserted the growth of the bureaucracy had resulted in "the perversion of the intent of the Constitution" (Child 1929, 93). A Kansas-based elite politician-lawyer decried the "present craze of tinkering with Constitution," praising the "original Constitution" as "originally drafted" (Smith 1927, 18; see also Constitutional Review 1923, 252; Hill 1917, 6).

These modern constitutional conservatives also populated professional legal organizations (Lienesch 2016). Bar association elites would reinforce the politics of the *Review*. In 1923, a group of corporate attorneys (the Commercial Law League), met in Chicago and heard their president rail against Progressive era legislation as "far outside the supposed powers and purposes of the Constitution as originally conceived." Tied to this was a concern that recent constitutional amendments were "pure democracy," a dangerous transmogrification of the constitutional Republic (Sherriff 1923, 319). In a 1931 address to Nebraska lawyers, the state bar president painted Nebraska's lawyers as the keepers of the Constitution: "It has been the conservatism of the bar that has preserved the first principles that were laid down by the framers of our fundamental law and it will be the conservative thought of the lawyers of this country that will save that instrument, in its original intent, if it is to be saved for coming generations" (Cleary 1931, 88). Former Senator Thomas Reed, a Democrat from Missouri, also addressed the meeting. Beginning his speech with a warning—there "are more students of Bolshevism in Congress today than of the American Constitution"—Reed catalogued recent constitutional developments. For Reed, the Progressive era expansion of the administrative state was worrisome: "Originally the Constitution was intended" to limit the federal government to "a few fundamental powers" (Reed 1931, 110, 114).

But in contradistinction to how constitutional conservatism would develop after World War II, the importance of constitutional "intent" was not a widely diffused *political* idea among conservative elites. Before Justice Owen Roberts' switch in time, the editorial page of the *Wall Street Journal* (*WSJ*) concerned itself with discussing the "organic law" of the Constitution, protecting property and contract rights, and the importance of judicial supremacy (e.g., *WSJ* 1931, 8; 1935a, 4; 1935b, 4; Woodlock 1936, 4). In these years, the intent construct was invoked but once by the *Journal* (*WSJ* 1923, 1). Instead, it repeatedly emphasized not only "the letter" of the document but also its "spirit" (*WSJ* 1925, 1; 1928, 1; 1932, 8). Substantively, though, the editorial page backed *Constitutional Review* and bar leaders' constitutional politics. Again and again, worries about "direct democracy" (often in scare quotes) and the commerce power—almost always coupled with states' rights—appeared in the *Journal*'s pages (Woodlock 1932, 1; *WSJ* 1934, 8; 1935a, 3; 1935b, 4; 1935d, 4). There were also indications that the racial realignment's tectonic plates were shifting (Schickler 2016). The newspaper reserved high praise for the Southern Committee to Uphold the Constitution: "It is clear enough that the Southern Committee, under the chairmanship of John H. Kirby of Texas, holds fast to the federal framework as it is" (*WSJ* 1935a, 4). The *Journal*'s editors, looking for allies, praised those "Republicans and anti-New Deal Democrats [who] have clutched the Constitution to their bosoms and became its stanch [*sic*] and exceedingly articulate defenders" (Kent 1936, 2).

Also interested in forging an alliance with Southern conservatives was the vociferously anti-New Deal American Liberty League (Craig 1992, 269–95). Wrapping its political concerns in constitution worship and echoing *Constitutional Review* and the *Journal* in a constant stream of pamphlets, the Liberty League reemphasized the growing administrative state ("Bureaucracy Menaces All Rights"; "The Evils of Bureaucracy Constitute an Old Story"; the "Great and Cancerous Bureaucracy"; "the Very Antithesis of Democracy Is Bureaucracy").[12] States' rights as protected by the Tenth Amendment and a formalistic conception of the separation of powers also dominated the League's constitutional commentary.[13] While FDR initially took the Liberty League's challenge to the New Deal seriously, the group's transparent grounding of its economic interests as compelled by the Constitution was mocked in the press and criticized by pro-New Deal governing elites. After FDR's landslide reelection in 1936, the group essentially ceased to exist, formally winding down in 1940 (Wolfskill 1962, 30–33, 248, 259–263). The living constitutionalism of the New Deal's legal liberals was ascendant (Gillman 1997).

In short, this was not "originalism" as it is understood today. Saliently, there was no mining of constitutional history to determine what various clauses meant to their framers in 1791 or 1868. What can be said is that pre-*Brown* an instinct toward a fixed, historical understanding of the Constitution was connected to an identifiable set of political concerns: the bureaucracy's

[12] Jouett Shouse, "Why?," American Liberty League (hereafter ALL), n.d.; Shouse, "The Constitution Still Stands," ALL, February 12, 1935; John W. Davis, "The Redistribution of Power," ALL, January 24, 1936; Shouse, "The Return to Democracy," ALL, July 1, 1935. All these pamphlets located in Jouett Shouse Collection (American Liberty League Pamphlets), University of Kentucky, https://exploreuk.uky.edu/fa/findingaid/?id=xt7wwp9t2q46.

[13] See Raoul Desvernine, "The Principles of Constitutional Democracy and the New Deal," ALL, July 11, 1935; Borden Burr, "The Constitution and the Supreme Court," ALL, September 19, 1935; James Reed, "The Constitution—The Fortress of Liberty," ALL, February 11, 1936; Desvernine, "The Need for Constitutional Growth by Construction or Amendment," ALL, April 3, 1936. All from the Shouse Collection.

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growth, "pure" or "direct" democracy, and states' rights. As Roosevelt and Truman stocked the Supreme Court with a working majority of racial liberals and the secular racial realignment continued apace (McMahon 2004), *Brown* would layer the constitutional politics of race on top (Cameron et al. 2013).

POSTWAR CONSTITUTIONAL CONSERVATISM AND *BROWN V. BOARD*

Just days after *Brown* was handed down, Georgia's segregationist Senator Richard Russell took to the Senate floor to fulminate that the unanimous opinion "substituted psychology for law" (*Congressional Record*, May 26, 1954). Mississippi's racist Senator James Eastland railed against the opinion's inclusion of "pseudo 'modern scientific authority' which was the sole and only basis for the decision of the Supreme Court" (*Congressional Record*, May 22, 1955). Reeling from the Court's decision in the *School Segregation Cases*, as *Brown* was first called, the attack on Footnote 11 citing social science research seemed an obvious place to start.

Along with Eastland and Russell, *National Review* would depict *Brown*'s reasoning as "sociological pioneering," "positivist sociological assertion," and "not merely bad law and bad politics, but bad sociology" (Meyer 1957, 527–8; NR 1958a, 437; 1959, 446–47). In 1963, Buckley reminded readers that Southern attacks on *Brown*'s "judicial tortuousness" were understandable through this frame: "a venture in sociological jurisprudence, utterly unrelated to the Constitution the South grew up swearing to" (1963, 397). *Human Events*, a populist, "shirt-sleeves" conservative content aggregator headquartered in Washington, DC, dismissed the Court as "nine sociologists in black robes" (Nelson 1957, 1–2). A Dallas-based federal district court judge scoffed at Warren's reasoning in a judicial opinion: if "the colored child" may suffer harm from segregated schools, "then the white child by the same psychological processes of reasoning [in *Brown*] may be found subject to an inferiority complex by reason of being required to sit in classes with the colored child" (*Borders v. Rippy*, 189 Fed. Supp. 231, 232 [1960]). And a Mississippi newspaper columnist praised a state court trial judge for criticizing the Supreme Court as "the Board of Sociology, garbed in judicial robes" in his jury instructions. "We have a hunch," the columnist wrote, "the high tribunal now has a moniker that will stick" (Hills 1959, 6).

This prediction proved prescient. A persistent critique of *Brown* and the Warren Court, "sociological jurisprudence" would successfully stick and come to be synonymous with legal liberalism. When Reagan nominated Scalia to the Supreme Court, the Department of Justice's constitutional conservatives tasked to the Scalia confirmation understood the deeper meaning of the term. Assistant Attorney General William Bradford Reynolds warned the nomination team that Scalia "may be called upon to explain his criticism of 'sociological jurisprudence': is *Brown v. Board of Education* illegitimate?"[14] That same year President Reagan told the press, "We don't need a bunch of sociology majors on the bench" (*New York Times* 1986).

This would be a collateral attack, however. Constitutional history would form the bedrock of constitutional conservatism as it developed in the postwar era. NR and its in-house authority on the Constitution and civil rights, James Kilpatrick, were central to diffusing the idea of constitutional text properly interpreted only through a fixed, historical lens. Despite Buckley's admiration for Kilpatrick's talent and his near ubiquity in the conservative media of the era, the importance of Kilpatrick to constitutional conservatism has been overlooked. Having placed himself at the center of their universe with his lucid defenses of states' rights and interposition, it was Kilpatrick's constitutional thought that identifiably influenced conservatives in the critical cohering period from *Brown* into the post-Civil Rights era. Kilpatrick corresponded widely throughout the burgeoning conservative coalition and his interlocutors took his ideas—publicly and privately expressed—on constitutional politics seriously. The Virginian had substantive correspondence with Senators Byrd, Eastland, Thurmond, and Russell,[15] the Republican National Committee,[16] Alabama Governor George Wallace,[17] a federal district court judge,[18] a North Carolina state senator and supreme court judge,[19] Virginia's attorney general and a state court of appeals judge, even a probate judge in Versailles, Missouri.[20] Corresponding comfortably with Byrd in the days after the opinion in *Brown* was released ("Dear Harry"), Kilpatrick told the Senator, "I would toss an old battle-cry back at the NAACP: Hell, we have only begun to fight."[21]

In addition to the national and state governing elites who relied on his thought, conservative

[14] Reynolds to Cribb, Memorandum, July 11, 1986, Box 242, Folder Scalia Confirmation, OAG Stephen Galebach Files, NARA, College Park, MD.

[15] Byrd to Kilpatrick, December 2, 1954, Box 7, Folder 2; Russell to Kilpatrick, April 19, 1956, Box 46, Folder 2; Eastland to Kilpatrick, March 24, 1965, Box 15, Folder 1; Thurmond to Kilpatrick, September 5, 1957, Box 51, Folder 2. All located in James J. Kilpatrick Papers, Small Special Collections Library, University of Virginia.

[16] Herman to Kilpatrick, November 9, 1965, Box 23, Folder 5, Kilpatrick Papers; Kilpatrick to Herman, November 10, 1965, Box 23, Folder 5, Kilpatrick Papers.

[17] Kilpatrick to Wallace, November 14, 1957; Wallace to Kilpatrick, November 3, 1964. Box 53, Folder 4, Kilpatrick Papers.

[18] Edgar Vaught to Kilpatrick, August 26, 1957; Vaught to Kilpatrick, October 24, 1957; Kilpatrick to Vaugh, October 28, 1957. All located in Box 52, Folder 6, Kilpatrick Papers.

[19] John Kerr, Jr. to Kilpatrick, January 3, 1956, Box 27, Folder 7; R. Hunt Parker to Kilpatrick, April 19, 1956, Box 40, Folder 2. Both located in the Kilpatrick Papers.

[20] Kilpatrick to J. Lindsay Almond, April 12, 1956, Box 1, Folder 5; John W. Eggleston to Kilpatrick, December 31, 1957, Box 15, Folder 4; A.J. Bollinger to Kilpatrick, February 12, 1966; Kilpatrick to Bollinger, February 23, 1966, Box 4, Folder 6. All located in Kilpatrick Papers.

[21] Kilpatrick to Byrd, May 20, 1954, Box 7, Folder 2, Kilpatrick Papers.

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intellectuals like Russell Kirk found solace in Kilpatrick's constitutional thought. Not merely a NR columnist, Kirk authored the conservative classic, *The Conservative Mind* (1953), a book still cited by conservatives for helping reinvigorate intellectual conservatism in the postwar era (Continetti 2018). In one friendly letter, Kirk joked to Kilpatrick, "According to the Saturday Review, I see, you publish almost daily 'strident editorials' against integration. Keep at it." Playing political prognosticator about the future of the 1957 Civil Rights Act, Kirk wrote to Kilpatrick, "The 'civil rights' comedy seems to be entering the last act… . If Eisenhower can be persuaded to veto the thing, I suspect that there will be trouble in the next session of Congress in getting any real support behind such a measure."[22] Richard Weaver, another leading conservative intellectual who wrote the canonical *Ideas Have Consequences* (1948), corresponded with Kilpatrick. "Just the other day," Weaver wrote, "I was looking again, with reawakened admiration, at [Kilpatrick's book] *The Sovereign States.*" In another letter, Weaver called the segregationist polemic "fine and courageous work."[23]

Thus, in both in his outlook and influence, it is a mistake to characterize Kilpatrick as simply a "Southern" voice—he excited a wide range of movement conservatives. And the conservative movement followed Kilpatrick's lead in revitalizing interposition post-*Brown.* In addition to a constant stream of post-*Brown* opinion pieces across conservative media (Hustwit 2013, 66–78), *The Sovereign States* combined history and constitutional analysis—"the right to interpose is the right of effective nullification" (1957, 97)—with an unabashed romanticization of the Jim Crow South. Rosalie Gordon approvingly cited and quoted Kilpatrick's argument in favor of interposition in her mass-market *Nine Men against America: The Supreme Court and Its Attack on American Liberties.* First published in 1958, it went through an impressive run of four editions with the final run in 1965 (Gordon 1958, 61, 117). NR gave Gordon's work positive coverage (NR 1957c, 2). And for those who did not want to purchase Gordon's book, a pamphlet crystallizing her (and Kilpatrick's) views was available.[24]

Even before Kilpatrick published *Sovereign States*, NR gave these views sympathetic coverage. Shortly after *Brown*, the journal of conservative thought reported that even "barbers and storekeepers" understood and believed in "nullification and interposition and usurpation" (Burnham 1956, 8–9). This was accurate reporting—a 1956 headline in the *Augusta* (GA) *Courier* read, "'Interposition' is Password Among People of the South Today" (January 1956, 4). However, as the *Wall Street Journal* noted in respectfully reviewing *The Sovereign States*' defense of interposition, "Kilpatrick is probably championing a lost cause" (*WSJ* 1957, 14).

Finally, another unsuccessful idea floated in the years after *Brown* argued that the Fourteenth Amendment was never "validly ratified" (Kilpatrick 1957, 258). Repeatedly citing Kilpatrick's work, a libertarian intellectual bemoaned the "scandalous adoption" of the amendment (Morley 1959, 68). In 1958, *U.S. News & World Report* ran an editorial titled, "There Is No 'Fourteenth Amendment,'" putting the amendment in scare quotes (Lawrence 1957, 138–9). The following year NR prayed, "When certain ancient spiritual values are recovered, the [Fourteenth and Sixteenth Amendments] that have perverted the Constitution will in the nature of things be reamended" (Chamberlain 1959, 557–8).

Also hoping to nullify the amendment was *The Dan Smoot Report.* While directed at a wide audience, the former FBI agent's newsletter had high-brow readers as well. Buckley subscribed to the newsletter, corresponded frequently with the creator's namesake, and viewed it as a useful outlet for NR's brand of conservatism.[25] Activist conservative citizens listened to Smoot. A Michigan attorney, to give one example, wrote to his congressional representative, "I obtain most of my information from The Dan Smoot Report, which I'm sure you're acquainted with. As my mother puts it--, 'That Dan Smoot doesn't believe in anything but the Constitution.'"[26] So when Smoot argued that the Fourteenth Amendment was an impermissible appendage to the Constitution, it resonated. In Smoot's retelling of ratification's history, "Army bayonets escorted illiterate negroes and white carpetbaggers to the polls, keeping most southern whites away." Smoot had a straightforward solution: "Obviously, we need to eliminate the Fourteenth Amendment and nullify all court decisions, executive actions, administrative regulations, and laws based on it.[27] But, like interposition, a sustained attack on the Fourteenth Amendment's validity was too transparent. Instead, conservatives turned to answer anew the Fourteenth Amendment's "inconclusive" intent.

From Interposition to Intent

Arizona Senator Barry Goldwater's movement-defining book, *The Conscience of a Conservative* (1960), set forth in simple prose a programmatic vision of conservatism that excited elites and movement

[22] E.g., Kilpatrick to Kirk, February 3, 1956; Kirk to Kilpatrick, January 15, 1958. Both located in Box 26, Folder 6 of the Kilpatrick Papers.
[23] Weaver to Kilpatrick, April 25, 1960; Weaver to Kilpatrick, September 23, 1957. Both located in Box 53, Folder 6 of the Kilpatrick Papers.
[24] Pamphlet, "Nine Men against America," Box 108, Folder 14, Herbert A. Philbrick Papers, Library of Congress, Washington, DC.
[25] For just a few examples, see Buckley to Smoot, August 29, 1955, Box 4, Folder Dan Smoot (1955, 1957); Smoot to Buckley, February 20, 1957, Box 4, Folder Dan Smoot (1955; 1957); Buckley to Manion, May 12, 1958, Part I: Box 6, Folder Clarence Manion (1958). All located in Part I of the Buckley Papers.
[26] Raymond Namikian to Hoffman, March 21, 1961, Box 49, Folder Supreme Court, Clare Hoffman Papers, Bentley Historical Library, Ann Arbor, MI.
[27] "Earl Warren Court—Part III," *The Dan Smoot Report*, April 5, 1965, Box 187, Folder 9, Philbrick Papers.

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denizens alike. "*The Conscience of a Conservative* was our new testament," Pat Buchanan recalled, "It contained the core beliefs of our political faith … we read it, memorized it, quoted it" (Allitt 2009, 188). Selling 3.5 million copies by 1963 and ghost-written by Buckley's brother-in-law (Brent Bozell), *Conscience* repeatedly invoked the intent construct as key to a conservative understanding of the Constitution. The constitutional problem *Brown* posed was that it ran afoul of the "intentions of the founding fathers" and the "intentions of the Fourteenth Amendment's authors"—in short, "the amendment was not intended to, and therefore it did not outlaw racially separate schools. It was not intended to, and therefore did not authorize *any* federal intervention in the field of education" (Goldwater 1960, 34, 35–6, emphasis in original).

This seemingly commonsense idea, based on first constitutional principles, would prove more successful than segregationist arguments and civil unrest. But in *Conscience of a Conservative* Goldwater simply redeployed the intent construct that had seen new life breathed into it post-*Brown. Brown*'s infidelity to the Fourteenth Amendment's intent widely and quickly diffused throughout movement conservatism. A worried listener wrote to the popular conservative talk radio entrepreneur Clarence Manion shortly after *Brown.* Manion reassured her that, "if you read the opinion carefully, you will see that the Court ADMITS that nothing in the HISTORY of the Fourteenth Amendment indicates that those who drafted it INTENDED that it should apply to the problem of segregated schools."[28] Buckley agreed. *Brown* was "patently counter to the intent of the Constitution, shoddy and illegal in analysis" (NR 1956, 5). Another movement conservative journalist put it starkly: *Brown* "threw down the one gauntlet Southerners cannot accept—not now, not in 1960, and not in the year of our Lord 2000. Therefore, they mean to reverse it" (Synon 1958, 1–4, 1). A "Brochure on the 14th Amendment" (1956) by a Raymondville, Texas man articulated the conservative understanding: "Not one iota of evidence exists to show that the 14th Amendment intended to do more for the Negro than safeguard his life, protect his freedom and to give him justice in court. No evidence exists that would tend to show that the framers of the 14th Amendment intended to set up a system of basic civil and political rights for the Negro." The next year Kilpatrick recommended the brochure to Bozell. "It packs more into 35 pages," he wrote, "than I have seen in several monographs four or five times that size."[29] The following year, Bozell criticized quiescent legal elites and insisted that "the authors of the Fourteenth Amendment did not intend to withdraw public education from the realm of state power" (Bozell 1958, 175–76).

In addition to interposition, *The Sovereign States* mined both the founding era and the ratification history of the Fourteenth Amendment for favorable evidence of a segregationist original intent. Widely reviewed, *The Sovereign States* again and again invoked the "original draftsmen," framer's "intent" and "understanding" to make its case (1957, x, 262–63, 264, 268–69, 270–72). Foreshadowing Goldwater, Kilpatrick concluded that neither the Reconstruction era Congress nor the states "*outlawed segregation by race in the public schools*"; thus, the Warren Court's ruling was objectively wrong (Kilpatrick, 1957, 264 emphasis in original). Disturbed by *Brown*, Warren Jefferson Davis, a South Carolina activist-journalist repeatedly invoked the intent construct in *The Case for the South* (1962). Citing NR, Dan Smoot, and *Wall Street Journal* critiques of *Brown*, Davis argued it "was a misconstruction of the intent of the Founders" and exhorted, "the intention of the framers of the Constitution should not be subordinated to arbitrary judicial interpretation" (Davis 1962, 47, 96–99, 141). In 1962, Kilpatrick—two years after joining NR's masthead—emphasized the importance of the intent construct in another book: *The Southern Case for School Segregation.* Still arguing with the Court's opinion in *Brown*, he wrote that in divining the intent of the Fourteenth Amendment, "[o]nly one procedure is known to the law; *it is the procedure used by the Supreme Court and by other courts from the very beginning of the Republic: It is to determine the intent of the framers.*[30] Bozell wrote a glowing review of the book for NR (Bozell 1963b, 199).

The Kilpatrick-led Virginia Commission on Constitutional Government further argued those "that framed who the Fourteenth Amendment … never intended for an instant that a guarantee of 'equal protection of the laws' was to affect the operation of separate schools in any way." In May 1959 testimony before the U.S. Senate, the Commission testified that the *Brown* opinion had ignored the "overwhelming and irrefutable" evidence of the Fourteenth Amendment framer's intent.[31] Undergoing five printings through 1967, the Commission sold a pamphlet of the testimony with the title *A Question of Intent: The States, Their Schools and the 14th Amendment.* Greeting the reader in the first sentence of the Preface was a quote from a legal treatise: "The fundamental principle of constitutional construction … is to give effect to the intent of the framers of the organic law and of the people adopting it".[32]

Throughout the 1960s, too, Dan Smoot, a self-professed "constitutional conservative," provided his wide audience with accessible tutorials on the Fourteenth Amendment (Hendershot 2011, 69). Teaching readers that the Warren Court "had *tried* to determine" the original meaning of the equal protection clause,

[28] Manion to Motley, 1954, Box 2, Folder 10, Manion Papers.
[29] John B. Mason, "A Brochure on the 14th Amendment," Box 21, Folder 7, Victor Howard Collection on Civil Rights and Church-State, Special Collections Research Center, University of Kentucky; Kilpatrick to Bozell, December 16, 1957, Box 5, Folder 2, Kilpatrick Papers.
[30] Kilpatrick, *Southern Case*, 129 (emphasis in original).
[31] "On the Fixing of Boundary Lines: A Statement," Virginia Commission on Constitutional Government, September 1958, Part I: Box 6, Folder James J. Kilpatrick (1958), Buckley Papers.
[32] Pamphlet, Virginia Commission on Constitutional Government, Box 10, Folder 7, Kilpatrick Papers.

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Smoot bemoaned the Court's failure to understand that "the Fourteenth Amendment did not have, and was not intended to have, anything whatever to do with the question of the public schools." Smoot continued: after "the illegal decision of May 17, 1954, the Court has erected an edifice of illegal decisions—an edifice which has become a legal Tower of Babel" (Smoot 1963, 5, 6, emphasis in original). As late as 1969, and undeterred by the Civil Rights movement, Manion still viewed *Brown* as the point of departure. Corresponding with Kilpatrick about the usefulness of limiting the Court's appellate jurisdiction, Manion wrote, "When the Warren Court decided *Brown v. Board of Education*, *Baker v. Carr* and *Engel v. Vitale*, it established the law of each respective case merely, not the law of the land for all time" (italics added). If only Congress had stripped the Court and "all inferior Federal Courts" of substantive jurisdiction in a timely fashion, "The value of *Brown*, *Baker*, and/or *Engel* as a controlling precedent would have been automatically destroyed" (italics added).[33]

Bozell also provided his own anti-Warren Court polemic. *The Warren Revolution* had a straightforward thesis: the Warren Court, "with the encouragement of the country's intellectual establishment," had instituted judicial supremacy and *Brown* epitomized this troubling trend (Bozell 1966, 25). Prior to 1954, the "race problem" was, as "the original framers in effect decided," left to be solved through interbranch coordination. But the *Brown* decision, relying on "psychological and sociological treatises" ignored "the views of the Constitution's framers." Mocking the Court's reasoning—the Fourteenth Amendment's framers "after all, had not read Freud"—Bozell argued that the *Brown* Court had taken upon itself to write a "*concept*" of equality "into the Constitution." Fond of italics, Bozell summed up his argument: "*The States that ratified the Fourteenth Amendment, equally with the Congress that proposed it, had no intention of outlawing separate schools*" (Bozell 1966, 31, 48, 54, 55, 56). Reviewing the book for *Human Events*, ostensibly reformed segregationist Senator Sam Ervin (D-NC) intoned, "The truth is that it was the duty of the [*Brown* Court] to turn the clock back to 1868 and ascertain and give effect to the intention of those who framed and ratified the 14th Amendment" (Ervin 1967, 10).

School Prayer, Voting Rights, and the Intent Construct

Brown was hardly the Warren Court's only provocation—among others cases, the Court's school prayer decisions also deeply wounded movement conservatives (Dierenfield 2007).[34] Already primed by *Brown* to turn to history, text, and the intent construct, conservatives did just that. A 1962 opinion by the Florida Supreme Court concerning school prayer in the public schools relied on the intent construct to *uphold* school prayer (the U.S. Supreme Court vacated the decision).[35] In response to a laudatory letter from the head of the American Council of Christian Laymen, the Florida Supreme Court Justice Millard Caldwell told Verne Kaub, "We feel we have construed the Constitution as the authors intended it to be construed."[36] Signifying the spread of the project from the Reconstruction Amendments to the Founding era, Bozell turned to Founding era history to tease out the meaning of First Amendment's establishment clause (Bozell 1963a, 19). NR stumped for a constitutional amendment overturning the school prayer decisions which would "revalidate the original premises of that august instrument" (NR 1962, 1).

If school prayer provoked unrest among conservatives, the Warren Court's reapportionment opinions—establishing the "one man, one vote" principle in directing malapportioned state legislatures to redraw district lines to better reflect population density—brought paroxysms. Smoot returned to his intent construct tutorials after the Court's reapportionment rulings. "Legally," Smoot remonstrated, "the court must restrict itself to determining what the constitutional principle in question meant *at the time it was written and adopted, to the people who wrote and adopted it*" (Smoot 1964, 273 emphasis in original). NR was especially harsh in its criticisms. One editor found the notion of "one man, one vote," to be "laughable to any student of the Constitution's formation"—he added that *Brown* had been "a rape of the Constitution" (Meyer 1964, 228). Bozell counseled that the Court had read into "the equal protection clause of the 14th Amendment a meaning no historian would ever attribute to the clause's framers" (Bozell 1963c, 398). The editorial page of the *Wall Street Journal* complained, "neither the wording nor the intent of the drafters of the 14th Amendment" supports the Court's ruling (*WSJ* 1964, 8). And in 1965, NR ran a cover story on the Voting Rights Act that plaintively asked, "**Must We Repeal the Constitution to Give the Negro the Vote?"**[37]

But it would fall to Dan Smoot, who had briefly been a PhD student at Harvard prior to World War II, to provide the most sophisticated exegesis of political originalism. "The *original* intent of any provision of the Constitution," Smoot taught conservatives, "*must* be determined by the *original* historical record of that provision." If a provision of the original Constitution, "the original record consists of debates at the Constitutional Convention of 1787; discussions of the provision in the *Federalist Papers* … and [the] official debates in the states which ratified the Constitution."

[33] Manion to Kilpatrick, May 20, 1969, Box 34, Folder 6, Manion Papers.
[34] In *Engel v. Vitale* (1962) and *Abington School District v. Schempp* (1963), the Court struck down what it viewed as coercive religious practices—particularly praying—in the public schools.
[35] *Chamberlin v. Dade County Board of Public Instruction*, 143 So.2d 21, 26–27 (Fla. 1962).
[36] Millard G. Caldwell to Kaub, June 11, 1962, Box 6, Folder 22, American Council of Christian Laymen Records, Wisconsin Historical Society, Madison, WI.
[37] Cover, April 20, 1965.

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If a "constitutional amendment," like the Fourteenth, is at issue, "its *original* intent" should be divined by the "debates in the national Congress which submitted the amendment, and debates in the states which adopted it." And when a case comes to the Supreme Court, it had only one duty: determine whether the "lower courts" had rendered their decision "in compliance with the *original* intent of the constitutional provision, as revealed by the *original* historical records.[38] Remarkable for its time, Smoot prefigured the pith of the theory of constitutional originalism that law professors and government lawyers would legitimate in the 1960s and beyond.

LEGITIMATING POLITICAL ORIGINALISM

In the legal professional arena, the intent construct was largely the province of conservative lawyers and state court judges rather than academic lawyers at elite schools in these years. (e.g., Felton 1960, 391; Long 1959). As late as 1967, a Yale law professor writing in the *Harvard Law Review* resignedly wrote, "Lacking professional qualifications, I have not attempted in this discussion to broach the many and probably at last not precisely soluble historical problems of 'original intent'" (Black 1967, 97). Alfred Avins felt otherwise. Rather than Bork, it was Avins who spear-headed academic originalism in the law reviews. Avins had elite legal credentials: an LLB and LLM from Columbia and NYU law schools, respectively.[39] Avins also argued before the Supreme Court for the constitutionality of literacy tests in an important 1966 Voting Rights Act case (*Katzenbach v. Morgan*). After the argument, he wrote to Buckley, "The beginning, middle, and end of all constitutional inquiry is the original intent of the framers."[40] Avins also saw Bork as an ally. After reading Bork's 1963 anti-Civil Rights legislation *New Republic* piece, he reached out to Bork: "From this article, I gather you have an interest in race relations."[41]

Most importantly, he was the first to *try* building the intent construct into a serious competitor to living constitutionalism in legal academics primary scholarly venue: the law review. In a 1965 article, he took on the constitutionality of literacy tests. Avins's review of the relevant history convinced him "it was not the original intent of the framers of the fourteenth amendment to forbid English-language or other literacy tests" (Avins 1965, 462). The next year in the *Stanford Law Review* he sounded remarkably like Dan Smoot in arguing, "the original intent can be established unequivocally with supporting statements by both those in favor of and those opposed to the amendment, that intent must govern interpretation of the amendment" (Avins 1966, 821). And in an odd article in the *Alabama Lawyer*, Avins attacked the Court's opinion *Gray v. Sanders* (1963) (ruling unconstitutional Georgia's county unit system of elections). The bulk of the article took the form of a mock opinion by a fictitious "Chief Justice Wilson." From the perspective of 1984 "*a la* George Orwell," Avins's impliedly liberal chief justice wrote, "Here, plaintiff's only defense is an obsolete to [*sic*] original intent of the framers of the Constitution" (Avins 1965a, 83–85). All told, it appears that Avins published at least 15 articles, in both prestigious (Stanford) and lesser (Mercer) law reviews in the 1960s arguing for the intent construct.

Avins also produced a reference book in 1967, aiming to help "judges, lawyers, teachers, and students" understand the original intent of the Fourteenth Amendment. The preface to *The Reconstruction Amendments' Debates* insisted that proper interpretation of the Constitution "can only obtain by interpreting every portion of the Constitution, including the amendments thereto, in accordance with the intent and understanding of the framers of the particular provision under consideration." In a teleological romp through American constitutional development, Avins, like originalists today, insisted the intent construct had *always* been the lodestar of proper constitutional analysis (Avins 1967, 1). NR ran repeated advertisements for the reference book. They asked potential readers, "What was the original intent of the framers of the Reconstruction Amendments? Do current United States Supreme Court cases comport with or run contrary to this original intent?"[42] The *Virginia Law Review* ran a review of Avins's contribution. The author suggested that "the relevant source material" compiled could perhaps give "reasonable men sufficient cause to disagree with the court's conclusion" in *Brown*.[43] An influential interest group (Americans for Constitutional Action) praised Avins's effort.[44]

Not content to toil in the law reviews, Avins also involved himself with the ACA's constitutional politics project regarding the Fourteenth Amendment.[45] He again promoted his scholarly agenda to Buckley: "To fill the conservative void, I am doing a good quantity of law review writing on constitutional history, in particular in the 14th Amendment and Reconstruction fields."[46] But Avins's career was turbulent. Wearing his racial politics on his sleeve held him back in the increasingly liberal 1960s legal academy. As with the head of the ACA, he pleaded with Buckley, "Numerous law schools will not consider me for a teaching post

[38] "Earl Warren Court—Part III," *Dan Smoot Report*, April 5, 1965, Box 187, Folder 9, Philbrick Papers (all emphases in original).
[39] Avins Resume, Undated, Box 1, Folder Children of the American Revolution, John B. Trevor, Jr. Papers, Bentley Historical Library, University of Michigan.
[40] Avins to Buckley, April 26, 1966, Part I: Box 38, Folder Avins, Buckley Papers.
[41] Avins to Bork, September 29, 1963, Part I: Box 1, Folder 4, Bork Papers.
[42] See, for example, the January 16, 1968 issue of NR at page 46.
[43] William J. Lee. 1968. "Book Review." *Virginia Law Review* 54: 1064–1068.
[44] Moreell to Avins, June 13, 1968, Box 21, Folder 30, ACA Records.
[45] Memo Re: Seal Committee Meeting, Thomas A. Lane, July 8, 1968, Box 4, Folder 1, ACA Records.
[46] Avins to Buckley, July 13, 1966, Part I: Box 38, Folder Avins, Buckley Papers.

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because of my race relations views." Buckley promised that he would "see that something is done about your situation. I admire your courage." When push came to shove, though, Buckley declined to involve NR in Avins's various fights.[47] Avins's career was on a downward trajectory. He would bounce around the law schools at Rutgers, Chicago-Kent, and Memphis State.[48]

Robert Bork's career was on an upward trajectory. Bork was an activist-intellectual who enjoyed writing for national prestige magazines like *Fortune* and the *New Republic.* (Bork chose Yale in 1962 over splitting his time between writing for *Fortune* and teaching at NYU's law school).[49] In between teaching, he made a name for himself as a public intellectual with provocative, conservative opinion pieces. In a 1963 *New Republic* piece—one that would cause problems for him when nominated to the Supreme Court in 1987—Bork argued against the civil rights legislation then being debated in Congress. Philosophically undergirding the public accommodations portions of the bill, Bork argued, was "an unexpressed natural-law view that some preferences are rational, that others are irrational, and that a majority may impose on a minority its scale of preferences."[50] To a letter writer, Bork defended his *TNR* piece. There must be the freedom to choose, and "the freedom to choose in a way most of us may consider wrong."[51]

Simultaneously, Bork began his career in political activism. In 1963, Bork reached out to the Connecticut Republican Citizens Committee, a "rebel group" of conservatives looking to oust moderates from the state GOP. "I am interested," Bork wrote the group, "in the work you are doing and, in fact, in Republican efforts generally."[52] In addition to his work for constitutional conservatives at the state level, Bork was active in Goldwater's campaign. For the Goldwater campaign, he wrote memoranda arguing against the Civil Rights Act and antitrust while rallying conservative and libertarian academic support for his candidate ("Scholars for Goldwater-Miller Committee").[53] Again rallying conservative and libertarian academic support for the GOP nominee four years later, Bork advised the Nixon campaign.[54] As his profile grew, Bork became more forward about his activism. Before his nomination by Nixon to the Solicitor General post, Bork offered his and a Yale colleague's assistance "on a rather wide variety of issues" to Senator Gordon Allott, a movement conservative from Colorado. "I cannot, of course," he admitted, "guarantee in advance that our position on all issues will parallel that of the Republicans in Congress, but, ssince [*sic*] Professor Winter and I are conservatives and Republicans, that will be true more often than not."[55]

Academically, though, Bork struggled to devise the "single unifying theory" of the Constitution that could solve the problem of constitutional politics. Bork envisioned a theory that could demonstrate "there are stable principles of freedom from coercion," a theory grounded in "first principles." Once this theory was devised "judicial objectivity becomes more possible," he promised himself in notes for an ultimately unpublished article ("Constitutional Theory").[56] There—perhaps surprisingly given his criticism of natural law vis-à-vis public accommodations legislation—Bork toyed with a potential libertarian-inflected "natural rights view that led to [the] Bill of Rights." The Yale law professor, though, abandoned his idiosyncratic attempt to ground the Constitution in libertarian natural law theory. As he groped his way to the positivist, historical, intent-based vision of the 1971 law review article, he wrote in his notes, "The choice seems to be between some such theory as this [libertarian natural law] and a notion that the Court ought to try to determine in some sense what the Constitution 'means.' That would be a question of words, as interpreted by a reader in 1787, a la Crosskey, of legislative intent, and of prior case law which has fixed the meaning."[57]

Remarkably, Bork did not cite any of Avins's many articles or his reference book in his now canonical 1971 law journal article. In addition to Avins's Supreme Court oral argument advocacy, his consistent activity in the conservative movement, and his scholarly productivity, in July 1970, Strom Thurmond took to the pages of *Human Events* to praise Avins: "[a] distinguished legal expert, he is probably the greatest living authority on the legislative history of the so-called 'Reconstruction amendments'"—the occasion for the article was Avins's plan to argue *another* Voting Rights Act case before the Court (Thurmond 1970, 30). Moreover, as a point of comparison to Bork's 1971 article, a 1972 *Connecticut Law Review* piece on the "framer's intent" cited much of Avins's work

[47] Avins to Buckley, January 13, 1964; Buckley to Avis, January 20, 1964. Both located in Part I: Box 29, Folder Avins, Buckley Papers.
[48] Robert H. Williams, "Legal Scholar Alfred Avins Dies at 64," *Washington Post*, June 11, 1999.
[49] Interview with Robert Bork by Fred Barbash and Al Kamen, December 11, 1984, Part 2: Box 438, Folder 13, Bork Papers.
[50] Bork, "Civil Rights—A Challenge," *New Republic*, August, 31, 1964, 21–24.
[51] Krane to Bork, March 13, 1964, Part I: Box 1, Folder 5, Bork Papers.
[52] Bork to Lupton, July 17, 1963, Box 1, Folder 1, Bork Papers. On the CRCC as a "rebel group," see "Affairs of State," *Town Times* (Watertown, CT), June 29, 1967.
[53] For just a few examples, see Bork to McCabe, August 5, 1964, Box 2, Folder 1; Bork to Campbell, August 21, 1964, Box 2, Folder 1; Raico to Bork, September 29, 1964, Box 2, Folder 1; Bork to Raico, October 13, 1964, Box 2, Folder 1; Bork to Campbell, October 26, 1964, Box 2, Folder 1. All located in Part I of the Bork Papers.
[54] For just a few examples, see Anderson to Bork, April 27, 1968, Box 3, Folder 1; Trent to Bork, May 3, 1968, Box 3, Folder 1; Nixon to Bork, June 7, 1968, Box 3, Folder 2. All located in Part I of the Bork Papers.
[55] Bork to Allott, June 22, 1970, Part I: Box 3, Folder 7, Bork Papers.
[56] Bork, Notes, Undated, Part I: Box 10, Folder 6, Bork Papers; Bork, Notes, Undated, Part I: Box 10, Folder 8, Bork Papers.
[57] Bork, Notes, Undated, Part I: Box 10, Folder 6, Bork Papers; Bork, Notes, Undated, Part I: Box 10, Folder 8, Bork Papers.

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(Kaczorowski 1972, 393). Bork eventually settled on aping Columbia's Herbert Weschler's famous "neutral principles," rather than the less relevant Crosskey, who also went uncited. At all events, Avins and Bork—and NR, Thurmond, Buckley, Kilpatrick, *Human Events*, Dan Smoot, and the constitutional conservative citizenry—ended up in the same place politically.

For much of the 1970s, even Bork did not view his now-canonical article as an important theoretical contribution. In July 1978 correspondence with a young, conservative University of Virginia law professor, Bork still viewed it though a free speech frame. The next month, he also shared the "old piece" with Justice Rehnquist.[58] Today, conservatives deem it an important early theoretical statement of their constitutional ideology.

CONCLUSION

This article argues that the modern GOP's constitutional "originalism" grew directly out of resistance to *Brown.* Once elite academic lawyers legitimized originalism as a potential jurisprudential theory, party-in-government elites such as Attorney General Meese could claim it, and Bork's article (saving *Brown* via an invented "juridical rule"), as setting forth an apolitical search for correct constitutional answers. More than that, as this constitutional ideology developed in the post-Reagan years with the sustained help of the Federalist Society and affiliated legal academics, conservatives rewrote their own history. This mythology not only had (and has) the virtue of providing a professional claim for conservative legal elites—these were (and are) *academic* arguments with the demand to be treated as such (Teles 2008)—they also provided the benefit of being able to erase the uncomfortable racial origins of modern originalism. The empirical purpose of this article has been to recover those origins.

Theoretically, one case study has limited reach. The theory is likely time bound. Built into it is an assumption of the clear distinction and division of labor between legal and political elites, an expectation that may not apply to the nineteenth century's "state of courts and parties" (Skowronek 1982). The clearest comparison is to ask whether the Progressives-cum-New Dealers' "living constitutionalism" follows the same historical pattern or if there are critical differences. An empirical extension of the theory, too, might examine how constitutional ideologies redevelop and expand (or contract) upon institutionalization in the Department of Justice and the courts. Finally, it may be time to retire the deracialized "three-corner" stool accounts of postwar (constitutional) conservatism's development. It is not that race is *all* important, but it is to say that race is *as* important.

[58] Bork to Lillian R. BeVier, July 2, 1978; Bork to Rehnquist, August 10, 1978. Both located in Part I, Box 7, Folder 3 of the Bork Papers.

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CONFLICT OF INTEREST

The author declares no ethical issues or conflicts of interest in this research.

ETHICAL STANDARDS

The author affirms this research did not involve human participants.

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