

When will legal scholars recognize that so-called conservatives have been conserving progressive victories?

Countering the Counter-Revolution Narrative

Jesse Merriam

Whenever a new book on the “legal conservative movement” (LCM) is published, I am reminded of M. C. Escher’s masterpiece *Day and Night*, in which black birds flying left form the background of night to illuminate white birds flying right. Recent works like Amanda Hollis-Brusky’s *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* present the legal left like Escher’s black birds—blended into the skyline of law, rendering anything moving right an aberration. This skewed perspective is built into how scholars today view the very nature of law as ineluctably veering leftward in the name of “progress,” making any resistance to that progress seem unnatural and indeed revolutionary.

In constructing the conventional narrative that the LCM has mounted a “counter-revolution,” scholars and pundits focus on three factors. First, since President Nixon’s election in 1968, Republican presidents have appointed thirteen of the last seventeen Supreme Court justices. As a result, in

every year since 1970, Republican-appointed justices have constituted a majority of the court. Second, since its formation in 1982, the Federalist Society has grown from a group of three law students into a forty-five-thousand-member organization that exerts significant influence over nominations to the

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federal bench. And third, as a result of the Federalist Society's careful vetting of nominees, conservative justices have achieved several victories, limiting some of the Warren Court's major progressive achievements while constructing certain conservative-friendly legal doctrines.

Marshaling this narrative, Erwin Chemerinsky, dean of the University of California, Berkeley, School of Law, asserts that "since 1968 conservatives have sought to remake constitutional law and they largely have succeeded" not only by "overturn[ing] the decisions of the Warren Court" but also by "aggressively pursu[ing] a vision of constitutional law that consistently favors government power over individual rights." Over the past five decades, Lincoln Caplan claims, "the Court has gotten increasingly more conservative." According to the late Ronald Dworkin, the five Republican appointees on the Roberts Court form a unified "right-wing phalanx" advancing a "revolution [that is] Jacobin in its disdain for tradition and precedent."

This narrative misses the mark on all three points. First, of the thirteen Republican-appointed justices, only five (Rehnquist, Scalia, Thomas, Roberts, and Alito) have ended up being consistently conservative. (It is too early to say anything about Gorsuch.) And even these five have fluctuated ideologically, mostly toward the left. By contrast, all four justices appointed by Democrats (Ginsburg, Breyer, Kagan, and Sotomayor) have been consistently liberal. They have also moved further to the left during their time on the court. Therefore, even though Republican appointees have technically controlled the court since 1970, a strong majority of justices has been progressive on many issues throughout this period.

Second, although the Federalist Society has achieved significant influence over the judicial nomination process, this has not translated into many conservative judicial outcomes. That is largely because the Fed-

eralist Society is far from the "right-wing cabal" LCM commentators represent it to be. To the contrary, Federalist Society leadership is quite centrist, particularly on social issues, and as a result the organization's role in the nomination process has not radically changed the federal judiciary, let alone mounted a counterrevolution.

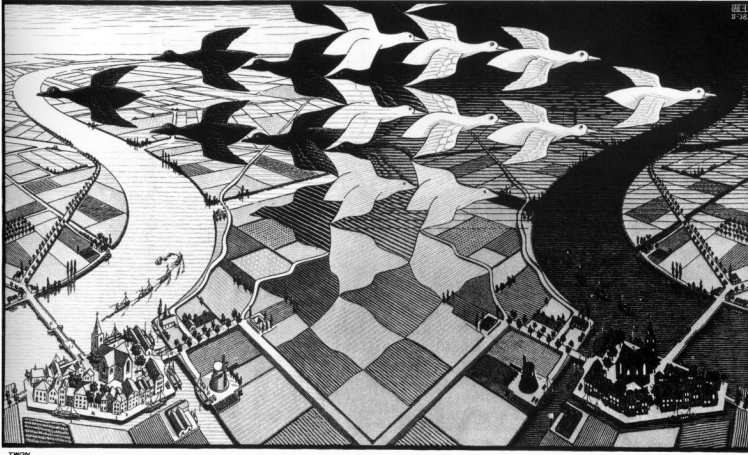
Finally, many of the Supreme Court decisions that LCM scholars deem "counter-revolutionary" have entrenched rather than challenged the Warren Court revolution. Most of these purported victories for the legal right simply limited further leftward movement in particular areas of law. While preserving many of the Warren Court's progressive adventures, the Republican-controlled Burger, Rehnquist, and Roberts Courts also engaged in progressive interventions of their own. These include landmark decisions in cases involving church-state relations, abortion, and gay rights.

These three points relate to a more fundamental problem that pervades LCM scholarship. Progressive scholars, and even many conservative ones, have a frighteningly shallow understanding of the intellectual underpinnings of the American right. It is largely because of this ignorance that so much LCM commentary implicitly defines conservatism in terms of its resistance to progressive values, not as an independent mode of thought. One reason that LCM commentators so badly misunderstand conservatism is that conservatism is so poorly represented in their academic environment.

The legal academy, conservatism, and fusionism

Readers know how difficult it is to be a conservative in academia, as recently documented in Joshua M. Dunn Sr. and Jon A. Shields's *Passing on the Right*. In law schools, however, the scarcity of conservatives has become truly

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“Originalist” successes have done little to counter the Warren Court’s leftward upheavals

staggering. A recent study found that 82 percent of law professors identify as Democrat voters. The percentage is actually higher if we exclude the few right-leaning and Christian law schools from the calculation. And the disproportion is even more extreme at the top-ranked schools that produce almost all the nation’s judges, elite corporate lawyers, and law professors.

Consider the observation of Georgetown Law professor Nicholas Rosenkranz that 117 of his 119 faculty colleagues are Democrat voters. Rosenkranz further notes that many of those 117 are far to the left of the national Democratic Party. Even this figure, however, does not adequately capture the scarcity of conservatives on law school campuses. By distinguishing simply between Democrats and Republicans, Rosenkranz treats libertarianism and conservatism as congruent ideologies. But when it comes to the legal issues that most divide the left from the right, libertarians and conservatives agree on very little. Many libertarian law professors have argued, for example, that the original meaning of the Constitution supports socially progressive causes, such as same-sex marriage, open borders, and abortion.

Few libertarians as there are in the legal academy, there are significantly fewer social

and cultural conservatives. In his article discussing Georgetown Law’s skewed ideological makeup, Rosenkranz, who in 2016 supported Jeb Bush in the Republican primaries before joining Rubio’s team as a senior legal adviser, assured readers that he supports gay rights. It is noteworthy that the other two non-Democrats at Georgetown Law are Randy Barnett, a socially progressive libertarian, and David Hyman, a JD/MD who appears to be conservative principally for reasons related to healthcare and tort reform. All three are eminent scholars whose views diverge from academic orthodoxy, but they are not conservative in the traditional sense.

The distinction between libertarians and traditionalist conservatives eludes most of the research on the LCM. As a result, scholars wildly overstate the extent of the conservative counterrevolution. Few studies of the LCM even discuss “fusionism,” Frank Meyer’s influential attempt to seek common ground between libertarianism and traditionalist conservatism without denying the tensions between them. And the few who do mention fusionism do so only obliquely and to score the trivia point that the Federalist Society’s executive director, Eugene Meyer, has tried to extend his father’s fusionist legacy.

Because LCM commentators neglect the origins of fusionism, these scholars also miss the tensions that threaten it today. Although over time the general conservative movement has shifted its ideological boundaries and excluded many prominent traditionalists, the movement at least retains a nominal connection to traditionalism. In the legal world, by contrast, traditionalists never had many seats at the table. And the few places that were occupied by traditionalists like Robert Bork, Lino Graglia, and Stephen Presser are being filled increasingly by socially progressive libertarians. The result is that, as Harvard Law's Mark Tushnet recently boasted, "The culture wars are over; they lost, we won." Tushnet is certainly right that, over the past fifty years, liberals have been able to create in America what Italian social theorist Antonio Gramsci described as a left-wing cultural hegemony, to the point that being conservative in academia, media, and many other segments of elite society now often requires concealing one's identity and beliefs. But Tushnet is wrong in describing this as a "war," at least in the legal academy. There never was a war, because there never was a meaningful legal opposition on the right.

The 2016 election represented a revolt against the expurgation of traditionalism from the American right. Middle America shocked most observers by supporting a candidate who was ostentatiously opposed to foreign interventionism and economic libertarianism. Pundits miss the point when they express bewilderment over how evangelicals and other traditionalists could vote for a thrice-married, flamboyant, New York City real estate mogul. The explanation is not that these voters were duped into believing that Trump is a traditionalist, which he most certainly is not. The answer, rather, is that he was the only candidate who promised to defend their values, communities, and identities rather than promote the democratization and globalization agenda that the

Republican Party has made a priority for so long.

Tellingly, only six law professors in the entire country openly supported Donald Trump, and only one of those six teaches at a top-twenty-five law school (Stephen Presser is an emeritus professor at Northwestern Law). In fact, scores of right-of-center law professors proclaimed that Hillary Clinton would be better for conservatives, even joining a widely distributed statement, "Originalists Against Trump." The anti-Trump stance of these prominent LCM representatives aided the progressive narrative that no good conservative could ever support the Republican nominee—because the best conservative, under our left-wing hegemony, is not a conservative at all but a socially progressive libertarian.

The left's power to define the boundaries of respectable conservatism is the driving force behind the conventional narrative that the LCM has mounted a legal counter-revolution. That raises the following question: What if the purported success of the LCM is actually a manifestation of the larger failures of American conservatism?

The meaning of legal conservatism

In searching for a clearer understanding of legal conservatism, it may be helpful to revisit William F. Buckley's definition of a conservative as someone who "stands athwart history, yelling Stop." Using Buckley's definition, we can immediately see the problem in the LCM scholarship. Given how far the Supreme Court has moved to the left over the past fifty years, particularly on issues relating to race, religion, and sexuality, the Burger, Rehnquist, and Roberts Courts appear something less than conservative, contrary to the conventional narrative. To illustrate this point, consider how books such as Erwin Chemerinsky's *The Conservative Assault on the Constitution* treat *Planned Parenthood v.*

Casey as a conservative decision because, in rejecting the strict trimester framework created in *Roe v. Wade*, it narrowed the right to an abortion. Likewise, scholars often treat *Regents of University of California v. Bakke* as critical to the conservative counterrevolution because, in striking down racial quotas in university admissions, the decision announced some limits to the constitutionality of affirmative action. In fact, Mark Tushnet recently identified *Casey* and *Bakke* as two of the top five cases that progressives should “overrule at the first opportunity on the ground that they were wrong the day they were decided.”

But the *Casey* and *Bakke* decisions, respectively, favored sexual autonomy and egalitarianism much more than countervailing conservative values, such as traditional sexual relations or individual academic merit. Indeed, *Casey* and *Bakke* did very little to change access to abortion or the use of affirmative action. In the nearly forty-five years since *Roe*, abortions in the U.S. have remained at between 1 million and 1.5 million per year. Affirmative action has, if anything, increased in the nearly forty years since *Bakke*. In practice, the move away from numerical quotas and toward “individualized, diversity-based programs” has made the extent of race-based preferences more covert, insulating admissions programs from public scrutiny and challenge.

Casey and *Bakke* are simply not conservative decisions, a point evidenced in 2016 by *Whole Woman’s Health v. Hellerstedt* and *Fisher v. University of Texas II*. In these decisions, the liberal justices, joined by Justice Kennedy, used the *Casey* and *Bakke* standards to expand abortion and affirmative action even further. After almost a half century of litigation, it is nearly unfathomable that either policy will ever be reversed. So much for counterrevolution.

The failure of legal challenges to abortion and affirmative action underscores a profound lesson about American political

discourse. It has become customary to think of the left in terms of advancement, which means pushing for ever more change: more openness, more diversity, more egalitarianism. The right, by contrast, is conceived in terms of resistance to this advancement. At first glance, this makes perfect sense. To be a progressive is to seek progress, of course, and to be a conservative is to conserve what existed before that progress.

What is often overlooked in this simple dichotomy is that it has become customary for the right to assimilate the left’s victories into its own ideological perspective after it has lost ground on a given issue. So it is often the case that while the left initiates change in a particular area of law, that change does not become an entrenched legal norm until the right assimilates that norm into the American creed and thereby formalizes it as integral to our legal framework. That is what legal conservatism has come to mean—not to stand “athwart history, yelling Stop” but to chase the left, begging “Please, slow down.”

Conserving progressive liberalism for more than fifty years

Five important consequences flow from a paradigm in which the right resists, assimilates, and then formalizes the left’s values and victories.

First, at any given point, legal conservatism is defined by positions that were considered quite progressive only a few years before. Understood in these terms, legal conservatism is entirely perspectival and time-dependent. It is not so much the Burkean preservation of the accumulated wisdom of tradition but rather a generational delay in copying the left, almost like a suburban dad who dons 1980s hip-hop attire to impress his teenage son.

Second, because today’s conservatism is nearly identical to the previous generation’s

liberalism, conservative organizations are vulnerable to ideological takeovers. Many legal conservatives identify as such only because the liberalism of their youth has been overtaken by a more aggressive version of egalitarianism. Conservative causes and organizations, therefore, serve as vehicles for preserving the politics of yesteryear rather than for offering what might be considered an independent conservative perspective. Indeed, it is not uncommon for Federalist Society chapters, particularly at elite law schools, to consist largely of centrists who feel alienated from the more radical left-wing politics that pervade university life.

Third, because the right has assumed the task of formalizing the left's victories, the debate on many legal issues has become methodological rather than substantive. For example, whereas conservatives extol racial diversity because, in their view, the ratifiers of the Fourteenth Amendment were racial egalitarians, progressives extol racial diversity on the grounds that our society now values racial egalitarianism. The argument is thus about sources, not content.

Fourth, originalism, the principal interpretive methodology of the legal right, is particularly susceptible to leftward drift. The "old originalism" associated with figures like L. Brent Bozell, Raoul Berger, and Robert Bork was developed explicitly to counter the Warren Court's progressivism. In the 1980s, this assault on the Warren Court became subsumed by a general campaign against judicial activism. But judicial activism was not necessarily the problem for many leading conservatives. The real issue was the progressive values on which the Warren Court based its revisions of American law. What scholars call "new originalism" avoids directly challenging those values in favor of highly theoretical arguments about interpretation and process. As an unanchored methodology, floating in the progressive ether of the legal academy, the new originalism has quickly drifted leftward,

as evidenced in Jack Balkin's "living originalism" and most recently in Steven Calabresi's argument that originalism supports same-sex marriage. Calabresi's transition on this issue is particularly telling, given that Calabresi is one of the three founders of the Federalist Society.

Originalism has thus become a tool not for conserving the past but for retrospectively justifying each progressive victory. Consider how Randy Barnett has defended originalism from liberal attack on the grounds that originalism supports the left's agenda: "It is almost perverse," Barnett wrote in the *Washington Post*, "how critics of originalism refuse to accept that originalism bolsters the correctness of their own positions." But, he lamented, "these critics of originalism simply won't take 'Yes' for an answer." Some may find it equally perverse that the legal right has become preoccupied with using originalism to defend progressive positions, transforming conservatism from Buckley's yelling "Stop" to Barnett's pleading "Yes."

Fifth, the Gramscian cultural dominance of the left has induced the LCM to articulate its mission in terms designed to appeal to the progressive culture. This tendency is exemplified by Clint Bolick, an influential libertarian lawyer who was recently appointed to the Arizona Supreme Court. In works spanning more than twenty-five years and covering such diverse topics as litigation strategy, school vouchers, and immigration policy, Bolick has argued that the LCM must model itself after the NAACP to "claim the moral high ground." This NAACP strategy, according to Bolick, requires framing conservative policies as offering special benefits to African Americans and Latinos, and Bolick therefore encourages conservative lawyers to use these groups as the lead plaintiffs, as opposed to "chasing firetrucks to see if any members of the Teamsters Union are upset about affirmative action." Focusing on working-class and rural interests, Bolick warned, is a "los-

ing strategy.” This advice has not aged well in light of the Middle American revolt in the 2016 election. And one cannot help but wonder whether Bolick’s NAACP strategy is part of the mentality that incited the revolt.

With both the left and the right focused on the same causes and populations, but differing only in the degree to which their arguments indulge in abstract appeals to markets and the Founders, it is no wonder that the LCM has failed to stop the leftward march of the progressive machine. The ultimate result of this paradigm is that conservative legal scholars and judges become defensible based on how liberal they are, if not in their intentions then in the consequences of their work. This phenomenon is on display in David Dorsen’s *The Unexpected Scalia: A Conservative Justice’s Liberal Opinions* (2017), which praises Scalia for using his originalism to advance various liberal causes.

The reverse, of course, is unfathomable. No one would write a book extolling Justice Ginsburg for her conservatism, not only because there would not be very much to write, but more importantly because conservatism is valuable in our culture only to the extent it formalizes progressive liberalism. Under these conditions, the question is whether anything besides methodology distinguishes the legal right from the legal left.

The legal corporatist movement

One of the most recent studies of the LCM, Amanda Hollis-Brusky’s *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, represents a new path in the scholarship. It devotes no more than a few passing references to cultural and social issues.

This silence is staggering. Because culture, tradition, and community are apparently no longer part of the way people think about conservatism, a movement that fails to

conserve these things can still be responsible for a “conservative counterrevolution.” Put differently, if we define legal conservatism as legal corporatism—i.e., as designed merely to serve the interests of the business community—then we could say that the movement has been successful. But that also means it has not been “conservative” in any fundamental sense.

Hollis-Brusky’s book, which the American Political Science Association recognized as 2016’s best book on law and courts, is especially interesting because of its titular invocation of Richard Weaver’s foundational work, *Ideas Have Consequences* (1948). Despite this central reference, Hollis-Brusky mentions Weaver only once, in explaining the title on the first page. Weaver is thereafter dismissed because, according to Hollis-Brusky, his “book’s contributions to modern conservative thought were modest.”

That Hollis-Brusky sees one of the most influential traditionalists of the twentieth century as having made only a “modest” contribution to modern conservative thought illustrates just how pervasively traditionalism has been expurgated from academic understandings of American conservatism. It is also noteworthy that this definition of conservatism is indispensable to Hollis-Brusky’s narrative. She can characterize the conservative movement as successful only by excluding from its founding goals the many causes in which the movement has failed. Not only is traditionalism as a field of conservative thought ignored, but no social issues other than gun rights are even mentioned in Hollis-Brusky’s entire book.

A richer understanding of the actual ideas that animated the conservative movement and its legal applications might have led Hollis-Brusky to a different interpretation of the supposed “federalism revolution” that produced *U.S. v. Lopez* (1995), the first case in nearly sixty years to enforce the Commerce Clause. As Hollis-Brusky explains, the

federalism revolution is the LCM's greatest victory. That is certainly true. As a legal matter, however, the *Lopez* decision simply said that the Commerce Clause imposes *some* limitation on federal power, with that limitation tracking the court's expansive interpretations of federal power in the New Deal and civil rights eras. It was hardly radical for the Rehnquist Court to search for a fragment of Commerce Clause substance in the body of the Constitution after the Warren Court had excised the federalism tumor. Far from a counterrevolution, *Lopez* is yet another example of legal conservatism formalizing progressive victories.

Even more important is that *Lopez* has had almost no practical effect. More than twenty years after the *Lopez* victory, local schools and communities continue to be the subjects of federal social experimentation and engineering, a perverse inversion whereby states are decreasingly the laboratories of experimentation, as Justice Brandeis memorably urged, but their laboratories are increasingly the sites of federal experimentation. Moreover, conservative justices, with the notable exception of Justice Thomas, have voted at a substantially higher rate than their liberal counterparts in favor of federal laws displacing state authority under the preemption doctrine. Chief Justice Roberts and Justice Kennedy have voted for preemption at an especially high rate in cases involving business interests, in virtual lockstep with the views of the Chamber of Commerce.

In practice, the LCM has succeeded not in conserving faith, community, or tradition, but in empowering global corporations and the executive war machine to destroy essential features of conservative life. In this sense, and only in this sense, much of

the LCM scholarship is right in pointing out the movement's success. But anyone in the twenty-first century who thinks global corporations are categorically on the side of conservatism rather than the cultural left should spend less time reading *The Road to Serfdom* and more time watching Super Bowl commercials.

The result is that all the substantive goals that originally animated legal conservatism have been ceded to the left, and the only thing that the legal right has successfully "conserved" is the interpretive method it has used to formalize and justify those concessions. Indeed, because legal conservatism has shifted so radically toward the left, classic works like Bozell's 1966 book on the Warren Court and Bork's *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (1996) now read more like reactionary literature than anything resembling contemporary legal conservatism.

An even more poignant irony is that traditionalism is both the leg of the conservative stool that has been most neglected and the one that is most critical for the stool to stand, particularly after the end of the Cold War and with the meteoric rise of global capitalism. But when one looks across our nation—where Christianity is fading, illegitimacy rates are skyrocketing, and rural communities are dying from opiate abuse and despair—it is hard to imagine how to defend tradition in a land that no longer seems to have one. It is difficult to see what American conservatism has conserved about America, leading one to wonder whether legal conservatives, just like their progressive commentators, now see the right as an aberration in succumbing to the normalcy of night. †