

# THE FORMER CLERKS WHO NEARLY KILLED JUDICIAL RESTRAINT

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## ABSTRACT

*Richard Posner wrote that the theory of judicial restraint is dead and that the liberal decisions of the Warren Court killed it. Posner should have placed some of the blame on himself and other former Warren Court and early Burger Court clerks who joined the legal academy. As young law professors, they rejected legal process theory that they had learned in law school from Henry Hart and Albert Sacks at Harvard, Alexander Bickel and Harry Wellington at Yale, and from process theory's patron saints on the Court—Felix Frankfurter and John M. Harlan. Legal process theory yielded to new theories, including rights protection (John Hart Ely and Owen Fiss), Critical Legal Studies (Duncan Kennedy and Mark Tushnet), and law and economics (Richard Posner and Guido Calabresi).*

*This symposium piece explores the rise and fall of legal process theory as well as the scholarship of former Warren Court and early Burger Court clerks who nearly killed it. It also suggests that there could be a revival of a process-based judicial restraint based on a new generation of late Burger Court/early Rehnquist Court clerks-turned-academics who came of age during the mid-1980s. These law clerks rejected judicial supremacy and adopted popular constitutionalism and other democratic approaches to constitutional interpretation. Popular constitutionalism is inspired by the same faith in the democratic political process as the judicial restraint advocated by James Bradley Thayer, Felix Frankfurter, and Alexander Bickel.*

## INTRODUCTION

In *The Rise and Fall of Judicial Restraint*, Richard Posner declared that Thayerian judicial restraint was dead.<sup>1</sup> He even identified the theory's cause of death: the liberal decisions of the Warren Court.<sup>2</sup> Posner's critique in many ways reflects conventional wisdom. Once the Warren Court let the

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1 Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 553 (2012).

2 *Id.* at 546 ("Its judicial demise is attributable to the exuberant activism of the Warren Court, which in the 1950s and 1960s powered a major, left-leaning expansion of constitutional law.").

genie out of the bottle in *Brown v. Board of Education*<sup>3</sup> and declared itself the “ultimate interpreter of the Constitution” in *Baker v. Carr*,<sup>4</sup> we entered an uninterrupted era of judicial supremacy.

Posner’s article, part of a *California Law Review* symposium, recognized that the theory of judicial restraint has many definitions.<sup>5</sup> Posner focused on James Bradley Thayer’s constitutional theory that the courts should overturn a federal statute only in extreme situations (i.e., when the statute was unconstitutional “beyond reasonable doubt”<sup>6</sup>).<sup>7</sup> Thayer believed that judicial decisions that invalidated federal laws undermined public participation in the democratic political process.<sup>8</sup> Posner traced the rise of Thayerian judicial restraint through the jurisprudence of Oliver Wendell Holmes, Jr., Louis Brandeis, and Felix Frankfurter and the scholarship of Alexander Bickel.<sup>9</sup> Posner also identified its weaknesses; he rightly observed that Thayerians lack a normative theory for determining when judges should declare a statute (or executive action) to be unconstitutional.<sup>10</sup> And he identified judicial restraint’s legacy that judges—by invoking Bickel’s passive virtues of standing, mootness, ripeness, and the political question doctrine—can and do avoid constitutional questions.<sup>11</sup>

The Warren Court’s liberal decisions are not the lone cause of death of judicial restraint. The development of legal theory also played a role. Indeed, judicial restraint’s theoretical downfall can be attributed in part to former Supreme Court clerks who entered the legal academy, clerks including Posner himself.

During the 1960s and early 1970s, Warren Court and early Burger Court clerks entered the legal academy. They rejected legal process theory that they had learned in law school from Frankfurter protégés Henry Hart and Albert Sacks at Harvard, Alexander Bickel and Harry Wellington at Yale, and others. Instead, this new generation of law professors adopted competing theories and formed their own schools of legal thought. These new theories and schools of thought displaced legal process theory and eroded academic interest in judicial restraint.

My contribution to this panel on the constitutional contributions of the Warren Court and Burger Court traces the development of legal theory since the 1960s and argues that Posner and his fellow clerks-turned-academics

3 347 U.S. 483 (1954).

4 369 U.S. 186, 211 (1962).

5 Posner, *supra* note 1, at 520–21.

6 See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 146 (1893) (quoting *In re Wellington*, 33 Mass. (16 Pick.) 87, 95 (1834) (internal quotation marks omitted)).

7 Posner, *supra* note 1, at 522.

8 JAMES BRADLEY THAYER ET AL., JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 86 (Philip B. Kurland ed., 1967).

9 Posner, *supra* note 1, at 525–32.

10 *Id.* at 544.

11 *Id.* at 553 (describing Thayerian judicial restraint’s “legacy” as “limitations on justiciability”).

moved the theoretical debate beyond process theory and judicial restraint. Many, but by no means all, of the important legal theorists of this generation were former law clerks.<sup>12</sup> In order to aid our understanding of this transformation, I have created a typology that places members of this upstart generation of law professors into one of five categories:

1. Rights Protectors (Warren Court true believers, rights as trumps, Ely's *Democracy and Distrust*);
2. Post-Realists (Critical Legal Studies, Critical Race Theory, and other theories that contend that doctrine does not account for judicial results, law is politics);
3. Law and Economics (liberal and conservative forms);
4. Originalists (which among this group of law clerks was an empty set); and
5. Judicial Restraint Holdouts.

These five typologies are intended as rough outlines and nonexclusive categories. Some, such as law and economics, apply more for private law than public law (especially constitutional law). During the course of his or her career, any single scholar could fall into one of several groups.

Legal process theory—the primary home for Thayerians of the 1950s and early 1960s—had fallen out of favor by the early-to-mid-1970s.<sup>13</sup> The Warren Court's most trenchant critics no longer ruled the academic roost. Instead, a new wave of clerks-turned-academics adopted new theories—rights protection, post-realism (Critical Legal Studies), law and economics, and (eventually) originalism—all of which supplanted process theory. With these new theories in ascendancy and legal process theory in decline, judicial restraint yielded to an uninterrupted era of judicial supremacy.

The story, however, does not end there. Another generation of Supreme Court clerks, at the end of the Burger Court, became law professors. Some came to distrust the Court as a rights protector, believing that the Justices were nothing more than politicians in robes, and thus rejected judicial supremacy.<sup>14</sup> Joined by some older Warren and Burger Court clerks in the academy, they advanced more democratic theories of judicial review, including popular constitutionalism.<sup>15</sup> Democratic constitutional theory, advocated by Larry Kramer, Robert Post, Pam Karlan, and others, began to look a lot like legal process theory of the 1950s and 1960s.<sup>16</sup>

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12 This group includes not only Supreme Court clerks but also lower court clerks. Dave Trubek, for example, clerked for Second Circuit Judge Charles Clark. Some important legal theorists, such as Roberto Unger, did not clerk at all. For a list of Supreme Court clerks according to their respective Justices, see TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE* app. 4 (2006).

13 See *infra* notes 96–122 and accompanying text.

14 See *infra* notes 143–65 and accompanying text.

15 See *infra* notes 143–65 and accompanying text.

16 See *infra* notes 143–65 and accompanying text.

The death of judicial restraint was like an academic popularity contest in which legal process theory was no longer trendy and hip. The young cool kids in the academy, many of them former Warren and Burger Court clerks, adopted new ideas and transformed legal theory. Part I explains the ascendancy of legal process theory during the 1950s and early 1960s and its relationship to judicial restraint. Part II explores the rejection of legal process theory by Warren Court and Burger Court clerks who became law professors, classifies these professors based on five typologies, and explains each typology and its leading adherents. Part III suggests a possible revival of legal process theory as the last generation of Burger Court clerks joined the academy and became disenchanted with judicial supremacy.

### I. JUDICIAL RESTRAINT'S HOME BASE: LEGAL PROCESS THEORY

Scholarly advocates for judicial restraint found a home in legal process theory. The 1950s and early 1960s were legal process theory's heyday. Espoused in different forms by Henry Hart and Al Sacks at Harvard, Alexander Bickel and Harry Wellington at Yale, and Herbert Wechsler at Columbia, process theory sought "reasoned elaboration" from judges,<sup>17</sup> "neutral principles" from judicial decisions,<sup>18</sup> use of "passive virtues" by the Supreme Court,<sup>19</sup> and the understanding of institutional interrelationships among courts, legislatures, and administrative agencies. These law professors grappled with the implications of *Brown v. Board of Education*, criticized the Warren Court's judicial supremacy, and promulgated their ideas in *Harvard Law Review* forewords.<sup>20</sup> They taught influential courses on the legal process at Harvard and Yale, courses that emphasized fair and democratic procedures over results.<sup>21</sup> John Henry Schlegel wrote of the up-and-coming Yale law faculty: "All were various species of legal-process-oriented liberals for whom *Brown v. Board of Education* (1954) was rightly decided; McCarthyism was detested, but anticommunism, essential; and, except for [Dean Eugene] Rostow, the Vietnam War was to be righteously opposed."<sup>22</sup> Above all, process

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17 HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 145–52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

18 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1 (1959). For a critique of Wechsler's article, see Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988).

19 Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

20 See Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463 (1995) (discussing the history and significance of the *Harvard Law Review* forewords).

21 See Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 10–11 (2013); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra* note 17, at cii–ciii.

22 John Henry Schlegel, *Those Weren't "The Good Old Days," Just the Old Days: Laura Kalman on Yale Law School in the Sixties*, 32 LAW & SOC. INQUIRY 841, 843 (2007) (reviewing LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES* (2005)).

theorists coalesced around fair procedures, the power of reasoned elaboration, and the Court's limited institutional competence.

The patron saints of legal process theory on the Warren Court were Felix Frankfurter and John M. Harlan II. Process theorists extolled Frankfurter's and Harlan's opinions in law review articles.<sup>23</sup> To their students at Harvard, Yale, and elsewhere, process theorists employed Frankfurter and Harlan as exemplars of how the Court should decide cases.

Frankfurter's connection to leading process theorists ran deep. Indeed, scholars often associate him with process theory.<sup>24</sup> It is inaccurate, however, to attribute the theory to him. He is best described as "one of the [theory's] godparents."<sup>25</sup> He never promulgated process theory the way that Scalia promotes originalism,<sup>26</sup> though Frankfurter certainly encouraged his former students and law clerks leading the charge.<sup>27</sup> Frankfurter's fingerprints on process theory were everywhere. Hart was his star student and co-author;<sup>28</sup> Bickel, Sacks, and Wellington were his law clerks;<sup>29</sup> and Wechsler was one of his admirers. Indeed, Hart and Wechsler dedicated the first edition of *The Federal Courts and Federal System* to "Felix Frankfurter who first opened our minds to these problems."<sup>30</sup> As William Wiecek remarked, "[l]egal [p]rocess was but Felix Frankfurter writ large."<sup>31</sup> The epicenter of process theory and Frankfurter worship was Harvard Law School. At Harvard during the late 1950s, Peter Edelman recalled, "Felix Frankfurter was God."<sup>32</sup>

During the 1960s, Frankfurter's champions, the process theorists, began to lose the battle of ideas. Frankfurter retired from the Court in 1962; his

23 See Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 38 (1957); Henry M. Hart, Jr., *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

24 See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 220, 235 (1995); Eskridge & Frickey, *supra* note 21, at civ; LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 49–50 (1986); William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2032–33 (1994); William M. Wiecek, *American Jurisprudence After the War: "Reason Called Law,"* 37 TULSA L. REV. 857, 867–72, 874 (2002).

25 Eskridge & Frickey, *supra* note 21, at civ n.234.

26 See ANTONIN SCALIA, A MATTER OF INTERPRETATION 44–47 (1997).

27 See Wiecek, *supra* note 24, at 871–72. To former clerks, Frankfurter suggested article ideas or commented on their scholarship. See, e.g., Letter from Felix Frankfurter to Alex Bickel, at 2 (Mar. 18, 1963) (Felix Frankfurter Papers, Harvard Law School [hereinafter FFHLS], Box 206, Folder 12, Pt. III, Reel 33); Letter from Felix Frankfurter to Henry M. Hart, Jr., at 1 (June 29, 1956) (FFHLS, Box 185, Folder 14–15, Pt. III, Reel 16); Letter from Al Sacks to Felix Frankfurter, at 1–3 (Jan. 7, 1954) (FFHLS, Box 187, Folder 12, Pt. III, Reel 18).

28 See Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68 (1935).

29 See PEPPERS, *supra* note 12, at app. 4.

30 HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, at ix (1st ed. 1953).

31 Wiecek, *supra* note 24, at 874.

32 Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1799 (1991).

final opinion, his dissent in *Baker v. Carr*, warned about the perils of judicial supremacy.<sup>33</sup> Frankfurter's replacement, Arthur Goldberg, cast the Warren Court in an even more liberal direction and emboldened it in protecting rights. Scholars have identified at least two or even three different Warren Courts.<sup>34</sup> The first began with *Brown* and ended with Frankfurter's retirement in 1962; the second began when Arthur Goldberg replaced Frankfurter; and the third began in 1967 when Thurgood Marshall replaced Tom Clark.<sup>35</sup> During the second and third phases, the protection of rights—civil rights, voting rights, rights of the accused, and the right to privacy—trumped emphasis on process.<sup>36</sup>

The legal academy also changed. Yale began to challenge Harvard as the nation's preeminent law school—at least for “a certain kind of student.”<sup>37</sup> Yale and Harvard law students rejected the emphasis on fair process, reasoned elaboration, neutral principles, and institutional competence amid the political and social upheaval of the civil rights and antiwar movements.<sup>38</sup> As these students entered legal academia in the early 1970s, law and economics on the right, rights protection on the left, and Critical Legal Studies on the far left began to supplant process theory.<sup>39</sup>

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33 *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting) (“In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.”); see Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 346 (2013).

34 See MICHAL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953–1969*, at 80 (2005) (discussing the shift occurring in the Warren Court after the replacement of Justice Frankfurter with Justice Goldberg); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 11–12 (1998) (positing a three-part Warren Court); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 497–99 (2000) (characterizing the Warren Court as three different courts); Mark Tushnet, *The Warren Court as History*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 3–4 (Mark Tushnet ed., 1993) [hereinafter *THE WARREN COURT*] (arguing that the Warren Court did not exist “as a cultural phenomenon” until the early 1960s).

35 See HORWITZ, *supra* note 34, at 12.

36 See BELKNAP, *supra* note 34, at 80 (positing that after the replacement of Frankfurter with Goldberg, “the substantive liberalism espoused by the chief justice, Black, Douglas, and Brennan vanquished the process liberalism Frankfurter had championed”).

37 KALMAN, *supra* note 22, at 32; see also *id.* at 56–57 (noting the characterization and unique aspects of Yale for particular students in the mid-to-late 1960s).

38 Eskridge & Frickey, *supra* note 21, at cxix–cxxi (describing student critiques of process theory by Duncan Kennedy and Roberto Unger).

39 See Barzun, *supra* note 21, at 8–11 (noting the attack on legal process theory from the right in the 1970s and 1980s as well as by Critical Legal Studies); Eskridge & Frickey, *supra* note 24, at 2051 (“Hart and Sacks’s synthesis was rejected by some of their most thoughtful students, from both the right . . . and the left.”).

One other thing contributed to the decline of process theory and judicial restraint: the death of Alexander Bickel.<sup>40</sup> If Frankfurter was the god of process theory, then Bickel was the son (don't ask me who the holy ghost was). Bickel, like Frankfurter, was troubled by the Court's decision in *Baker v. Carr* eviscerating the political question doctrine and introducing an unworkable arbitrary and capricious standard.<sup>41</sup> Bickel, like Frankfurter, placed great faith in the Court as an institution, and Bickel's early work emphasized that the Court should zealously guard its legitimacy.<sup>42</sup> The Court legitimized both constitutional and unconstitutional legislation just by ruling on it. Thus, the Court should guard its legitimacy and when possible avoid constitutional questions. Bickel's passive virtues captured Brandeis's and Frankfurter's reliance on constitutional avoidance canons,<sup>43</sup> and Bickel's countermajoritarian difficulty emphasized the Court's tenuous position and limited institutional competence in a democratic system.<sup>44</sup> He was a constitutional law giant whose impact at Yale matched Frankfurter's at Harvard.<sup>45</sup> A Romanian-Jewish immigrant to the United States at age fourteen, Bickel understood Frankfurter's patriotism and emphasis on order and rule of law. Bickel was a political liberal who supported Robert Kennedy's presidential bid yet reviled the New Left's campus demonstrations during the late 1960s and early 1970s, who thought the Warren Court had gone too far in protecting individual rights yet defended *The New York Times* in the Pentagon Papers case.<sup>46</sup> Bickel's later scholarship criticized the Warren Court's excesses.<sup>47</sup> His passive virtues are judicial restraint's most enduring legacy.

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40 See Posner, *supra* note 1, at 533 ("With Bickel's death in 1974, the main Thayerian tradition comes to an end.").

41 See ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* 175–98 (1965); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 193–97 (2d ed. 1986) [hereinafter BICKEL, *LEAST DANGEROUS BRANCH*].

42 See BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 41, at 25–26 (arguing that "insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures"); see *id.* at 29–31, 71–72, 129 (discussing the Court's legitimating function).

43 See ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 17 (1957) (quoting Brandeis that the "most important thing we do is not doing"); BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 41, at 111–98; Bickel, *supra* note 19, at 41. Nonetheless, Brandeis did not always avoid constitutional questions. See, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Willing v. Chi. Auditorium Ass'n*, 277 U.S. 274 (1928).

44 BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 41, at 16–23.

45 See KALMAN, *supra* note 22, at 52; Robert A. Burt, *Alex Bickel's Law School and Ours*, 104 *YALE L.J.* 1853, 1856 (1995) (stating that Bickel's "distinctive vision framed the terms of debate in constitutional jurisprudence in the 1960's and beyond"); Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 *HARV. C.R.-C.L. L. REV.* 521, 521 (1976) ("While Alexander Bickel's premature death at the age of forty-nine was a personal tragedy for his family and friends, it was an intellectual loss of almost equal proportion for his wide and varied audience.").

46 KALMAN, *supra* note 22, at 52–54, 208–09, 214–15. For Bickel's decision to represent *The New York Times* and initial views on the case, see DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED* 101–04 (1996).

During the late 1960s Bickel clashed with his students, several of whom became leading members of the legal academy.<sup>48</sup> In 1974, Bickel died at age forty-nine of cancer. By the mid-1970s, his former students and their theories were in ascendancy. No process theorist stepped up to challenge them. Hart had died in 1969 after several years of declining health.<sup>49</sup> Al Sacks suffered “severe health problems” during the late 1970s and 1980s and served as dean of Harvard Law School, both of which slowed his scholarly efforts.<sup>50</sup> Yet Bickel’s death was the one that robbed process theory and judicial restraint of its standard-bearer and most eloquent spokesman.

## II. FIVE TYPES OF WARREN COURT AND EARLY BURGER COURT CLERKS IN THE ACADEMY

Legal theory played a key role in the decline of Thayerian judicial restraint. The Warren Court’s critics in the legal academy—the process theorists—saw their theories fall out of favor. Instead, Warren Court and early Burger Court clerks became law professors and advanced theories that made process theory passé.

This Part seeks to identify the Warren Court and early Burger Court clerks in the academy and to understand their theoretical opposition (or support for) judicial restraint. To do so, it places these legal academics into one of five categories: (1) Rights Protectors; (2) Post-Realists/Critical Legal Studies (CLS); (3) Law and Economics; (4) Originalists; and (5) Judicial Restraint Holdouts. This typology explains what each of these schools of thought stood for, who their leaders were, which Justices they clerked for, and how these upstart law professors contributed to judicial restraint’s demise.

The categories are broad, overlapping, and in some instances inadequate. It is impossible to account for every Warren Court and early Burger Court clerk who became a law professor. Nor is it possible to capture all the nuances of complex legal theories in thumbnail sketches. Typology, however, has its place. Inspired by Roscoe Pound’s sociological jurisprudence and Philip Bobbitt’s modalities of constitutional interpretation (and with apologies to Pound and Bobbitt for putting their ideas in the same breath as mine), I have identified academics and their theories with one of five schools of thought in order to present a more complex portrait about who or what killed the theory of judicial restraint.

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47 For Bickel’s criticism of the Warren Court, see generally ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

48 KALMAN, *supra* note 22, at 155, 287 (discussing Duncan Kennedy’s “radicaliz[ing]” experiences at Yale, his interactions with Bickel, and Bickel’s relief that Kennedy did not accept Yale’s offer to join the faculty).

49 For the best chapter on Hart, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 258–85 (2000); *see also id.* at 390 n.195 (discussing Hart’s declining health).

50 HART & SACKS, *supra* note 17, at xcvi.



A. *Rights Protectors*

## Category 1: Rights Protectors

Intellectual leader: John Hart Ely (Warren OT 1965)<sup>51</sup>Inspirations: *Carolene Products* Footnote Four

Patron Saints: Justice Brennan, Chief Justice Warren, John Rawls

Charter Members: John Hart Ely, Ronald Dworkin, Owen Fiss, Frank Michelman, Laurence Tribe

Purpose: To justify the Warren Court's liberal decisions

Category 1 (Rights Protectors) is the broadest of the five categories. Many liberal professors entered the legal academy after clerking on the Warren Court and early Burger Court. These young academics believed in the Court's mission of protecting civil rights and civil liberties. They placed their faith in the judiciary as the most effective branch when it came to safeguarding the legal rights and remedies of the less fortunate. They gravitated to theories that defended the Warren Court's liberal decisions and the role of the Court as a rights protector. They were not troubled by Bickel's counter-majoritarian difficulty and embraced the Court's role as standing up for the little guy. Laura Kalman has referred to this category as "legal liberalism."<sup>52</sup> A less flattering label is Warren Court preservationism. As Kalman wrote, "Calabresi, Ely, and other legal liberals of all ages operate in a twilight zone where Earl Warren receives artificial life support."<sup>53</sup>

This category encompasses numerous liberal academics and their theories. Some of them believed in their patron saint Justice Brennan's approach that rights are trumps—that rights trumped the power of the federal government and especially the power of state governments to abridge minority rights. Viewed by many as the chief tactician of the Warren Court's civil rights and civil liberties revolution,<sup>54</sup> Brennan inspired fierce loyalty among many of his former clerks who entered the academy and who theorized about ways to justify the Court's rights-protecting role.

Owen Fiss (Brennan OT 1964) is considered a paradigmatic Warren Court preservationist and rights protector. Fiss believed that American con-

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51 This Article identifies clerks by the terms in which they served. OT means October Term.

52 LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996) ("[Legal liberalism refers to] trust in the potential of courts, particularly the Supreme Court, to bring about 'those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy change with nationwide impact.*' Because of the nation's experience with the Warren Court, legal liberalism has been linked to political liberalism since midcentury." (quoting GERALD N. ROSENBERG, *THE HOLLOW HOPE* 4 (1991))).

53 *Id.* at 8.

54 Robert C. Post, *William J. Brennan and the Warren Court*, in *THE WARREN COURT*, *supra* note 34, at 123 (quoting Hutchinson that Brennan was "responsible" for the Warren Court's "intellectual legacy"); POWE, *supra* note 34, at 499 (noting that Dennis Hutchinson, Sanford Levinson, and Robert Post credited Brennan with the Warren Court's leadership).

stitutional law began in 1954 with *Brown v. Board of Education*<sup>55</sup> and that everything after 1969 was a retrenchment on the Warren Court's "program of constitutional reform," which was "almost revolutionary in its aspiration and, now and then, in its achievements."<sup>56</sup> Fiss's early scholarship on injunctions emphasized the Court's role not only as rights protector but also as remedy enforcer. Contesting the progressive idea that injunctions should be an extraordinary remedy (particularly in the labor context), Fiss argued in favor of structural injunctions in light of "the triumph of *Brown* and the civil rights injunction[s]."<sup>57</sup>

Like Fiss, Frank Michelman (Brennan OT 1961) is another intellectual leader of the rights protectors. Building on John Rawls's theory of distributive justice, Michelman believed that rights protection extended not only to race but also to class.<sup>58</sup> In a groundbreaking 1969 *Harvard Law Review* foreword, he articulated a minimum theory of equal protection that urged the Court to use the Fourteenth Amendment to protect the poor.<sup>59</sup> Michelman's theory, if adopted by the Court, would have resulted in a different outcome in cases such as *San Antonio v. Rodriguez*, which upheld Texas's system of financing public education through property taxes even though the system resulted in wide economic disparities among its public school systems.<sup>60</sup>

Michelman continued to advance a Rawlsian theory that the courts should protect the poor—particularly when it came to welfare rights.<sup>61</sup> The Court gave support to his theory with *Goldberg v. Kelly*,<sup>62</sup> which held that welfare benefits could not be revoked without procedural due process.<sup>63</sup> *Goldberg v. Kelly* was a fundamental case about the proper role of the Court in the eyes of rights protectors such as Fiss, Michelman, and Charles Reich (Black OT 1953).<sup>64</sup> Indeed, Fiss taught generations of Yale law students civil

55 347 U.S. 483 (1954).

56 Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991).

57 OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 6 (1978).

58 See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 14–15 (1969) (building on Rawls's theory of "justice as fairness" and the identification of "just wants").

59 *Id.* at 14–15 & n.20. See generally Frank I. Michelman, *The Priority of Liberty: Rawls and "Tiers of Scrutiny"* (Harvard Pub. Law, Working Paper No. 11-22, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1927292](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1927292) (discussing "Rawlsian political liberalism").

60 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

61 See Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1016 (1973) (discussing Rawls's "comprehensive, coherent theory of social justice").

62 397 U.S. 254 (1970).

63 *Id.* at 261.

64 *Id.* at 262 n.8 (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)) (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)); see also Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 789 (1990) (describing *Goldberg's* outcome as "singular" and "remarkable" and attributing it to Brennan's jurisprudential triumphs during the 1960s); Charles A. Reich,

procedure through the lens of *Goldberg v. Kelly* and its progeny.<sup>65</sup> For Fiss, “Procedure,” as he referred to his legendary course, means not the Federal Rules of Civil Procedure but the Fourteenth Amendment’s Due Process Clause and the Court’s ability to use it to protect the less fortunate.<sup>66</sup>

The *primus inter pares* among the intellectual leaders of the rights protectors was John Hart Ely (Warren OT 1963).<sup>67</sup> As a Yale law student, he was a standout pupil of Bickel’s. As a summer associate at Arnold, Porter & Fortas, he assisted partners Abe Fortas and Abe Krash in preparing the briefs for Fortas’s oral argument in *Gideon v. Wainwright*.<sup>68</sup> Ely’s clerkship with Chief Justice Warren turned him into a lifelong defender of Warren and his Court.<sup>69</sup> Ely dedicated his most important book, *Democracy and Distrust*, to Warren and wrote: “You don’t need many heroes if you choose carefully.”<sup>70</sup>

*Democracy and Distrust* borrowed heavily from process theory, blunted Bickel’s Warren Court criticism, and answered Bickel’s countermajoritarian difficulty.<sup>71</sup> The Court was not countermajoritarian; judicial review was not a “deviant institution in the American democracy.”<sup>72</sup> The Court’s role, according to Ely, was not to trump the democratic political process but to improve it. Instead of inviting judges to impose their fundamental values on the country, Ely advocated “a participation-oriented, representation-reinforcing approach to judicial review.”<sup>73</sup> Ely’s theory justified the Court’s intervention in *Brown v. Board of Education*<sup>74</sup> as well as *Baker v. Carr*<sup>75</sup> and subsequent voting rights cases.<sup>76</sup> He disagreed with *Roe v. Wade*<sup>77</sup> because it second-

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*Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 731 (1990) (describing *Goldberg* as “a landmark in the evolution of social justice”).

65 See OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES 54–130 (2003).

66 Fiss’s retirement speech in his last civil procedure class made students cry. See M.L., *A Professor’s Reach*, YALE L. SCH. (Feb. 21, 2011), <http://www.law.yale.edu/admissions/12827.htm>.

67 As of 2000, Ely was the fourth most-cited legal scholar behind Posner, Dworkin, and Holmes. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 tbl.6 (2000).

68 ANTHONY LEWIS, *GIDEON’S TRUMPET* 122–26 (1964).

69 John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 11 (1974) (“He was a leader because he was a man with a mission, and because the mission was good.”); see *id.* (describing Warren as “one of the greatest single forces for right the nation has ever known”).

70 JOHN HART ELY, *DEMOCRACY AND DISTRUST*, at v (1980).

71 *Id.* at 69–72 (discussing Bickel’s later work and Warren Court criticism); see also Harry H. Wellington, *Foreword* to BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 41, at x (arguing Ely “in one way or another is a student of Bickel” and that his scholarship would not have been possible without *The Least Dangerous Branch*).

72 BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 41, at 18. For Bickel’s discussion of the countermajoritarian difficulty, see *id.* at 16–28.

73 ELY, *supra* note 70, at 87; see *id.* at 87–104.

74 347 U.S. 483 (1954).

75 369 U.S. 186 (1962).

76 ELY, *supra* note 70, at 116–25.

77 410 U.S. 113 (1973).

guessed legislatures, revived the evils of *Lochner*,<sup>78</sup> and lacked a constitutional principle.<sup>79</sup> Ely's theoretical disagreement with *Roe* revealed the strong influence of legal process theory on *Democracy and Distrust*. Yet Ely also rejected the prior generation's emphasis on neutral principles, the Court's limited institutional competence, and safeguarding the Court's legitimacy. He later wrote: "What it was about Felix Frankfurter that supposedly 'fooled' Franklin Roosevelt was the 'legal process' joker, the assumption that there are times when one may strongly disapprove of a law without being prepared to declare it unconstitutional."<sup>80</sup>

Ely's theory of judicial review was not new. It justified the Warren Court's jurisprudence by borrowing from process theory as well as from footnote four of *Carolene Products*, which called for a "more 'exacting' judicial scrutiny" for legislation that interfered with the democratic political process.<sup>81</sup> The text of Harlan Fiske Stone's opinion suggested the Court should take a deferential approach in reviewing economic legislation. But his famous footnote argued that legislation that violates "a specific prohibition of the Constitution" including the "first ten amendments," that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or that prejudices "discrete and insular minorities" should be subject to "a correspondingly more searching judicial inquiry."<sup>82</sup>

The power of Ely's book was its common sense approach to a previous generation's post-*Brown* and post-*Baker* anxiety about the scope of judicial review, the debate about whether judges should impose their fundamental values, and whether we would become a government by judiciary. It rejected Bickel's concern with the counter-majoritarian difficulty and the Court's legitimating function and Wechsler's concern with neutral principles. It spoke for a new generation of academics intent on defending the liberal decisions of the Warren Court and on protecting rights of those who needed protecting—either because they were "discrete and insular minorities" or because of defects in the political process or both.

In addition to Ely, others answered Bickel's concern about the counter-majoritarian difficulty and his criticism of the Warren Court's perceived excesses in *Baker v. Carr* and other cases. Though more of a process theorist than a rights protector, Gerald Gunther (Warren OT 1954) mocked Bickel's passive virtues for praising the Court's intervention in *Brown* and its avoid-

78 *Lochner v. New York*, 198 U.S. 45 (1905).

79 John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926, 937–43, 948–49 (1973).

80 John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 865–66 (1991). Ely noted: "I'm not sure this account is correct." *Id.* at 866 n.102.

81 ELY, *supra* note 70, at 76–78 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)) (citing *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944)).

82 *Carolene Prods.*, 304 U.S. at 152 n.4 (citations omitted); see also David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741, 745 (1981) (identifying footnote four's influence on the Roosevelt Court's anti-totalitarian theory of the Constitution).

ance of a 1955 interracial marriage case *Naim v. Naim*,<sup>83</sup> but criticizing its decision in *Baker*—as “the 100% insistence on principle, 20% of the time.”<sup>84</sup> Near the end of his illustrious career and after thirty years of work on the project, Gunther published a biography of Judge Learned Hand, one of the leading lower court judges and practitioners of judicial restraint.<sup>85</sup> Instead of emphasizing Hand’s judicial restraint, his criticism of *Brown* and judicial review (the former conveniently blamed on Frankfurter),<sup>86</sup> or Hand’s inspiration for the law and economics movement in *Carroll Towing*<sup>87</sup> (which Posner pointed out was not even mentioned in the biography), Gunther turned Hand into a civil libertarian and constitutional law scholar.<sup>88</sup> In other words, Gunther turned Hand into Gunther. The Hand biography became another argument for protection of civil rights and civil liberties.

This far-from-exhaustive discussion of the rights protectors category cannot be complete without mentioning Laurence Tribe (Stewart OT 1967). Immediately after his clerkship, Tribe joined the Harvard law faculty and established himself as one of constitutional law’s leading liberal voices. In 1978, he published the first edition of his highly influential treatise, *American Constitutional Law*.<sup>89</sup> Tribe’s treatise made no secret of its preference for the Court’s protection of civil rights and civil liberties and its distaste for legal process theory, passive virtues, or judicial restraint. In the preface to his first edition, he wrote: “Though I express occasional reservations about judicial initiative in specific settings, I reject the assumptions characteristic of Justices like Felix Frankfurter and scholars like Alexander Bickel: the highest mission of the Supreme Court, in my view, is not to conserve judicial credibility . . . .”<sup>90</sup> Tribe wrote in his 1978 preface: “I perceive in recent decisions of the Supreme Court a distressing retreat from an appropriate defense of liberty and equality.”<sup>91</sup> Seven years later, he argued and lost a challenge to Georgia’s anti-sodomy law in *Bowers v. Hardwick*.<sup>92</sup>

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83 *Naim v. Naim*, 350 U.S. 891, 891 (1955) (mem.) (per curiam), *appeal denied*, 350 U.S. 985 (1956) (mem.) (per curiam).

84 Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

85 GERALD GUNTHER, *LEARNED HAND* (2d ed. 2011).

86 *Id.* at 572–79.

87 *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (laying out the so-called “Hand Formula” where the burden of precaution required is a function of the probability and the gravity of injury).

88 Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 514–15 (1994) (reviewing GUNTHER, *supra* note 85); *see id.* at 513–20 (contrasting Hand’s opinions in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917) with *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951)). Posner concluded: “I would rate Hand’s contribution to constitutional thought slight.” *Id.* at 520.

89 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

90 *Id.* at iv.

91 *Id.* at v.

92 478 U.S. 186 (1986).

Led by Fiss, Michelman, Ely, and Tribe, rights protectors embraced theories that sought to preserve the liberal decisions of the Warren Court and to justify the Court's interventionist role to protect the civil rights and civil liberties of social outcasts, racial and religious minorities, and the poor. They looked to Rawls's *Theory of Justice*,<sup>93</sup> footnote four of *Carolene Products*,<sup>94</sup> and the Fourteenth Amendment's Equal Protection and Due Process Clauses.<sup>95</sup> And they rejected concerns about the Court's legitimacy and countermajoritarian difficulty and rebuffed the use of passive virtues. Even if judicial review is antidemocratic, rights protectors believed that by protecting rights the judiciary made American democracy a more just and fair form of government.

### B. *Post-Realists*

Category 2: Post-Realists (Critical Legal Studies, Critical Race Theory, etc.)

Intellectual leaders: Duncan Kennedy (Stewart OT 1970), Roberto Unger

Inspirations: Legal Realism, Deconstruction, Marxism

Patron Saints: William O. Douglas, Karl Marx, Max Weber

Charter Members: Peter Gabel, Robert Gordon, Morton Horwitz, Mark Kelman, Karl Klare, John Henry Schlegel, David Trubek, Mark Tushnet (Marshall OT 1972)

Purpose: To demystify doctrine and the rule of law as indeterminate (the indeterminacy thesis) and critique legal liberalism from the left

The New Left entered law school at the height of the black power and antiwar movements. Yale had eclipsed Harvard as the law school for the radical left. During the 1970 May Day demonstrations over the murder trial of Bobby Seale, New Haven was the epicenter of student activism. Some law students (including Hillary Rodham Clinton) attended Seale's trial as observers. Other more radical students clashed with the faculty and administration. They lacked faith in institutions and could cite numerous examples as to why—the murders of Dr. Martin Luther King, Jr. and Bobby Kennedy, the election of Richard Nixon, the Kent State shootings, FBI wiretapping of radicals, and the Vietnam War and bombing of Cambodia. The lack of faith in institutions extended to the Supreme Court. Radical law students challenged both their professors' belief in legal process theory as well as the Warren Court's legal liberalism. Nonetheless, some of these students excelled in law school, clerked on the early Burger Court, and entered the legal academy.

New Left academics formed schools of thought that I have labeled post-realist in an effort to capture not only Critical Legal Studies (CLS) but also

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93 JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

94 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

95 U.S. CONST. amend. XIV.

Critical Race Theory (CRT) and Feminist Legal Theory (FLT).<sup>96</sup> Post-realists deconstructed legal doctrine. They believed that doctrine did not account for judicial results, and legal rules were indeterminate—the “indeterminacy thesis.”<sup>97</sup> The rule of law—in private law categories such as torts, contracts, and property as well as public law—was merely a cover for political judgments and policy preferences. As Mark Tushnet observed, “the proposition common to most [CLS] authors [is] that law is politics.”<sup>98</sup> Borrowing from legal realism of the 1920s and 1930s, deconstructionist literary theory, the law and society movement, and the “false consciousness” of Marxist theory, the post-realists attacked process theory and rights protection. The choice between the democratic political process and the judicial protection of civil rights and civil liberties was a false one. Both theories failed because of their faith in the rule of law and because of the indeterminacy of rules.

One of the leading post-realists was Duncan Kennedy. As a Yale law student, Kennedy clashed with Bickel and other process theorists.<sup>99</sup> As a young Harvard law professor, Kennedy started Critical Legal Studies with David Trubek, his first-year property professor who had been purged from Yale in 1972 and landed at Wisconsin.<sup>100</sup> Kennedy and Trubek recruited other New Left professors including Tushnet and John Henry Schlegel as well as fellow travelers from the law and society movement.<sup>101</sup> In the spring of 1977, they

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96 Tensions among CLS, CRT, and FLT existed from the beginning. CLS’s indeterminacy thesis clashed with some of CRT’s and FLT’s emphasis on rights. See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1520 (1991) (“[S]ome feminist and minority scholars who share the [CLS] political location have disagreed with some formulations of the indeterminacy thesis, and in particular with the use of that thesis to challenge the importance of the vindication of rights, especially constitutional rights.”). Others associated with CRT, including Derrick Bell, echoed CLS’s skepticism. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

97 Compare Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 339 (1996) (proposing an indeterminacy thesis that is not vulnerable to the criticisms lodged against the original version), with Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 558–59 (1993) (arguing that claims premised on the “indeterminacy thesis” are unpersuasive), and Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462–63 (1987) (offering a critique of the indeterminacy thesis).

98 Tushnet, *supra* note 96, at 1517.

99 See *supra* note 48.

100 John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 392–93 (1984).

101 *Id.* at 395–96.

Kennedy is a cross between Rasputin and Billy Graham. Machiavellian, and with a gift for blarney that would make the stone get up, walk over, and kiss him, he can work an audience or an individual with the seductiveness of a revivalist preacher, for Kennedy wants your soul. Trubek, on the other hand, the self-described leader of the Radical Yale Law School in Exile “Mafia,” is more like a cross between Lloyd Cutler and Rabbi Ben Ezra. Enormously skilled at bureaucratic maneuvering (he has almost singlehandedly kept the soft money heat pump flowing at Wisconsin for several years now) and a naturally diplomatic conciliator of

held the first of two CLS conferences at the University of Wisconsin Law School. Kennedy published articles about private law doctrines in contracts and torts to reveal the contradictions inherent in the choice between formal legal rules and standards.<sup>102</sup> As law students, Kennedy and the other high priest of CLS, Roberto Unger, had written unpublished essays attacking the Hart and Sacks materials.<sup>103</sup> Kennedy, Unger, and other CLS scholars also exposed the “vacuity of the discourse” about rights.<sup>104</sup> A “false consciousness” in the logic and efficacy of rules (classical legal thought) was just as bad as “false consciousness” about the efficacy of protecting rights.<sup>105</sup>

There was only one problem with post-realism. Once CLS had deconstructed everything—private law, public law, doctrine, rights protection—they lacked a theory to replace the ones that they had deconstructed. They couldn’t answer the question: “[W]hat would you put in its place?”<sup>106</sup> Other academics, some of whom had clerked on the Warren and early Burger Courts, were equally dissatisfied with process theory yet came up with theories of their own.

### C. *Law and Economics*

Category 3: Law and Economics

Intellectual leaders: Richard Posner (Brennan OT 1963)

Inspirations: Learned Hand’s *Carroll Towing*

Patron Saints: Ronald Coase, Guido Calabresi (Black OT 1958)

Charter Members: Richard Posner, Guido Calabresi, Gary Becker, Henry Manne, A. Mitchell Polinsky

Purpose: To inform legal decision-making based on cost-benefit analysis and economic efficiency

If post-realists attacked legal process theory from the left, then the law and economics movement supplanted it from the right. The president of the 1961–1962 *Harvard Law Review* was Richard Posner. During the 1950s,

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no mean talents, he makes and maintains alliances with consummate ease. One need not, however, defend one’s soul against Trubek’s onslaught; he mostly wants your support.

*Id.* at 392 (footnote omitted).

102 See generally Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); see also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987) (critiquing the debate about rules and standards).

103 See *supra* note 38 and accompanying text; see also KELMAN, *supra* note 102, at 187–212 (discussing CLS’s critique of process theory).

104 Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 39 (1984).

105 *Id.* at 40–44.

106 Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779, 780 (1992) (reviewing KELMAN, *supra* note 102). But see John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 ALA. L. REV. 967, 968 (2007) (“CLS wasn’t killed by a question; it simply drifted out of fashion for want of a ‘new look.’”).



Frankfurter had first dibs on the law review's best and brightest. But by 1962, Frankfurter had retired, and Harvard's top students clerked for Brennan—including Posner.<sup>107</sup> For two years after his Brennan clerkship, Posner worked for one of Frankfurter's former clerks and protégés, Federal Trade Commissioner Philip Elman.<sup>108</sup> In just three short years, Posner had been exposed to the inner sanctums of legal liberalism and legal process. He charted a third course—law and economics.

Law and economics did not begin with Richard Posner. As he conceded, he was standing on the shoulders of economist Ronald Coase and Yale law professor Guido Calabresi.<sup>109</sup> Coase's 1960 article *The Problem of Social Cost* and Calabresi's *Some Thoughts on Risk Distribution and the Law of Torts* a year later started the movement.<sup>110</sup> Coase introduced economic efficiency, transaction costs, positive and negative externalities, and marginal economic theory into the legal lexicon.<sup>111</sup> The Coase theorem posited that, in the absence of transaction costs, parties could achieve efficient outcomes by contracting around externalities regardless of the initial distribution of property.<sup>112</sup> Transaction costs, however, were rarely so low.<sup>113</sup> Calabresi applied similar ideas about economic efficiency to tort law, specifically to the cost of accidents.<sup>114</sup>

Posner popularized law and economics—by writing about antitrust law, by extending economic analysis to many types of legal questions in the first edition of his groundbreaking book *Economic Analysis of Law* in 1973, and by becoming one of the most prolific scholars of last forty years.<sup>115</sup> Law and

107 Richard A. Posner, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 9, 9 (1997) [hereinafter Posner, *In Memoriam*]; Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 13 (1990).

108 Interview, *A Conversation with Judge Richard A. Posner*, 58 DUKE L.J. 1807, 1812 (2009) (describing Elman as “a former boss of mine whom I greatly respected”); Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 761–62 (2005) (discussing Elman).

109 RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 4 (1981) (describing them as “pioneers”).

110 R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). For a discussion of Calabresi's role in developing the ideas in the Coase Theorem, see Alain Marciano, *Calabresi, “Law and Economics” and the Coase Theorem* (Int'l Ctr. for Econ. Research, Working Paper No. 26/2010, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1710608](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1710608).

111 See Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L.J. 499, 541–42 (2011).

112 Coase, *supra* note 110, at 10.

113 *Id.* at 15 (describing it as a “very unrealistic assumption”).

114 GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970). See generally Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85 (2005) (discussing Calabresi's book, as well as exploring its influences and impact on current scholarship).

115 RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 1–8 (1973). He is the most cited legal scholar of all time. See Charles K. Rowley, *An Intellectual History of Law and Economics:*

economics has developed in numerous ways. It can be positive or normative, liberal or conservative. Indeed, Calabresi, a leading Warren Court preservationist and rights protector, argued that efficiency considerations should be balanced against moral ones as well as against institutional competence.<sup>116</sup> In recent years, left-of-center legal scholars including Cass Sunstein (Marshall OT 1979) have focused on behavioral economics.<sup>117</sup>

The post-realists, particularly CLS and the law and society movement, relentlessly critiqued law and economics. Duncan Kennedy wrote that the idea that judges should decide among possible legal rules based on Kaldor-Hicks efficiency (with the better off party compensating the worse off) is “a bad idea, practically unworkable, incoherent on its own terms, and just as open to alternating liberal and conservative ideological manipulation as the open-ended policy analysis it was supposed to replace.”<sup>118</sup> And yet Kennedy’s biography lists “Left Wing Law and Economics” among his specialties.<sup>119</sup> Law and economics is a big tent indeed.

With CLS applying its indeterminacy thesis to law and economics and law and society preferring qualitative methodologies to quantitative ones, no one in the legal academy was talking about process theory anymore. With the post-realists led by Kennedy and law and economists led by Posner jockeying for position in the intellectual pecking order, process theory was no longer relevant to the contemporary scholarly debate.

The law and economics debate took place mostly in torts, contracts, property, criminal law, and administrative law and regulation. Unlike post-realism, law and economics applied more to private law than public law and had little to say about constitutional theory or a general theory of judging. Posner, the leading law and economist, has critiqued Ely’s *Democracy and Distrust* and what Posner contends is the general failure of constitutional theory.<sup>120</sup> When it comes to judging, Posner has aligned himself with legal pragmatists who fit doctrine around consequences.<sup>121</sup> Not surprisingly, Pos-

1739–2003, in *THE ORIGINS OF LAW AND ECONOMICS* 3, 20 (Francesco Parisi & Charles K. Rowley eds., 2005) (describing Posner as “unequivocally” the “most important scholar in law and economics” since he published *Economic Analysis of Law*); *supra* note 67.

116 Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972).

117 See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008).

118 Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 465, 465 (Peter Newman ed., 1998); see also KELMAN, *supra* note 102, at 151–85 (discussing Kennedy’s and Michelman’s critiques of the conservative preferences in law and economics).

119 *Duncan M. Kennedy*, HARV. L. SCH., <http://www.law.harvard.edu/faculty/directory/10469/Kennedy> (last visited Apr. 12, 2014).

120 RICHARD A. POSNER, *OVERCOMING LAW* 198–214 (1995).

121 Posner, *supra* note 1, at 539; see *id.* 539–42; see also RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 5 (2013) (“I am a pragmatic judge . . .”); *id.* at 5–6 (linking pragmatism with legal realism); RICHARD A. POSNER, *HOW JUDGES THINK* 230–65 (2008) (“The word that best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior is ‘pragmatist’ . . .”); see *id.* at 230–65; RICHARD A. POSNER, *CARDOZO* 28 (1990) (“Cardozo’s extrajudicial writings constitute in fact the fullest

ner argues that “[m]any of the most highly regarded judges and Justices in American legal history” have been pragmatists.<sup>122</sup> But when it comes to today’s constitutional interpretation, another theory has dominated the marketplace of ideas.

#### *D. Originalism*

Category 4: Originalism

Intellectual Leaders: Ed Meese, Antonin Scalia

Inspirations: Hugo Black

Patron Saints: James Madison

Charter Members: None from this generation of Warren Court/Burger Court clerks; Robert Bork, Antonin Scalia

Purpose: To limit constitutional decision making to the original intent of the Framers and the original meaning of the text

In a July 1985 speech to the American Bar Association, Attorney General Ed Meese attacked liberal decisions of the Warren Court and Burger Court and feared that “a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government.”<sup>123</sup> Instead of interpreting the Constitution based on a judge’s policy preferences, Meese advocated a different approach: “The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.”<sup>124</sup> Meese’s speech declared originalism to be the official policy of the Reagan Administration:

It has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention. In the cases we file and those we join as *amicus*, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.<sup>125</sup>

Meese’s theory wasn’t new, either. Hugo Black could be considered the twentieth century’s “most successful originalist” for taking a textualist

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statement of a jurisprudence of pragmatism that we possess . . . Cardozo’s formulation was not only more fully developed but also clearer, more explicit, and more coherent [than Holmes’s].” (footnote omitted).

122 Posner, *supra* note 1, at 542; *see id.* at 540 (noting that prominent pragmatists included John Marshall, Holmes, Brandeis, Cardozo, Robert Jackson, Learned Hand, Roger Traynor, and Henry Friendly).

123 Edwin Meese III, *The Great Debate: Attorney General Ed Meese III*, FEDERALIST SOC’Y (July 9, 1985), <http://www.fed-soc.org/resources/page/the-great-debate-attorney-general-ed-meese-iii-july-9-1985>.

124 *Id.*

125 *Id.*; *see* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 13–14 (2009) (positing that originalism was an instrument of the Reagan Administration to put its critique of the Warren and Burger Courts in “jurisprudential terms,” and that Ed Meese instituted a campaign to publicly promote this idea).

approach to the Constitution, a theory then-described as interpretivism.<sup>126</sup> In attempting to incorporate the Bill of Rights into the Fourteenth Amendment's Due Process Clause, Black relied on the original intent of the Framers of the Reconstruction Amendments.<sup>127</sup> Black, not Brennan, is often considered the "intellectual leader" of the Warren Court.<sup>128</sup>

Originalism, as conceived by Meese and adopted by the Reagan Administration, promoted different types of jurists than Hugo Black. Less than a year after Meese's ABA speech, Reagan nominated D.C. Circuit Judge (and former law professor) Antonin Scalia to the Supreme Court. With almost no fanfare because of liberal opposition to Rehnquist's elevation to Chief Justice, the 50-year-old Scalia was confirmed 98 to 0.<sup>129</sup> Reagan's next Supreme Court nominee, Robert Bork, was not so fortunate. Bork established his academic reputation at Yale as one of the nation's foremost antitrust scholars and dabbled in constitutional law by writing about neutral principles.<sup>130</sup> Bork's attempts to defend originalism during his 1987 Supreme Court confirmation hearings resulted in his rejection by the U.S. Senate by a 58-to-42 vote.<sup>131</sup> From Meese's speech to Scalia's nomination to Bork's hearings, originalism was born. Originalism's rise was aided by the founding of the Federalist Society, which was started in 1982 by conservative and libertarian law students at Yale, Harvard, and Chicago and has grown into a national home for the conservative legal movement and for many originalists.<sup>132</sup>

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126 David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 975 (2008) (describing Black as "the most successful originalist of the last century" and as using it "to attack what was, in his view, a corrupt tradition . . . of the pre-New Deal Court"); see also David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137, 143 (2011) (describing Black and Scalia as the "two most prominent originalists of the last hundred years").

127 ROGER K. NEWMAN, HUGO BLACK 349–60 (2d ed. 1997); see *Adamson v. California*, 332 U.S. 46, app. at 92 (1947) (Black, J., dissenting); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 866 (1960).

128 Akhil Reed Amar, *2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1242 (2002) ("[A] forceful case can be made for Hugo Black as the true intellectual leader—the most valuable player—of the Warren Court."); Roger K. Newman, *The Warren Court and American Politics: An Impressionistic Appreciation*, 18 CONST. COMMENT. 661, 696 (2001) (reviewing POWE, *supra* note 34) (citing mid-1960s commentators dubbing Black the Warren Court's intellectual leader); Posner, *In Memoriam*, *supra* note 107, at 11 ("Brennan was not the 'intellectual leader' of the 'Warren Court.' The intellectual leader, if there was one, was Black . . .").

129 See 132 CONG. REC. 23,813 (1986).

130 For examples of Bork's work, see ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978), and ROBERT H. BORK, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

131 See 133 CONG. REC. 29,121 (1987).

132 See STEPHEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 135–80 (2008); *Our Background*, FEDERALIST SOC'Y, <http://www.fed-soc.org/aboutus/id.28/default.asp> (last visited Apr. 8, 2014) ("We are committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.").

Today originalism is the dominant method of constitutional interpretation, started by the right and adopted by the left. The starting point for most academic debates about constitutional interpretation is whether one is for or against originalism. Yet among Warren Court and early Burger Court clerks who became law professors, originalism is a null set. Why didn't originalism have any takers among this group? One reason is timing—they entered the academy before 1985 and adopted other theories. Another reason is that most of the Warren Court and early Burger Court clerks were liberal, and the legal academy that they joined was even more liberal. For liberal clerks entering the liberal academy, originalism did not have any appeal. Indeed, it would be years before some liberal law professors abandoned rights protection and post-realism and declared themselves originalists.<sup>133</sup> Despite these recent liberal converts, originalism remains the primary intellectual stomping ground for libertarians and conservatives.

Even though Warren Court and early Burger Court clerks-turned-professors did not adopt Meese's preferred theory, originalism marginalized legal process theory and judicial restraint. For the right, process theory and judicial restraint lacked any prescriptive or normative insights into how to stem the tide of liberal Supreme Court decisions. The right attacked liberal decisions of the Warren and Burger Courts and the rights protectors who defended them by adopting a normative theory with more populist and intuitive appeal. By interpreting the text of the Constitution according to its original meaning or according to the Framers' original intent, originalists tapped into America's obsession with its Founding Fathers and its founding ideals of freedom and democracy. Process theory and judicial restraint did not stand a chance.

### *E. Judicial Restraint Holdouts*

#### Category 5: Judicial Restraint Holdouts

Intellectual Leader: J. Harvie Wilkinson (Powell OT 1972)

Patron Saints: John M. Harlan II, Henry Friendly, Lewis Powell

Charter Members: Paul Bator (Harlan OT 1956), Jesse Choper (Warren OT 1960), Charles Fried (Harlan OT 1960)

Purpose: To limit judicial decision making and avoid constitutional questions out of respect for and belief in the democratic political process

This group of Warren Court and early Burger Court clerks/academics is larger than the null set among the originalists, but not by much. For the same reasons that the clerks were not drawn to originalism, they were not drawn to judicial restraint either. Most of the clerks were liberal. Most of their Justices were liberal. The legal academy was liberal. The cutting edge theoretical debates pitted law and economics against CLS. Forming a

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<sup>133</sup> See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* (2012); AKHIL REED AMAR, *AMERICA'S CONSTITUTION* (2005); JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

rearguard action in favor of judicial restraint was not a popular move. Despite these obstacles, a small group of conservative clerks drew inspiration from the judges whom they clerked for—Harlan, Powell, and White on the Supreme Court and Henry Friendly on the Second Circuit. As originalism became more popular among center-right academics and rights protection became the rallying cry on the left, they rejected both trends. Former clerks including Paul Bator, Jesse Choper, and Charles Fried became judicial restraint holdouts.<sup>134</sup>

J. Harvie Wilkinson III, a University of Virginia law professor until he was appointed to the Fourth Circuit, has been the leading voice of the judicial restraint holdouts.<sup>135</sup> Wilkinson's advocacy of judicial restraint did not require a resuscitation of Bickel or process theory. Rather, Wilkinson rejected all normative constitutional theory. He believed that originalists were as activist as rights protectors/living constitutionalists.<sup>136</sup> He rejected process theory, including Ely's *Democracy and Distrust*, as a "third way down a rabbit hole" as well as Posner's pragmatism.<sup>137</sup> Given the failure of all constitutional theory, Wilkinson argued that judges should restrain themselves and play less intrusive roles in American democracy.<sup>138</sup> Others, including Cass Sunstein, have previously advocated judicial minimalism.<sup>139</sup>

Despite Wilkinson's best efforts, constitutional theory largely remains a battle between rights protectors and originalists. Process theory lost the battle of ideas, the victim of a squeeze play between post-realism on the left and law and economics on the right. A new generation of Supreme Court clerks turned academics have sought to change that. Like Wilkinson and other members of the judicial restraint holdouts, they recognized that both rights protection and originalism promoted the greatest evil of all—judicial supremacy.

### III. JUDICIAL RESTRAINT IS NOT DEAD—IT'S NOT EVEN PAST

There are no new ideas in American constitutional law. Old ideas masquerade as new ideas under new names. Today's popular constitutionalism looks

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134 Bator became the lead author of Hart and Wechsler's *Federal Courts* casebook. PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973).

135 J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY (2012).

136 *Id.* at 11–32 (describing living constitutionalism as "activism unleashed"); *id.* at 33–59 (describing originalism as "activism masquerading as restraint"). *But see* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (defending a common law, precedent-based approach).

137 WILKINSON, *supra* note 135, at 60–79 (on Ely); *id.* at 80–103 (on Posner and pragmatism).

138 *Id.* at 104–16.

139 CASS R. SUNSTEIN, ONE CASE AT A TIME, at ix (1999) (stating that the goal of his book "is to identify and defend a distinctive form of judicial decision-making, which I call 'minimalism'").

a lot like the process theory and judicial restraint of the 1950s and 1960s.<sup>140</sup> Both popular constitutionalism and process theory rejected judicial supremacy. Both preferred to avoid constitutional questions and to decide them through the democratic political process. And both objected to the infiltration of partisan politics into judicial decision making. What goes around comes around.

During the mid-1980s, late Burger Court clerks entered the legal academy. Neither rights protection nor originalism appealed to them. They finished their clerkships disillusioned by the politicization of Supreme Court decision making and with the Court's embrace of judicial supremacy. That disillusionment only increased as the Burger Court yielded to the Rehnquist Court, and decisions such as *City of Boerne v. Flores*<sup>141</sup> continued to aggrandize the Court's power at the expense of the other branches and the states.

Larry Kramer (Brennan OT 1985) was one of these disillusioned Supreme Court clerks turned academics.<sup>142</sup> As a law clerk to Judge Henry Friendly on the Second Circuit, Kramer marveled at Friendly's pride of judicial craftsmanship and obsession with getting the law right (as opposed to choosing an outcome based on his political or policy preferences and then justifying it in a way that achieved a majority opinion).<sup>143</sup> After clerking for Friendly, clerking for William Brennan was a culture shock.<sup>144</sup> Kramer liked and admired Brennan but was appalled by how much of the Court's decision making had been infected by politics.<sup>145</sup> Even the clerks were politically polarized.<sup>146</sup> Brennan contributed to that polarization by telling his clerks that the most important rule was the rule of five.<sup>147</sup> "Five votes," he said while holding up his hand and wiggling his fingers. "Five votes can do any-

140 Snyder, *supra* note 33, at 349 (linking Thayerian judicial restraint and popular constitutionalism).

141 521 U.S. 507, 511 (1997) (invalidating the Religious Freedom Restoration Act as exceeding Congress's Section 5 power under the Fourteenth Amendment).

142 See Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L. REV. 1149, 1222 (2010).

143 *Id.* (citing Letter from Larry Kramer to Henry J. Friendly, at 1–2 (Sept. 25, 1985) (Henry Friendly Papers, Harvard Law School, Special Collections Library, Box 221, Folder 221-6)).

144 *Id.* (citing Letter from Larry Kramer to Henry J. Friendly, at 1–2 (Sept. 25, 1985) (Henry Friendly Papers, Harvard Law School, Special Collections Library, Box 221, Folder 221-6)).

145 *Id.* Kramer believed that Thurgood Marshall provided the fourth vote to grant cert in *Bowers v. Hardwick* because Kramer had circulated a memo that mistakenly indicated that Brennan would vote to grant cert. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN 497–98 (2010).

146 EDWARD LAZARUS, CLOSED CHAMBERS 419 (1998) (revealing a conservative and liberal clerk fought in the courtyard of the Supreme Court and fell into the fountain). *But see* Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 877 (1999) (reviewing *Closed Chambers* and taking Lazarus (Blackmun OT 1988) to task for breaching law clerk confidentiality and for such disclosures).

147 Nat Hentoff, *Profiles: The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 60.

thing around here.”<sup>148</sup> Across the political spectrum, judicial supremacy reigned supreme. Friendly’s emphasis on rule of law and judicial minimalism was nowhere in sight.

Fed up with judicial supremacy and the politicization of the Supreme Court, Kramer published a 2004 book, *The People Themselves*, which offered an escape from judicial supremacy and a reinvigoration of the democratic political process—popular constitutionalism.<sup>149</sup> Besides its opposition to judicial supremacy and belief that the people as opposed to the Court should have the last word in interpreting the Constitution, popular constitutionalism lacked a precise working definition.<sup>150</sup> When pressed about how popular constitutionalism would work in practice, Kramer offered a vision of departmentalism in which each branch would play a co-equal role in interpreting the Constitution.<sup>151</sup>

Kramer was not alone in championing popular or populist constitutionalism.<sup>152</sup> He was joined by prior generations of law professors. Mark Tushnet, a charter member of CLS, called for the abolition of judicial review and a return to populist constitutionalism.<sup>153</sup> Robert Post (Brennan OT 1978) and Reva Siegel articulated a theory of democratic constitutionalism in which the Court engages in dialogue with the elected branches.<sup>154</sup> Bruce Ackerman (Harlan OT 1968), another former Friendly clerk, advanced a theory of non–Article V amendments known as “constitutional moments” that emphasized presidential elections and landmark legislation such as the New Deal.<sup>155</sup> For Ackerman, the heroes and triumphs of the Civil Rights Movement were not the Warren Court, *Brown v. Board of Education*, or *Baker v. Carr*, but the protesters led by Dr. King and elected officials (like Lyndon Johnson and Everett Dirksen) who facilitated the passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965 that Ackerman dubbed “landmark statutes.”<sup>156</sup> During the mid-1990s, William Eskridge and Philip Frickey (Marshall OT 1978) contributed to a growing revival of legal process theory.<sup>157</sup>

148 *Id.*

149 See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5 (2001).

150 Snyder, *supra* note 33, at 348 & n.18.

151 See KRAMER, *supra* note 149, at 6; Larry Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1176 (2006).

152 See RICHARD D. PARKER, “HERE, THE PEOPLE RULE” 4–5 (1994); JAMIN B. RASKIN, *OVERRULING DEMOCRACY* 1–2 (2003).

153 See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154 (1999).

154 Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007).

155 See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

156 Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1768–70, 1781–82, 1786–87 (2007); see *id.* at 1742, 1761, 1792 (referencing “landmark statutes”). See generally 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

157 See *supra* notes 17, 21 & 24.



Pam Karlan (Blackmun OT 1985) wrote a 2012 *Harvard Law Review* foreword, *Democracy and Disdain*, which criticized the Court's recent decisions about the Affordable Care Act and other statutes as contemptuous of democracy.<sup>158</sup> She correctly predicted that *Shelby County v. Holder*<sup>159</sup> would chip away at the Voting Rights Act.<sup>160</sup> As a rights protector since her Blackmun clerkship, from her work as a voting rights lawyer with the NAACP Legal Defense Fund to her Supreme Court advocacy as a Stanford law professor, Karlan may have written her foreword more as a rhetorical move rather than a switch from the rights protector to popular constitutionalist camps. One wonders what she thought of Scalia's dissent in *United States v. Windsor*<sup>161</sup> arguing that the best way to overturn DOMA was through the democratic political process.<sup>162</sup> Is the lesson of *Windsor* that the only rule that matters is Brennan's rule of five? If so, then CLS's indeterminacy thesis appears to be carrying the day.

Popular constitutionalism suffers from the same flaws as process theory/judicial restraint—neither theory provides any normative guidance on when the Court should strike down a statute or executive action. Kramer rejects this critique of popular constitutionalism as implicitly suggesting that the Court is the only branch that can declare something to be unconstitutional and that the Court has been effective in protecting rights.<sup>163</sup> The people and their elected representatives are just as capable of interpreting the Constitution and protecting rights through the legislative and electoral processes. But Posner correctly observed that Thayerian judicial restraint died in part because it provided an inadequate guide to judges about when to abandon their restraint, about when extreme cases mean extreme.<sup>164</sup> The same can be said of popular constitutionalism.

The lack of normative guidance from process theory or popular constitutionalism does not mean that either theory should be jettisoned. Rather, what is needed is more legal theory and legal history about how to put these theories into practice. A good start would be taking Felix Frankfurter's jurisprudence seriously and rereading his dissent in *Baker v. Carr*.<sup>165</sup> Another positive step would be a reconsideration of the constitutional avoidance scholarship of Alexander Bickel. Finally, scholars should dig deeper into the constitutional scholarship of James Bradley Thayer—what motivated Thayer at the time; why his theory attracted leading legal thinkers including Holmes,

158 Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 13 (2012).

159 133 S. Ct. 2612, 2631 (2013) (striking down section 4(b) of the Voting Rights Act).

160 Karlan, *supra* note 158, at 69–70.

161 133 S. Ct. 2675 (2013).

162 *Id.* at 2697–2703 (Scalia, J., dissenting) (urging respect for “democratically adopted legislation,” rejecting judicial supremacy, and arguing that there was no Article III case or controversy).

163 Email from Larry Kramer to author (Jan. 11, 2012) (on file with author).

164 Posner, *supra* note 1, at 533.

165 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting); Snyder, *supra* note 33, at 346, 411–15.

Brandeis, and Frankfurter; and why early twentieth century progressives embraced Thayerian judicial restraint.

#### CONCLUSION

The point of this Article is to show that the liberal decisions of the Warren Court were not the sole cause of death of judicial restraint; developments in legal theory also played a role. A new generation of law professors had recently finished clerking on the Warren Court and early Burger Court and rejected the legal process theory that they had learned as law students. Most gravitated to new and exciting theories—rights protection, post-realism, law and economics, and originalism. And the judicial restraint holdouts lacked the numbers and prolific scholars to object. It remains to be seen whether popular constitutionalism championed by the next generation of clerks-turned-academics augurs a return to process theory and Thayerian judicial restraint.