POSTMODERN CONSERVATISM: THE INTELLECTUAL ORIGINS OF THE ENGLER COURT (PART I)

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I. INTRODUCTION: THE GOVERNOR'S REMARKS TO THE MICHIGAN SUPREME COURT HISTORICAL SOCIETY AT THE DETROIT ATHLETIC CLUB

On April 18, 2002, Governor John Engler delivered a valedictory of sorts. In the last year of his third four-year term as Governor of the State of Michigan and barred from running again by term limits, he knew that he was entering the home stretch of his gubernatorial career.

The occasion was the annual meeting of the Michigan Supreme Court Historical Society, held at the beautifully renovated Detroit Athletic Club (DAC) in downtown Detroit.[1] The DAC, as it is known, is a stunning Albert Kahn building that is a delight of proportion, tasteful ornament, and elegance surrounding spacious athletic facilities.[2] For most of the last thirty years, its surrounding neighborhood near Harmonie Park was fading, but more recently, there had been a resurgence.[3] Located a few blocks away, the Detroit Opera House was rescued from oblivion. The blossoming Theater District, anchored by the Fox Theatre—a restored movie palace—was only a short walk to the west. The new Comerica Park, home of the Detroit Tigers, had recently been built literally next door, and Ford Field, home of the Detroit Lions, which abuts it, was under construction when the Governor spoke. The setting seemed appropriate to the subject, and the Governor liberally sprinkled his address with sports metaphors and reminders that the proceedings needed to move promptly so that the guests could be on time for an afternoon baseball game.[4]

The Historical Society chose to present the Governor with its first Legal History Award.[5] Judging from his remarks responding to the honor, the Governor was moved by the occasion.[6] Although Governor Engler graduated from law school, unlike so many lawyers turned politicians, the Governor began his career in politics, winning election to the Michigan House of Representatives at the same time that he graduated from Michigan State University in 1971 and became the

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1. The Quarterly Newsletter of the Michigan Supreme Court Historical Society contains a record of some of the proceedings, including a transcript of the Governor's remarks. *Governor Engler's Judicial Philosophy*, SOC'Y UPDATE (Mich. Supreme Court Historical Soc'y, Lansing, Mich.) Summer 2002, at 1 [hereinafter MSCH NEWSLETTER].

2. For a history of the DAC see KENNETH VOYLES & JOHN BLUTH, THE DETROIT ATHLETIC CLUB 1887-2001 (2001).

3. *Id.*

4. MSCH NEWSLETTER, *supra* note 1, at 1.

5. *Id.*

6. *Id.*

youngest person elected to the legislature in Michigan history.[7] He was a very hard worker and made a habit of familiarizing himself with all aspects of government and everyone in it.[8] He soon became Republican Minority Leader.[9] It was only then that he began to attend classes at Cooley Law School,[10] which is located a few blocks from the State Capitol in Lansing. Cooley offered classes in the evenings and year-round. Despite an enormous legislative workload, Governor Engler graduated in the normal three-year period.[11]

In his speech, Governor Engler looked back in obvious satisfaction on his role in shaping the state's supreme court.[12] When he began his first term as governor in 1991, the Michigan Supreme Court reflected the state's history as liberal, populist, and union-oriented.[13] Seven years later—although the chief justice was Dorothy Comstock Riley, recently voted the most "predominant" jurist of the last half-century by the members of the Michigan Political History Society and initially an appointee of Republican Governor William "Bill" Milliken, as had been the case for the last forty years—there was a Democratic and liberal majority on the Court.[14] Charles Levin was still on the court in 1998.[15] A member of the political family that produced a United States Senator as well as a congressman,[16] Justice Levin was known for his long, scholarly opinions that always seemed to work their way to a "liberal" result.[17] So too was Patricia J. Boyle, who left a federal district court judgeship to serve on the court.[18] She was a great admirer of one of the more

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7. GLEAVES WHITNEY, JOHN ENGLER: THE MAN, THE LEADER, THE LEGACY 47-55 (2002).

8. *Id.* at 56-57, 70, 110.

9. *Id.* at 86. And, later, Senate Majority Leader.

10. *Id.*

11. *Id.*

12. MSCH NEWSLETTER, *supra* note 1.

13. *See infra* notes 14-24.

14. Justice Riley was the chief justice from 1987-91 and a member of the court from 1982-83 by appointment and 1985-97 after winning election in her own right. *Society Honors Justice Dorothy Comstock Riley with Legal History Award*, SOC'Y UPDATE (Mich. Supreme Court Historical Soc'y, Lansing, Mich.) Summer 2003, at 3.

15. Justice Levin was on the court from 1973-96. Elisha Fink, *Michigan Lawyers in History—Justice Charles Levin: A Scholarly Independent*, MICH. B.J., September 2000.

16. Justice Levin's cousins are both prominent Democratic politicians: U.S. Senator Carl Levin has served in the Senate from 1979 to the present; Sander Levin has been a U.S. Congressman from 1983 to present. POLITICAL GRAVEYARD, http://politicalgraveyard.com/families/11211.html (last visited Feb. 1, 2014).

17. Fink, *supra* note 15.

18. *See* MICH. SUPREME COURT HISTORICAL SOC'Y, *Presentation of the Portrait of the Honorable G. Mennen Williams*, *in* INDEX TO SPECIAL SESSIONS OF THE MICHIGAN SUPREME COURT 1857-2003 at 453-81 (2004).

prominent former members of the court, G. Mennen ("Soapy") Williams, one time "boy-wonder" governor, member of the Kennedy Administration, and a liberal in the Hubert Humphrey mold.[19] Another Democrat was Michael F. Cavanagh, a former district and appeals court judge who was soon to be chief justice of the Michigan Supreme Court from 1991 and would remain in that role until 1995.[20] Conrad Mallett, former legislative affairs director for Governor William Milliken and executive assistant to Detroit Mayor Coleman Young, also had been active in Democratic Party affairs.[21] In addition to Chief Justice Riley, the Republicans on the court were former Senator Robert Griffin,[22] a man reflective of the administration of William Milliken, a Republican who nonetheless tended slightly to the left of the political center,[23] and James Brickley, Milliken's Lieutenant Governor as well as the former President of Eastern Michigan University.[24] Thus, in addition to the liberal majority on the court, the Republicans were more centrist than conservative.

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19. *Id.*

20. Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try To Do The Right Thing*, 76 U. DET. MERCY L. REV. 709 (1999).

21. *Conrad Mallett, Jr.* MICH. SUPREME COURT HIST. SOC'Y, http://www.micourthistory.org/justices/conrad-mallett-jr/ (last visited Feb. 1, 2014).

22. U.S. Congressman from 1957 until 1966, U.S. Senator from 1966 to 1978, and Michigan Supreme Court Justice from 1987 to 1994. *Justice Robert Griffin*, MICH. LEAGUE OF CONSERVATION VOTERS, http://www.michiganlcv.org/greengavels/justices/justice-robert-griffin (last visited Mar. 10, 2014).

23. *See* DAVE DEMPSEY, WILLIAM G MILLIKEN: MICHIGAN'S PASSIONATE MODERATE (2006). As to the view that he was more left of center than to the right of it, the following remarks by a well-known Michigan political commentator tell the tale:

> [H]e had his detractors, mostly in his own beloved Republican party. He was always a little too moderate for that far-right crowd and they didn't much like him hanging around with Democrats, with whom he fashioned an exemplary record during his record 14 years in office.
>
> He was asked once why he didn't chuck the GOP and switch parties. After all, he did endorse a string of Democrats for president because he could not hold his nose and vote for some of the Republicans who wanted into the White House.
>
> In his own low-key way he suggested that if he wanted his party to change, he'd have a better shot at it from the inside looking out rather than the other way around.

Tim Skubick, *Gov. William Milliken, Still One-of-a-Kind on His 90th Birthday*, MLIVE (Mar. 25, 2012, 7:54 AM), http://www.mlive.com/politics/index.ssf/2012/03/tim_skubick_gov_william_millik.html.

24. *Stricken with Cancer, Brickley to Leave Supreme Court*, GONGWER NEWS SERV., July 14, 1999, at 1 [hereinafter *Brickley to Leave*] ("Known on the court for his open manner with the public and readable decisions, Mr. Brickley was frequently a swing vote in decisions. Increasingly, however, he appeared to find himself at odds with other court republicans on issues of individual and defendant rights.").

It is not easy for a governor to change the complexion of the supreme court in Michigan. Justices are elected.[25] Elections are theoretically nonpartisan, but the judges are chosen at the political conventions of each party.[26] Name recognition seems to play a significant role in who gets elected,[27] but the most critical factor is whether the word "incumbent" appears after a nominee's name.[28] One might assume that Michigan voters have a conservative streak when it comes to electing judges: if you are on the job, you stay on it. On the other hand, Michigan is the quintessential union state, and perhaps this is where the union way and the traditionalist approach converge; it is a seniority system for judges.

However, between 1997 and 1999, the makeup and direction of the court changed dramatically. Through a series of judicial appointments to vacant seats promptly followed by electoral ratification, Governor Engler placed three key justices on the court: Clifford Taylor, Stephen Markman, and Robert Young.[29] They replaced Justice Riley, who retired due to illness,[30] Conrad Mallett,[31] who surprised his party by resigning

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25. *Judicial Branch*, MICHIGAN.GOV, http://www.michigan.gov/som/0,1607,7-192-29701_29703---FI,00.html (last visited Feb. 1, 2014).

26. *See* Brent Bateman, *Partisanship on the Supreme Court: The Search for a Reliable Predictor of Judicial Behavior*, 45 WAYNE L. REV. 358, 359, 362 (1999); K. Randazzo, H. Spaeth & J. Willis, *Informal Decision Making on the Michigan Supreme Court: Assessing Partisan Cleavages*, MICH. LAW. WKLY., Nov. 12, 2001.

27. Bateman, *supra* note 26, at 362-63.

28. *See, e.g.*, Brian Dickerson, *Engler Legacy Will Live on in State's Courts*, DETROIT FREE PRESS, Nov. 18, 2002.

> Both political parties indulge the myth that Michigan voters select their judges in nonpartisan elections. But a large percentage of judges reach office by gubernatorial appointment—and once installed little short of a felony can dislodge them. . . . For practical purposes, state judges above the District Court level are nearly as secure as their counterparts on the federal judiciary, who can be removed only by impeachment.

Id. It can also be argued that fundraising is a vital factor in being elected. *But see* Kurt M. Braver, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out with the Bathwater*, 44 WAYNE L. REV. 367 (1988) (stating that if given a choice between the incumbent label and a huge war chest, the former is clearly the best bet).

29. Abagail Thernstrom, *Trial Lawyers Target Three Michigan Judges up for Election*, WALL ST. J., May 8, 2000, at A43 (contending that the election in 2000 was extremely contentious and that the trial lawyers, the AFL-CIO, and the Democratic Party waged a vigorous campaign against the three new members of the court, arguing that they were anti-consumer, anti-labor, anti-civil rights, and members of the dangerous cabal called the Federalist Society).

30. ELLEN CAMPBELL & JILL K. MOORE, MICHIGAN SUPREME COURT HISTORICAL REFERENCE GUIDE 205 (1998).

31. *Id.* at 217.

and creating a vacancy for the Governor to fill,[32] and Justice Brickley who resigned due to the illness that would shortly claim him.[33]

Justice Taylor joined the court in 1997, and Justices Markman and Young joined in 1999, all by appointment of the Governor.[34] In 1998, Maura Corrigan, a former appeals court judge, was elected to a vacant seat.[35] Thus, in 1999, what had been a "liberal" court (by a 4-3 majority) became a "conservative" one (5-2), which was about to be dominated by the core of new justices appointed by the Governor and soon-to-be Chief Justice Corrigan.[36]

With these appointments (as well as his appointments to the lower courts—it is estimated that over his term as Governor he appointed nearly one-third of the judges in the state),[37] Governor Engler was able to identify and place on the court individuals with a distinct judicial philosophy. As he explained in his remarks at the Historical Society meeting, this was a conscious effort, reflecting strongly held beliefs:

> When it comes to judicial appointments, I can be a little bit controversial but as in much else, my critics miss the point.
>
> They charge that I want a "Republican court."
>
> Or a "*politically* conservative court."
>
> Or most heinous of all, a "John Engler court."
>
> That's sophistry. I've said it so many times when I've had the privilege of speaking at judicial investiture ceremonies and it is appropriate to mention it again today:
>
> I want jurists on the Michigan bench:
>
> - who understand that it is legislators, not judges, who make the law;
> - who believe that the people should govern through their elected representatives;
> - who comprehend that the burden of policy-making is on the legislative not the judicial branch;

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32. *See* Press Release, Governor Engler, Governor Issues Statement on Resignation of Chief Justice Mallett (Dec. 11, 1998), http://www.state.mi.us/migov/gov/pressreleases/199812/mallett.html.

33. *Brickley to Leave*, *supra* note 24.

34. *On and Off the Court—Chronological Order*, MICH. SUPREME COURT HIST. SOC'Y, http://www.micourthistory.org/on-and-off-the-court/chronological-order/#11 (last visited Feb. 1, 2014).

35. *Id.*

36. *Cf.* Lawrence M. Glazer, *Scholars Explore Michigan Supreme Court Upheavel*, DOME (Feb. 20, 2011), http://domemagazine.com/glazer/lg0211.

37. *Focus on Brickley's Successor*, GONGWER NEWS SERV., July 15, 1999, at 1 [hereinafter *Brickley's Successor*].

> ·who render decisions based on the *text* of the Constitution or statute rather than on somebody's social agenda.
>
> In short: I'm looking for a few intelligent, hard-working men and women with fidelity to the Constitution![38]

The speech had the air of a valedictory because, as the Governor made clear, he was leaving office convinced that his goal with respect to the philosophy of the court had been achieved: "There is no doubt in my mind that this Society complements the work of our current Michigan Supreme Court, which is simply stellar,"[39] he remarked at one point. He then continued, "Just last Friday, Gene Meyer, president of the Federalist Society in Washington, DC, told one of my assistants that the Michigan Supreme Court is, bar none, the best state court in America."[40]

As was especially appropriate for a gathering of a historical society, the Governor went on to provide a larger context for his thinking:

> In historical perspective, it is certainly fair to compare our current supreme court with the greatest court in Michigan history, when the "Big Four"—Justices Cooley, Campbell, Graves, and Christiancy—served on the bench.
>
> The two courts are similar because of the integrity of their judicial method, which is textual and restrained.
>
> Again, the aim is to seek out the original meaning of a statute or the Constitution, and to be guided by the words that are in the law, not by some "penumbra" or social agenda; not by what legislators hope for but by what they say.[41]

Perhaps the Governor's interest in Cooley and the "Big Four" was a byproduct of his law school days. Not only was Cooley Law School named after Justice Cooley, but when Engler was a student, one wall of Cooley Law School had a huge mural depicting the "Big Four"[42] of

38. MSCH NEWSLETTER, *supra* note 1, at 2. With apologies to the Governor, as we shall see, it is neither "heinous" nor inaccurate to refer to the Michigan Supreme Court from 1999 until the defeat of Justice Cliff Taylor in 2008 by Democratic nominee Diane Hathaway as "the Engler Court." He made a conscious effort to mold the court by selecting judges who reflected his judicial philosophy, and he was remarkably successful in the effort. Hence the choice for the title of this article.

39. *Id.*

40. *Id.*

41. *Id.*

42. A giant copy of a picture made for the State Bar of Michigan in the 1960s and later presented to the Michigan Supreme Court, where it can be viewed at the entrance to the courtroom. *See Presentation of the Portrait of Justices Christiancy, Campbell, Graves and Cooley*, MICH. SUPREME COURT HIST. SOC'Y, http://www.micourthistory.org/special-

Michigan's "Greatest Court."[43] The Governor's interest in conservative thought goes back much further than that, however. As one of his professors at Michigan State University (his undergraduate alma mater) recalled, "I remember he stopped at my office once and asked about conservative writers: Clinton Rossiter, Peter Viereck, and Russell Kirk. It was unusual: a young man in the later '60s who was genuinely interested in conservative thought."[44]

In the Governor's eyes, this "judicial method" of textualism and restraint was consistent with the decision of the Framers, and Justices such as Holmes and Brandeis carried it forward.[45] "Unfortunately," he

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sessions/presentation-of-the-portrait-of-justices-christiancy-campbell-graves-and-cooley/ (last visited Feb. 1, 2014).

43. Jerome C. Knowlton noted,

> On January 1, 1868, those four, then comparatively young men, sat together for the first time as the Supreme Court of the State of Michigan. For a long series of years they continued together, and as the term of one after another expired he was elected as a matter of course. Such was the confidence of people in their judgments. Today they are frequently spoken as of "The Big Four" of our supreme court.

Jerome C. Knowlton, *Thomas McIntyre Cooley*, 5 MICH. L. REV. 309, 309 (1907); *see* Edward M. Wise, *The Ablest State Court: The Michigan Supreme Court Before 1885*, 33 WAYNE L. REV. 1509, 1532 (1987) (locating the origin of the phrase "The Big Four" early in the twentieth century).

44. WHITNEY, *supra* note 7, at 42.

> [Russell Kirk] happened to be an Engler constituent going back to the governor's days as a state senator. The two men forged a friendship, with Kirk as mentor and Engler as student. In 1991, Kirk discussed his admiration of Engler and delivered a minor lesson in conservative governance: "He's certainly not an ideologue because the word 'ideology' means political fanaticism, a belief that one can achieve earthly paradise through politics. And there's nothing of that in John Engler. 'Pragmatist' is not quite the right word either, although it is closer. A pragmatist believes in what seems to work, what seems practical or successful at the moment. To describe the philosophy of John Engler, you might call him an 'empiricist,' one who looks to history and long-term experience, what is functional of the past, what has worked well over long periods of time, lessons of history, lessons of philosophers, sages of the past. That's the kind of man he is."

John Miller, *Citizen Engler: Michigan's Governor Ends a 12-year Reign*, NAT'L REV. ONLINE (Jan, 2, 2003, 9:30 AM), http://www.nationalreview.com/articles/205380/citizen-engler/john-j-miller. Governor Engler subsequently became a Trustee of the Russell Kirk Foundation.

45. As we shall see, the judicial methods of Holmes and Brandeis had many facets; to say that their hallmarks were textualism and restraint is probably not a fair reading of either Justice and both were very different from one another. Brandeis, in particular, made his reputation as a progressive during the era of the "Progressive" Movement (i.e., variously the 1890s to 1920s or 1900s to 1913). As Grant Gilmore put it,

> Brandeis (1856-1941) went into practice in Boston following his graduation from the Harvard Law School in 1878. His practice, which was originally of a

continued, "we saw that start to change by a creeping activism that moved into the judiciary at the federal and state level, and it was reinforced at times by professors in the law schools."[46] The result? "By the late 1960s, the judiciary was usurping legislature's authority on a regular basis, dictating public policy on issues ranging from bussing to abortion."[47]

For Governor Engler, the "ideal of judicial restraint" is of paramount importance. "One of the key achievements of the Reagan Revolution was to bring the idea of judicial restraint back into public discourse . . . . Even the contentious Bork hearings in the fall of 1987 gave our nation a much-needed tutorial in competing judicial philosophies."[48] This ideal, according to the Governor, "is absolutely vital to the health of our constitutional republic. It transcends partisan politics, but needs protection by and within our political process."[49]

The then-current Michigan Supreme Court reflected this ideal in the Governor's view. While he noted that it "has rendered decisions that in some cases run counter to my policies or social philosophy . . . . I have to concede that upon closer examination of most of the cases, it is hard to argue with the results . . . because they stick to interpreting the law *as written*."[50]

The Governor was also not the only one who thought highly of his appointments. There were some commentators who argued that the court was the best state supreme court in the land.[51] Three years after the

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perfectly conventional nature, gradually involved him, on a national scale, with the great social and political problems of the day, and he became known as the most effective advocate of liberal or progressive ideology. Nominated to the Supreme Court by President Wilson in 1916, he was bitterly attacked by conservatives in the Senate hearings, but his appointment was eventually confirmed by a 47-22 vote. He served as an Associate Justice until his retirement in 1939.

GRANT GILMORE, THE AGES OF AMERICAN LAW 132 n.4 (1977).

46. MSCH NEWSLETTER, *supra* note 1, at 3.

47. *Id.*

48. *Id.*

49. *Id.* As will be discussed in some detail, the concept of "judicial restraint" is often associated with the separate problem of the willingness of a court with the power of judicial review to strike down statutes as unconstitutional rather than merely the court's "restraint" in interpreting the text. Contemporary conservatives in general, and the Michigan Supreme Court applauded by the Governor, have a very different concept of the wisdom of judicial restraint than that which harkens back to the days of a Holmes or Brandies. *See* Part II of this Article (forthcoming next year).

50. MSCH NEWSLETTER, *supra* note 1, at 3.

51. *Id.* at 2. *See also* Patrick J. Wright, *The Finest Court in the Nation: Hurray for Michigan Justice*, WALL ST. J., Oct. 13, 2005; Matthew Schnider, *Michigan's Big Four: An Analysis of the Modern Michigan Supreme Court*, FEDERALIST SOCIETY (Oct. 2008);

Governor's speech, in 2005, the press reported that both Maura Corrigan and Robert Young were being mentioned as possible replacements for Sandra Day O'Connor on the United States Supreme Court.[52] Not surprisingly, perhaps, the Court also had equally (if not more) impassioned critics.[53]

Interpreting the law on the basis of the words in the statute was unquestionably one legacy of the Governor's stint in law school. As a legislator, Engler was famous for reading the text of every bill and not relying on second-hand reports.[54] When he enrolled in law school after a decade in the legislature, he was shocked to find that judges relied on a host of methods to interpret the statutes he helped enact, including reports of various House and Senate staffs that provide a form of "legislative history" in Michigan.[55] Engler believed from his experience that such reports were wholly unreliable, and he was dismayed that judges would look upon them as authoritative. Subsequently, it was he who ordered that a legend be printed on those materials saying that they were not to be relied upon as expressions of legislative intent.[56]

When appointing justices to the Michigan Supreme Court, Governor Engler was to follow the same hands-on approach. At his appointment ceremony to the Michigan Supreme Court, Justice Robert Young commented,

> I am particularly gratified to be appointed by you, Governor Engler, because I know you have actually read my decisions and you would be surprised at how uncharacteristic it is that an appointing governor has ever read anything that their appointees

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Peter Leason, *Michigan Supreme Court is Supreme*, NAT'L REV. ONLINE (Aug. 22, 2000 3:40 PM), http://old.nationalreview.com/comment/commentprint082200d.html; *cf.* COLLEEN PERO, JUDICIAL CONSERVATISM AT WORK: A LOOK AT THE MICHIGAN SUPREME COURT 1999-2003 (Mich. Chamber of Commerce, Sept. 2003) ("It is especially appropriate to examine the Michigan Supreme Court's work since 1999 to see the results of judicial restraint in action, and perhaps to use this court's record as a roadmap for others who hold a similar philosophy.").

52. David Eggert, *Two Michigan Supreme Court Justices Mentioned for U.S. High Court*, ASSOCIATED PRESS, July 18, 2005, *available at* www.freerepublic.com/focus/f-news/1446025/posts.

53. *Id. See also* Thernstrom, *supra* note 29.

54. WHITNEY, *supra* note 7, at 58, 70-71.

55. Telephone Interview with Carole Viventi, Sec'y of the Mich. Senate (July 31, 2003).

56. *Id.* Ms. Viventi, who has a long history in Michigan politics, attended Cooley Law School with the Governor and was a member of his study group. She very generously shared with me her recollections of those days and the impact of the law school experience on the Governor.

> have written. You fully understand how I approach the task of judging.[57]

In summary, the Governor argued that he appointed "judicial conservatives," whom he defined as follows:

> [A] judicial conservative is not the same thing as a political conservative.
>
> Political conservatives are advocates for certain public policy or social outcomes.
>
> Not the judicial conservative.
>
> Judicial conservatives liken their role to that of an umpire.
>
> Others play the game; the judge calls the balls and strikes.
>
> In the seventh inning the rules are not going to change, the strike zone will not suddenly shrink or expand, and it won't be good enough if you almost touch home plate. The umpire cannot change those rules. That is the same logic that I would like to see on the bench.[58]

Thus, this perfect match between setting and subject was complete. In the picture, as the Governor painted it, the fading grandeur of the Michigan Supreme Court was undergoing restoration. The Governor's analysis of the problem and the solution was informed by a view of history and called for an appreciation of, and a comparison with, the past. His metaphors provided illustrations of principles that need to be considered.

This was an impressive testimonial. It was as colorful, as beautifully proportioned, as powerful, and as compelling as the DAC itself and the works of art that adorn it.

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57. Mich. Supreme Court Historical Soc'y, *The Honorable Robert P. Young, Jr. Investiture Ceremony, in* INDEX TO SPECIAL SESSIONS OF THE MICHIGAN SUPREME COURT 1857-2003, at 447 (2004).

58. MSCH NEWSLETTER, *supra* note 1, at 3. The idea of judges as umpires who should call balls and strikes has an interesting history. At his confirmation hearing for the United States Supreme Court, Chief Justice Roberts also used this analogy. For an enlightening and entertaining analysis of the analogy, see Aaron S.J. Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, YALE L.J. ONLINE (March 4, 2010), http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/the-justice-as-commissioner:-benching-the-judge%11umpire-analogy/. For reasons of both history and logic, Zelinsky persuasively argues that the analogy does not hold up well. However, as used by the Governor (and Chief Justice Roberts), the point was intended to be a simple one: The essence of the job is to apply rules, not to make them. The key issue is whether that distinction is more apparent than real.

To the honest critic, such a work of art deserves careful respect and appraisal. Utilizing the methods of the "old" art historians, its provenance should be reviewed with care. Its antecedents need to be traced and explained and its cultural context carefully located. Is the work faithful to its subject? Does it give us insight and understanding into aspects of the human condition that we may not have previously appreciated in the same way or in the same depth? In short, is it a work of lasting merit, or does it catch the fancy of the present moment only?[59]

Also, we will take a leaf from the work of the "new" art historian as well—the art critic with the postmodern sensibility who asks what are the social and political circumstances that produce the work. Why did this come to be viewed as "art"? Why are things represented in one fashion and not another, and what does this tell us about the society that produces and consumes it?[60]

Thus, the Governor has given us our task: to take seriously the intellectual history that led him to his judicial philosophy; to seek to understand how that philosophy was embraced by his nominees to the court; to compare it with the philosophy of the great Michigan Supreme Court of Cooley, Campbell, Christiancy, and Graves;[61] to see how the court has applied that philosophy in the cases that it has decided during the period when the Engler appointees have been in the ascendancy, and how it compares with the methods and decisions of the Big Four.[62] It is a worthy charge. Let us have at it!

II. THE INTELLECTUAL ORIGINS OF POSTMODERN LEGAL CONSERVATISM

Academic studies seem to generate a bewildering variety of labels to demarcate various time periods. This appears to be particularly true in the case of art and intellectual history. We have overlapping categories by style (impressionism, cubism, realism, surrealism), economics (pre- and post-industrial), geography (Italian, French, English), ethnic group (Flemish, Indo/European), and time (ancient, medieval, modern, postmodern), just to pick some examples. The profusion of labels often adds as much confusion as clarification.

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59. *See, e.g.*, HELEN GARDNER, HORST DE LA CROIX & RICHARD G. TANSEY, GARDNER'S ART THROUGH THE AGES 2-6 (5th ed. 1970).

60. *See* THE NEW ART HISTORY 4-5 (A. L. Rees and Frances Borzello eds., 1988). For a refutation of postmodern art history, see generally R. KIMBALL, THE RAPE OF THE MASTERS (2004).

61. *See supra* Part I.

62. This will be the subject of Part II of this Article forthcoming next year.

So, it is with some trepidation that we begin with a label that is pregnant with ambiguity: postmodernism. Despite the dangers of utilizing a term that has been employed with diverse meanings, it seems useful here because its predominant association has been with those who have embraced a posture of extreme skepticism and relativism.[63] More importantly, however, the term is used because it is the relevant term to intellectual historians and what we are talking about is intellectual history.[64]

This is true in two senses. First, law itself can be understood as intellectual history narrowed down to the realm of judicial institutions.[65] It is a series of abstract intellectual concepts, albeit ones with severe real world consequences like dividing property, separating families, and sending people to jail. For the last eighty years, almost all of its practitioners in this country have been trained in universities that pride themselves on being academic institutions. Those institutions have created an intellectual climate in which ideas are developed and passed on to future generations of lawyers, politicians, and judges. Thus, academic thought and culture are highly consequential. This is also of particular interest in this context because Cooley, Campbell, and Christiancy were among the first faculty of the Michigan University Law Department[66] (now known as the University of Michigan Law School),[67] and Cooley gave that school preeminence in the 1870s over virtually all other law schools in the nation.[68]

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63. STEPHEN R.C. HICKS, EXPLAINING POSTMODERNISM: SKEPTICISM AND SOCIALISM FROM ROUSSEAU TO FOUCAULT (2004), *available at* www.stephenhicks.org/wp-content/uploads/2009/10/hicks-ep-full.pdf.

64. *See id.*

65. *Cf.* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980).

66. ELIZABETH BROWN & WILLIAM BLUME, LEGAL EDUCATION AT MICHIGAN, 1859-1959, at 32 (1959).

67. The University of Michigan Law Department was created in 1859. Cooley, Campbell, and Charles Walker were the first three faculty members. Cooley moved to Ann Arbor and was the only resident faculty member for many years, with the others living in Detroit. Christiancy was a later addition. Knowlton, *supra* note 43, at 312.

68. Although Cooley is said to have modeled the first course of direction along the lines of Harvard, this was the model of Joseph Story. Cooley's great contribution was to publish his lectures that became textbooks in many other schools, most famously his works on the Constitution but also his torts treatise. *See* Paul D. Carrington, *Law as Common Thoughts of Men: The Law, Teaching, and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495 (1997). The famous Harvard model of Langdell—the "case method"—did not come into being until 1870, at which time it faced bitter opposition, not becoming dominant until a number of years later. *See* Bruce Kimball, *The Langdell Problem: Historicizing the Century of Historiography 1906-2000*, 22 LAW & HIST. REV. 277 (2004).

Second, we are talking about intellectual history because that is how the Governor approached his tasks.[69] He was interested in a court that was animated by ideas and a philosophical viewpoint.[70] He could have focused solely on choosing the wise, the experienced, the highly regarded, or those who were completing a career of public service. While each of these things might have been a factor to some degree, the Governor made plain that the overriding consideration was judicial philosophy.[71]

If we are to understand the philosophy that Governor Engler described, we must first understand the intellectual climate in which it was born. Furthermore, we shall see that in many ways that philosophy and much of the methodology that has been adopted along with it—such as great reliance on textual interpretation—is a reaction to postmodernist criticism and theory (in addition to the Governor's own experience in the legislature). In fact, the "judicial conservatism" described by the Governor cannot really be understood any other way, for it is much different from the traditional principles associated with classical conservative thought as well as the traditional (and therefore conservative in at least some sense of the word) common law approach to the law.

It should not be surprising that this is so. History shows us that many intellectual movements were reactions to the prevailing climate. This is as true of legal theory as it is of almost every other field of human knowledge.[72] It has been particularly true in America over the last fifty years as legal theory has developed in response or reaction to seminal decisions, especially *Brown v. Board of Education*[73] and *Roe v. Wade*.[74]

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69. *See generally* WHITNEY, *supra* note 7, at 56-57, 70, 110.

70. *See* MSCH NEWSLETTER, *supra* note 1.

71. *Id.*

72. *See* ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 14 (Oxford Univ. Press 2d ed. 2003).

> [I]f we are to try to understand how legal philosophy has developed and how its debates and disputes have been formed and conducted, the answers cannot be found entirely in the logic of philosophical argument. They are, in part at least, located in the wider context of ideas and activities in which theories are developed and evaluated. [There are reasons for considering] that context to be, in part, professional and political. [This] approach to understanding legal philosophy . . . in no way denies the significance of the substantive content of legal philosophy's debates about the nature of law. It argues, however, that the content is to be understood not as timeless but as a response to conditions and problems existing at particular historical moments in Western legal developments.

Id.

73. Brown v. Bd. of Educ., 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1955).

We like to think of law as immutable, unaffected by intellectual fads or fancies and relentlessly moving towards a more perfect achievement of justice. But, of course, we can only understand law with the intellectual equipment at hand, and our mental toolboxes are filled with devices that have been accumulated over thousands of years. Some of those tools worked with parts that have long since been discarded, a fact of which we may be blissfully unaware as we try to employ them to solve new problems. It has been wisely said that each generation must rediscover religious truths for itself,[75] and the same is true of law as well. Our modes of thought, our means of understanding, and our basic assumptions vary from generation to generation, even though we are frequently insensible to the changes that have occurred.[76]

A. Postmodernism Defined

Postmodernism might be explained as the relentless effort to ferret out the hidden agenda behind every argument.[77] In the eyes of postmodern scholars, concepts that purport to have stable, absolute meanings are seen as fronts for hidden value judgments and unsupportable assumptions.[78] This is taken to be particularly true in religion and philosophy.[79] Thus, for example, religious principles are seen as methods of control over the masses and concepts of right and wrong are seen as the results of cultural conditioning rather than incontrovertible moral principles. As one key postmodern writer, Jean-

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74. Roe v. Wade, 410 U.S. 113 (1973) *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

75. SÖREN KIERKEGAARD, FEAR AND TREMBLING 145 (Alastair Hannay trans., Penguin Books 1985).

76. For my detailed examination of this theme in the context of some Michigan real property law cases, see Carl W. Herstein, *Annual Survey, Real Property Law*, 48 WAYNE L. REV. 815 (2002). For a nice example of the subtle process of historical and legal revision and an interesting sociological study of the work of the United States Supreme Court in addressing the legal issues that arose out of the Civil War, see PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999).

77. For detailed discussions of postmodernism focusing on its impact on American legal thought, see STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE (2000); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995); DOUGLAS E. LITOWITZ, POSTMODERN PHILOSOPHY & LAW (1997); FROM MODERNISM TO POSTMODERNISM: AN ANTHOLOGY (Lawrence Cahoone ed., 2d ed. 2003) [hereinafter FROM MODERNISM TO POSTMODERNISM].

78. FROM MODERNISM TO POSTMODERNISM, *supra* note 77, at 10.

79. Postmodernists are "utterly skeptical of the three great sources of cognitive norms: God, Nature and Reason." *Id.*

Francois Lyotord, claims, there are no overarching theoretical foundations, such as reason or science, that provide a basis for understanding and justifying legal relationships (among others).[80] These "meta narratives" are false, in the postmodernist's view.[81] In fact, postmodernists are clearest about what they do not believe in.[82] There is a strong strain in their thinking that science and reason have been found wanting in building a foundation for a sound society. In a sense, they reject the Enlightenment as a failure.[83]

Stephen Feldman sees eight main themes in postmodernism,[84] saying that it:

> [] Is anti-foundationalist and anti-essentialist, which is to say that nothing can truly be said to have a certain meaning and there is no reality to the idea of core knowledge[85] (like Gertrude Stein's famous definition of the City of Oakland: "there is no there, there"[86]);
>
> [] Challenges the notion that there are fixed certainties or boundaries, such that all categories are arbitrary and that ideas from one discipline disrupt those of another[87] (perhaps this is why we cannot agree on labels or consistent time periods);
>
> [] "Revels in Paradox"[88] (as in the Pirates of Penzance, where our hero is born on February 29 in a leap year and while he is free from his pirate vows on his twenty-first birthday, since he has celebrated only five actual birthdays, his vow remains binding—all together now: "a paradox/a paradox/a most ingenious paradox"[89]);

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80. *Jean-Francois Lyotard*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, www.iep.utm.edu/lyotard (last visited Feb. 1, 2014).

81. *Id.*

82. FROM MODERNISM TO POSTMODERNISM, *supra* note 77, at 10.

83. LITOWITZ, *supra* note 77, at 10-11.

84. FELDMAN, *supra* note 77, at 38-44. Although he makes an appropriately self-reflexive observation that "these various postmodern themes neither exhaust the meaning of postmodernism nor stand independently from each other. Unquestionably, many post-modernists would dispute my choice of themes or even my entire thematic effort." *Id.*

85. *Id.* at 38, 163-66.

86. GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 298 (1993).

87. FELDMAN, *supra* note 77, at 39, 166-68.

88. *Id.* at 40, 169.

89. W.S. Gilbert & Arthur Sullivan, *When You Had Left Our Pirate Fold*, *in* THE PIRATES OF PENZANCE (1879).

[] Emphasizes "the social construction of the self"[90] (perhaps *The Great Gatsby* would be a good example of conscious self-construction;[91] another aspect of this is the tendency of a person to take on the characteristics of what they associate with a social role);

[] Is "self-reflexive or self-referential"[92] (being conscious of an inability to be truly detached from our habits of thought and social and political environment; it can also be seen as the application of the Heisenberg uncertainty principle to personal understanding—the act of observation itself impacts the thing being observed);

[] Is ironic[93] (taking note that the literal meaning of a word in a given context conveys something different than what appears to be intended; or that actions have the opposite effect of what they were supposed to produce; or to take another example, one might find it ironic that a master of irony in fiction was Jane Austen, and a master of irony in history was Edward Gibbon, both of whom lived hundreds of years prior to the postmodern era); and finally,

[] Politically ambivalent in that it can be both radical in implication but useful in achieving conservative ends[94] (although few if any prominent postmodernists can be seen as conservative, ironically enough, we shall see that there might be some truth in this paradoxical proposition!).

One might summarize it all by saying that being a postmodernist is to live in a Mark Escher painting.[95]

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90. FELDMAN, *supra* note 77, at 41, 174-76.

91. F. SCOTT FITZGERALD, THE GREAT GATSBY (1925).

92. FELDMAN, *supra* note 77, at 42, 176-80.

93. *Id.* at 43, 180-81.

94. *Id.*

95. Lawrence Cahoone similarly finds five "claims" of postmodernism. After noting that "[i]t is difficult—some would say impossible—to summarize what postmodernism means, not only because there is much disagreement among writers labeled postmodern, but also because many deny having any doctrines or theory at all," he goes on to say that "the very idea of a summary may be antithetical to postmodernism." FROM MODERNISM TO POSTMODERNISM, *supra* note 77, at 8. "Still," he writes, "understanding must begin somewhere," showing, I suppose, that he is a modernist at heart. *Id.* His five claims are as follows: first, that there is no grand unity, only limitless and inexplicable complexity; second, that everything is dependent upon signs, language, or interpretation—there can

As explained in an interesting essay by J. M. Balkin,[96] there are at least two ways of looking at postmodernism (or any other period) and the law (or anything else). The first is essentially descriptive. This view looks at law as it exists in practice during the postmodern period and asks, what are its salient features?[97] Thus, Balkin, who focuses on just such an analysis, concludes that constitutional law in our current postmodern world is "fragmented, de-centered and diffused."[98] Putting to one side whether this is an accurate view (or, to embrace a bit of postmodernist irony, whether an accurate view is even possible), it is a factually oriented, historical approach.

The other way to look at postmodernism (or any other philosophy or set of concepts or theories) is on an intellectual level to see whether it is useful (or, in some sense "true" or "accurate," although post-modernists would reject such efforts as meaningless) in understanding or analyzing what is occurring.[99] Thus, one can choose to look at law through a postmodern prism, applying the ideas of postmodern philosophy or theory and using them to critique existing ways of thinking about the law.

B. The Origins of Postmodernism

The origins of postmodernism go back to the late 1800s (during the Victorian, not even the Modern Period–or was this during the "Birth of the Modern?"[100] See what I mean about those confusing, overlapping

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be no direct link to data or sensation; third, knowledge is all "constructed"—that is, facts are picked and chosen from the infinite possibility of choices to create meaning but there is nothing inherently accurate or correct or authoritative about the meaning of what is pieced together, rather it is always "reflective" of cultural or political or other norms that govern the society in which the history is constructed; fourth, norms are "imminent," meaning that they cannot be separated from the intellectual and social context in which they are produced or from the political power structure in which they occur; and, fifth, the "analytic strategy" of postmodernism applies these four themes to demonstrate that all aspects of culture are maintained through "constitutive repression," meaning that there is an active process of exclusion, opposition, and the creation of hierarchies (and consequently privilege as well) in every situation. *Id.* at 8-11. Cahoone also acknowledges that "no one who tries to write in a way that would be 'consistent' with these five themes could help but become a hermeneutic pretzel." *Id.* at 12. Paradox? Irony? Self-reflection? Check.

96. J. M. Balkin, *What is Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992).

97. *Id.*

98. *Id.* at 1985.

99. *Id.* at 1971.

100. *See generally* PAUL JOHNSON, THE BIRTH OF THE MODERN: WORLD SOCIETY 1815-1830 (1991). While Johnson notes that some point to the 1780s as the decisive decade for

categories?) when Nietzsche launched his radicalizing assault on philosophical convention.[101] Or, once again to embrace a more postmodernist sensibility, it can be said that when various writers have attempted to construct an understanding of postmodernism by looking back at the past and interpreting it in a way that allows the development of a coherent narrative, they have begun with Nietzsche.

Why Nietzsche? As Douglas Litowitz nicely notes, this "surge of interest" in Nietszche among legal scholars "is somewhat surprising, considering that he did not present a systematic philosophy of law and is generally thought to have been a legal nihilist who denied the existence of basic human rights."[102]

As Litowitz goes on to explain, Nietszche did not have a great deal to say about the law. Furthermore, there is a great deal about his thought that is downright repugnant and, rightly or wrongly, has been linked to the breaking point in civilization that ushered in the First World War[103] as well as to views that gave rise to Nazism. Nonetheless, Litowitz suggests that there are a number of aspects of his thought that seemed to open the door to the postmodern viewpoint:

> My reading of Nietzsche's comments on law and law-related issues is that his approach to law is best understood as a critique of legal foundationalism in general and natural law theory in particular . . . despite the fact that he had comparatively little to say on this topic . . . it is possible to use Nietszche's few extended comments on law and law-related issues to create a three-pronged attack on natural law theory. First, Nietszche presents an epistemic skepticism which casts doubts on the possibility of natural law. Second, he presents a linguistic theory that exposes natural law to be a human fiction, a life-preserving and perhaps useful convention. Third, and most important,

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the creation of "modern" society, he contends that it only took root during the period that followed the Napoleonic War. *Id.* at xvii. *Compare* ROY PORTER, THE CREATION OF THE MODERN WORLD: BRITISH ENLIGHTENMENT (2000) (contending that the modern world is the product of the Enlightenment in Britain in the seventeenth and eighteenth centuries).

101. *See, e.g.*, FRIEDRICH NIETZSCHE, BEYOND GOOD & EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE (Walter Kaufman trans., Vintage Books 1989) (1966).

102. LITOWITZ, *supra* note 77, at 42.

103. GEORGE WEIGEL, THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD 37 (2005). "In works like 'Thus Spoke Zarathustra' and 'Beyond Good and Evil,' [Nietzsche] envisioned a master race of Romantic genius with a warrior spirit. Appropriating Nietzsche's advocacy of strength and praise for war, Hitler littered his oratorical displays with phrases hacked from this great mind . . . ." Yvonne Sherratt, *Five Best, A Personal Choice; On Philosophers and the Third Reich*, WALL ST. J., July 13, 2013, at C10.

> Nietszche presents a genealogical analysis of law which denies the notion of inherent rights. Nietszche's approach to law is primarily though not exclusively critical: he wants to debunk the idea that law can be founded on metaphysical or epistemic claims about nature, pure reason, self-evidence, or Christian morality.[104]

The fact that Nietzsche's thought relative to law is at such a high level of abstraction allows connections to be drawn broadly. Richard Posner connects Nietzsche's thought with that of Oliver Wendell Holmes.[105] He sees them both as removing law from moralistic pretensions.[106]

My own, somewhat postmodernist (or, at least, cynical) view is that Nietzsche has been a popular figure for study among academics because his views have the combination of obscurity, radicalism, continental cache, and anti-religiosity that has made them popular with the last few generations of academics who seem drawn to these themes. Furthermore, since his work is so malleable, it is a nice jumping off spot. Whether, therefore, Nietzsche actually provided the germ of postmodern thought from which it grew, or whether he has been dragged into the narrative history of postmodernism due to accident, academic conspiracy, or random error, I cannot say with certainty. But at least you now know the conventional version of the story (or the metanarrative if you prefer postmodern terminology).[107]

C. The Postmodern Ascendancy

Over the years, these thoughts and similarly iconoclastic notions were taken up by new generations of academics, who pursued similar lines of thought in language, politics, art, and literature. The ideas

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104. LITOWITZ, *supra* note 77, at 43.

105. RICHARD POSNER, FRONTIERS OF LEGAL THEORY 145-69 (2001).

106. *Id.* at 181.

107. Postmodernism in the academy (and in the works of many of the most influential of the early postmodernist thinkers) is awash in convoluted and confusing jargon which, in addition to obscuring some of the points being made, lends itself to spoof and satire. One of the more well-known (and embarrassing) spoofs was by mathematician Alan Sokol, who sent an article to a leading North American Journal of cultural studies that he cleverly wrote to mimic the post-modern style and appeal to the ideological preconceptions of the editors. The article, called "Social Text," was duly published, after which Sokol announced the hoax and co-wrote a book entitled *Intellectual Impostures*, much to the consternation of at least some of the victims of the joke.

seemed to take support as well from developments in anthropology and the hard and soft sciences.[108]

History, for example, with the exception of those of a Marxist bent, saw the general abandonment of notions of progress, renaissance, and enlightenment (now seen as the "Whig Theory of History")[109] in favor of a strict historicism. That is, history reflects an ongoing series of discrete events, not necessarily leading anywhere, not inherently susceptible to traditional notions of better and worse, and definitely not pointing in any particular direction.[110] Of course, with the collapse of the Soviet Union, even many of the traditional Marxists modified their approach to some degree.[111]

The publication of Thomas Kuhn's book, The Structure of Scientific Revolutions,[112] in 1962 revolutionized the (assumed rather than articulated) perception that the hard sciences moved forward in a logical, rational fashion. Instead, as he showed, science moves in fits and starts as one explanatory paradigm replaces another, and is susceptible to the fallibilities associated with other branches of knowledge.[113]

> Like the choice between competing political institutions, that between competing paradigms proves to be a choice between incompatible modes of community life. Because it has that character, the choice is not and cannot be determined merely by the evaluative procedures typical of normal science, for those depend upon a particular paradigm and that paradigm is at issue.[114]

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108. See subsequent discussion in Part II.C.

109. Herbert Butterfield wrote a highly influential book that purported to debunk the idea that English history was the story of gradual but inexorable progress. HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1965).

110. "Historicism" is another term that has a slippery meaning. For some it was a derogatory term, for others an expression of a scientific approach to history, and for others the meaning I have ascribed to it here. For a detailed explanation of the many and varied meanings of the term as I have seen it described, see Carl W. Herstein, *Real Property Law*, 48 WAYNE L. REV. 815, 861-62 (2002).

111. Andy Blunden, *Marxism After the Fall of the Soviet Union*, MARXISM, http://www.marxists.org/reference/subject/philosophy/help/marxism.htm (last visited Feb. 1, 2014).

112. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (4th ed. 2012).

113. *Id.*

114. *Id.* at 93. See also STEVEN JOHNSON, WHERE GOOD IDEAS COME FROM: THE NATURAL HISTORY OF INNOVATION (2010), for a more recent book on how scientific advances take place emphasizing somewhat different (although not necessarily contradictory) factors with respect to this process, such as accidents, hunches, and factors coalescing at the same time. One can argue that scientific advancement is, therefore, less

This book popularized the idea of "path dependency,"[115] that is, that trends move down certain well-trodden avenues rather than flowing wherever logical inquiry dictates. Given that legal theorists have long used the metaphor of following a path (Oliver Wendell Holmes essay "The Path of the Law"[116] being a famous example), the concept had immediate resonance with legal thinkers.

To a degree, the postmodern mood fit well with American pluralism. In a society in which free speech is a cherished notion, it is a small step from the view that divergent views must be tolerated to a belief that all views are equal. Similarly, because the government is to respect every religious view as equally true, it was not long before the spirit of acceptance was transformed in the minds of many to a sense of benign contempt, and all religions were seen as equally false.[117]

As a future Pope wrote in 1996,

> Relativism . . . appears as being the philosophical basis of democracy, which is said to be founded on no one's being able to claim to know the right way forward; and it draws life from all the ways acknowledging each other as fragmentary attempts at improvement and trying to agree in common through dialogue, although the advertising of perceptions that cannot be reconciled in a common form is also part of this. A free society is said to be a relativistic society; only on this condition can it remain free and open-ended.
>
> In the realm of politics this view is to a great extent true. The one single correct political option does not exist . . . In the realm of politics and society, therefore, one cannot deny relativism a certain right.[118]

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a clash of incompatible paradigms and more a matter of the necessary preconditions being in place to allow the existing paradigms to be undermined by surrounding circumstance.

115. *See generally* KUHN, *supra* note 112; JOHNSON, *supra* note 114.

116. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). For just one set of the many reflections on the historic significance of this article, see Symposium, *The Path of the Law After 100 Years*, 110 HARV. L. REV. 989 (1997).

117. An embrace of something like the view of Gibbon: "The various modes of worship, which prevailed in the Roman world, were all considered by the people as equally true; by the philosopher, as equally false; and by the magistrate, as equally useful." EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 34 (1899).

118. JOSEPH CARDINAL RATZINGER, TRUTH AND TOLERANCE: CHRISTIAN BELIEF AND WORLD RELIGIONS 117-18 (2003).

A feeling of disenchantment was also consistent with the country's efforts to come to grips with the experience of the various ethnic, religious, and other minority groups of which it is formed. The Civil Rights struggle made plain the gap between the aspirations of America's noble ideals and its implementation of them in its laws and institutions. How could Jefferson believe that all men are created equal and yet be a slaveholder?[119] Why did America fight a civil war that begat emancipation only to acquiesce in the "new birth of freedom" being aborted by Jim Crow?[120]

Postmodernism also appeared to be consistent with the messy political realities of American democracy, at least as dissected by many academics and intellectuals.[121] In the period following World War II, political scientists seemed to show that democracy was not very democratic (both through "social choice" theory[122] and more traditional approaches emphasizing the disenfranchisement of minorities and the deficiencies of the political process); "one man one vote" was not the law until the 1960s[123] (if then); gerrymandering is an accepted—though still controversial—part of the political process;[124] and anybody who took a smattering of political science in college after the mid-1960s knew that interest group analysis was said to explain more than the idea of town meeting democracy.[125] Thus, campaign finance (and the need for

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119. JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON (1998).

120. C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

121. For a useful overview, see Richard Briffault, *The Contested Right to Vote: The Contested History of Democracy in the United States*, 100 MICH. L. REV. 1506 (2002) (reviewing ALEXANDER KEYSSAR, THE RIGHT TO VOTE (2000)).

122. See the helpful survey of social choice literature in Maxell Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L. J. 1219 (1994). As Stearns explains, social choice theory arises out of a paradox first identified by the French philosopher and mathematician Marquis de Condorcet "that absent clear majority support for one of three or more options presented to a collective decision-making body there may be no rational means of aggregating individual preferences." *Id.* at 1222. The paradox was elaborated and elucidated in KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951). Arrow's theorem that no legislature could remain rational and simultaneously satisfy five criteria of legislative fairness resulted in a vast outpouring of legal scholarship, influencing a wide variety of ideas about law and politics, including such things as statutory interpretation (i.e., if the legislative process is not truly logical or rational, how does one understand—and determine—such fundamental legal concepts as legislative intent?).

123. Baker v. Carr, 369 U.S. 186 (1962).

124. Gaffney v. Cummings, 412 U.S. 735 (1973).

125. Based upon the body of "Public Choice" literature, stemming from works such as JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

"reform"), with an emphasis on the relationship between raising money and getting elected, came to be seen as the true test of political reality. These theoretical perspectives worked their way into legal analysis as academicians sought to apply them to the analysis of statutory interpretation. They asked how one can understand "legislative intent" if social choice theory demonstrated that what was intended was not necessarily a particular outcome but rather a result of competing outcomes that did not reflect a clear consensus?[126]

Many in the academy also embraced Marxist or neo-Marxist views in history, philosophy, and other disciplines. In Europe, such views became the prevailing academic orthodoxy. While certain arguments about the merits of the Marxist political experiments were terminated by the collapse of the Soviet system, Marxist concepts remained influential, such as "false consciousness" and the undesirability of capitalism.[127] During the 1970s and 1980s, some European thinkers, especially Michael Foucault, Jacques Derrida, Jean-Francois Lyotard, and an American, Richard Rorty, developed some extremely influential theories.[128] Several of them were responding to the European philosophical tradition of structuralism.[129] In brief, the structuralist argument is that meaning is derived from the relationships that have come to exist between and among things and concepts that come to form an overarching structure, not because of any inherent, definite meaning.[130] As explained by Lawrence Cahoone, structuralism was developed by linguists and championed by a French anthropologist, Claude Levi-Strauss.[131]

> Structuralism rejected the centrality of the self and its historical development that had characterized Marxism, existentialism, phenomenology, and psychoanalysis. The social or human sciences, like anthropology, linguistics, and philosophy, needed

126. Adrian Vermeule, *Interpretative Choice*, 75 N.Y.U. L. REV. 74, 87-91 (2000).

127. *See, e.g.*, HERBERT MARCUSE, ONE DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY (2d ed. 1991). Marcuse's idea of "Repressive Tolerance" has been particularly influential with those on the left, who believe that tolerance should not be allowed to those on the right. *See also* ROBERT PAUL WOLFF ET AL., A CRITIQUE OF PURE TOLERANCE (1965). The influence of Marxism took some surprising turns; for example, Catherine MacKinnon, who was strongly influenced by Marxist thought, became the midwife of feminist jurisprudence. *See generally* Catherine MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. LEGAL EDUC. 199 (2003).

128. KENNETH RICHARD SAMPLES, A WORLD OF DIFFERENCE 227-28 (2007).

129. JOHNSON, *supra* note 100.

130. *Id.*

131. FROM MODERNISM TO POSTMODERNISM, *supra* note 77.

> to focus on the supra-individual structures of language, ritual, and kinship which make the individual what he or she is. Simply put, it is not the self that creates culture, it is culture that creates the self.[132]

On the one hand, structuralist thought retained a commitment to a belief in the possibility of objective, scientific method, but on the other hand, it was deeply relativist, for there was nothing fundamental, "authentic," or objective by which a culture could be judged.[133] When adopted by legal academics, structuralism's approach involved a shift from customary methods of legal analysis: "Thinking about law like a structuralist changes one's stance toward the materials one analyzes. The legal structuralist sets aside question of law's origin, consequence, and meaning. He focuses on the relationships within legal texts rather than between law and its content."[134]

In contrast, Foucault, Derrida, and others argued that structuralism was overly deterministic and mechanical. Their approach was dubbed "post-structuralism."[135]

These philosophical developments were highly related to an interest in language. The complexities of expressing meaning and the relationship between meaning and understanding were argued over in considerable detail.[136] Because law, especially a law built upon a written tradition of constitution and statutes, is utterly dependent upon language, it is not surprising that three arguments soon worked their way into legal theory.[137]

The Vietnam War period was the defining experience for many who ended up as tenured university faculty members from the 1980s to the present day.[138] The views they developed as students protesting the Vietnam War shaped their view of the world. They embraced skepticism

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132. *Id.* at 4.

133. *Id.*

134. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 290 (1996) (quoting David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 267 (1985-86)).

135. SIMON CHOAT, MARX THROUGH POST-STRUCTURALISM: LYOTARD, DERRIDA, FOUCAULT, DELEUZE 175-76 (2010).

136. *Id.*

137. KALMAN, *supra* note 134.

138. *See, e.g.*, Franklin v. Leland Stanford Junior Univ., 218 Cal. Rptr. 228, 233 n.6 (Cal. Ct. App. 1985).

of institutions, especially official government explanations.[139] Thus, the European post-structuralist thinkers immediately appealed to them.[140]

Finally, and most importantly for the present exercise, postmodernism seemed to fit with the realities of law. The strict formalist view of law as a process of deductive reasoning from established principles, usually associated with Dean Langdell of the Harvard Law School from the late 1870s on,[141] did not hold sway for long in the American law school.[142] The attitude toward law dubbed "legal realism" developed in the 1920s and never really let go, even as other approaches,[143] such as the legal process school epitomized by Hart and Sacks at Harvard,[144] ebbed and flowed. Legal realism focused on the fact that there was a great deal of uncertainty in the legal system at every level; that rules were misunderstood, misapplied, or sometimes even misplaced; that legal decision-makers exercised discretion that could on occasion be arbitrary or malign; and that the justice system was sometimes grossly unjust.[145] In addition, legal academics began to focus on the antidemocratic nature of American judicial institutions and wrestle with their place in a generally democratic system.[146]

As law schools became increasingly interdisciplinary throughout the 1970s, 1980s, and 1990s, postmodern ideas seemed to have a particularly powerful attraction for many legal academics.[147] Out of this climate arose such thinkers as Stanley Fish, an expert on literature[148] who has also

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139. *See, e.g.*, Deborah Waire Post, *Academic Freedom as Private Ordering: Politics and Professionalism in the 21st Century*, 53 LOYOLA L. REV. 177, 186-89 (2007).

140. *Id.*

141. *See, e.g.*, ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 52-55 (1983).

142. If Bruce Kimball's exhaustive work is to be believed, Langdell was not the caricature that he is usually perceived to be, nor were his teachings nearly as rigid or monolithic. *See* Kimball, *supra* note 68. Any good postmodernist will, of course, note that reputation is socially constructed and serves various political and ideological agendas. On this point, it is hard for a modernist (or even a reactionary) to argue the contrary.

143. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 114-15 (2000).

144. Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1273-74 (1995); William N. Eskridge, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2040-45 (1994).

145. *See e.g.*, M. HOROWTIZ, THE TRANSFORMATION OF AMERICAN LAW 169-92 (1992).

146. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale Univ. Press, 2d ed. 1962) (spawning a cottage industry in this field). *See generally* KALMAN, *supra* note 134.

147. LITOWITZ, *supra* note 77, at 1.

148. Fish made his reputation as a Milton scholar. *See* STANLEY FISH, SURPRISED BY SIN: THE READER IN PARADISE LOST (1967). Fish took textual analysis from literature to

become a leading thinker on law.[149] In Professor Fish's view, it is not correct to say that there is no objective truth; rather, there is no way for human beings to figure out what it is.[150] Thus, all claims to right, wrong, better, or worse come down to preferences.[151] He has his preferences, you and I have ours. A corollary to this proposition is that there is no such thing as a "principled argument." Everything is a disguised grab to elevate someone's preferences over somebody else's.[152]

The critical legal studies movement (CLS) was the culmination of these trends. In addition to the adoption of philosophical models of post-structuralism and postmodernism such as deconstruction, CLS was very explicitly a political enterprise, self-described as left wing in political orientation.[153] While the "realists" had attempted to accurately describe the political and results-oriented aspects of the law as an element of it, the CLS view was that the manipulation of law to achieve political ends was its very essence.[154]

The triumph of postmodern thought is far more pronounced in the academic world than anywhere else. Universities and their law schools, particularly the "elite" schools, are full of courses on "deconstruction" and postmodern philosophy and theory.[155] One might be inclined to think it a matter of little relevance to the rest of the world, which seems ignorant of, and indifferent to, such abstract and out of the ordinary thinking. That would be wrong, however. More and more of the population is university trained and exposed to such thinking. In the law

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legal theory. *See, e.g.*, STANLEY FISH, IS THERE A TEXT IN THIS CLASS (1980); STANLEY FISH, THE STANLEY FISH READER (1999).

149. *See, e.g.*, Stanley Fish, *Teaching Law*, N.Y. TIMES (Dec. 12, 2011, 9:00 PM), http://opinionator.blog.nytimes.com/2011/12/12/teaching-law/.

150. STANLEY FISH, THE TROUBLE WITH PRINCIPLE 1-15 (1999).

151. *Id.*

152. *Id.* See, for example, Fish's analysis of Justice Thomas's dissent in the recent affirmative action decisions:

> Justice Thomas is not the only one in search of timeless tools to deal with the untidiness of the situations time throws up. It is the law's claim precisely to base itself in such tools. But I believe this search has failed, and therefore we will always be engaging in the ad hoc, pragmatic reasoning of which Justice Thomas accuses the majority.

Stanley Fish, *One Man's Opinion*, N.Y. TIMES, June 30, 2003, at A21. Also of interest is Edward Rothstein, *Connections: Moral Relativity Is a Hot Topic? True. Absolutely.*, N.Y. TIMES, July 13, 2002, at A13 (discussing perceptions of postmodernism in general, and Fish in particular, in light of the September 11th terrorist attacks).

153. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 753-57 (1985).

154. *Id.*

155. *See, e.g., Fall 2013 Course Overview*, YALE LAW SCHOOL, http://ylsinfo.law.yale.edu/wsw/prereg/course_overview.asp (last visited Mar. 12, 2014).

schools, where most of the faculty are drawn from the few "elite" schools,[156] and which have become vastly more "interdisciplinary" and therefore greatly influenced by trends in the academy at large,[157] these concepts have become enormously influential and, in part, explain some of the disconnect between legal scholarship and legal practice. Furthermore, society's opinion-makers, especially journalists and authors, as well as art critics,[158] have become steeped in this environment. Philosophical thought gradually and insensibly works its way into every aspect of our day-to-day life, changing the way we think and talk and understand the world around us.[159] Law, being one of the

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156. Yale, Harvard, and Stanford produce a huge percentage of law school faculty members. *See Where Tenure Track Faculty Went to Law School*, BRIAN LEITER'S LAW SCHOOL RANKINGS, www.leiterrankings.com/faculty/2000faculty-education.shtml (last visited Oct. 9, 2013).

157. Arthur Allen Leff, *Law and Quite Possibly the Rose Will Go On Smelling as Sweet as It Does Only So Long as We Go On Calling It a Rose*, 87 YALE L.J. 989 (1978), a trend that has done nothing but accelerate since the publication of that article.

158. In the world of art, postmodernism resulted in a truly ironic and paradoxical outcome for art criticism: its critics refused to pass judgment on the merits of a work. As summarized by one writer,

> Mainly, however, critics who have not retreated into monasteries have often retreated in another way, according to the art historian James Elkins. They have, he says in his brief but heartily polemical book, "What Happened to Art Criticism?", given up being critics. They are expert at describing and evoking recent work, placing it in historical context, drawing stylistic and intellectual links among artists. But, with a few exceptions, they do not judge. A Columbia University survey of 230 art critics conducted in 2002 found that making evaluations ranked at the bottom of their list of priorities. Elkins calls this retreat from judgment "one of the most significant changes in the art world in the previous century." He writes that critics have become "voiceless," "ghostly," "unmoored." Art criticism, Elkins says, is in "worldwide crisis.

Barney Gewen, *State of the Art*, N.Y. TIMES BOOK REVIEW, Dec. 11, 2005, at 29.

159. For a clever, conservative take on the trend, see, for example, Jonah Goldberg, *A Welcome Blow for Ineffective Intellectuals,* TOWNHALL.COM (Apr. 23, 2003) http://townhall.com/columnists/jonahgoldberg/2003/04/23/a_welcome_blow_for_ineffective_intellectuals/page/2.

> The moral relativism implicit in postmodernism has soaked into the entire culture. The central assumption of post-modernism is that independent moral judgments are impossible and that conviction is a substitute for fact. If my personal truth is true "for me" no one can say otherwise.
>
> I once defended myself against the charge of racism from a college student by citing the definition from the dictionary. She responded that "dictionaries are meaningless" all that mattered is how she felt. "One man's terrorist is another man's freedom fighter"; "it depends on the meaning of 'is'"; "who are you to judge?"; "it's all relative"; "perception is reality"; on and on: These are the barnacles that build up on a society which takes postmodern thought seriously.

most intellectual of disciplines, has been profoundly affected by these developments.

D. Conservatism and Postmodernism

One could argue that the traditional conservative should feel right at home in the postmodern intellectual world. After all, most of what has been described is really little more than the elaboration and intellectual embroidery of ideas with which conservative thought is fully conversant. That is, in classic Augustinian terms, man is a flawed creature, freighted down with original sin, constantly battling his impulse for self-aggrandizement, and in a state of perpetual bewilderment and self-delusion about right and wrong.[160] Consequently, the temptation always exists, and frequently is acted upon, to behave badly; to say one thing and mean or do another; to aspire to great things but to fail and require forgiveness. Conservatives, in other words, have always been skeptics about the perfectibility of man and the adequacy of reason without faith.

These thoughts, of course, had implications for an Augustinian view of law:

> Humans weakened in intellect and will now need law as a guide for the perplexed and as a restraint for the malicious. Although it may be true that some are still motivated to obey out of love, the majority are moved only by fear. . . . [P]eace in the society can only be insured only through punishment of the criminal within and war against [the enemy] without.[161]

Of course, Augustine saw absolute good—God—and absolute evil—the repudiation of God (i.e., sin). Our religious beliefs give us the key to what is otherwise unknown. This provides an anchor for understanding

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> When Hillary Clinton ran for the Senate in 2000, she told voters the only question was which candidate is more "concerned" about the issues facing New Yorkers—not which candidate was more qualified or which candidate had better ideas.
>
> If you can't grasp why this is a terrible trend, ask yourself this: When you hire a plumber, are you looking for someone who can fix your toilet, or are you looking for the person most concerned about fixing your toilet? The answer explains why we don't hire postmodernists as plumbers, and why we shouldn't hire them as politicians—or professors—either.

Id.

160. DONALD X. BURT, FRIENDSHIP & SOCIETY: AN INTRODUCTION TO AUGUSTINE'S PRACTICAL PHILOSOPHY 151 (1999).

161. *Id.*

and dealing with the mass of imperfections with which we are confronted.

One might also mention theories of natural law which still retain vitality, and though more popular among the religiously inclined, they have also appealed to the agnostic and secular as well. Because there is more than a hint of natural law philosophy in the works of America's Founding Fathers, including the Declaration of Independence, it retains significance in any American discussion of legal philosophy.

It might also be said by the unreconstructed conservative that the most prevalent contemporary religion is the worship of man. Its creed is the belief in the perfectibility of humanity and human institutions. This, to a significant degree, is the legacy of the period referred to as "the Enlightenment," which ushered in a philosophical era in which the theologically oriented analysis of Augustine was replaced by an agnostic approach.[162]

Postmodernism also rejects traditional religious notions. But in rejecting as well the fundamental enlightenment notion that reason can provide a complete path to truth, the postmodernist and the conservative are in agreement: for the classic conservative, reason without faith is insufficient as a guide to understanding and building a just order. For the postmodernist, reason is not an adequate guide to building a just order either, but he would argue that there is no basis for faith and, therefore, no sound source of moral guidance. Not surprisingly, the conservative reaction has been to point out that the consequences to society of such an approach can be an absence of morality that can lead to a societal breakdown. As Phillip Johnson has argued,

> Secularised [sic] intellectuals have long been complacent in their apostasy because they were sure they weren't missing anything important in consigning God to the ashcan of history. They were happy to replace the Creator with a mindless evolutionary process that left humans free and responsible only to themselves. They complacently assumed that when their own reasoning power was removed from its grounding in the only ultimate reality, it could float, unsupported, on nothing at all. As modernist rationalism gives way in universities to its own natural child, postmodernist nihilism, modernists are learning very

162. William Bristow, *Enlightenment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2011), *available at* http://plato.stanford.edu/archives/sum2011/entries/enlightenment/.

> slowly what a bargain they have made. It isn't a bargain a society can live with indefinitely.[163]

Nevertheless, it is both ironic and paradoxical that reading postmodern work is like reading the development of theology without God. It retains the interest in fundamental questions, covers the gamut of human experience (including the obsessive focus on sexuality[164] that religious traditions are often accused of falling prey to), delves into fine philosophical distinctions, and revels in its own distinct and often obscure vocabulary. But, unlike most theology, it suffers from the lack of both the soul and fundamental moral center that only a belief in the divine provides. In fairness, many postmodernists, in either their work or their lives (or both), have assumed political postures that they would argue provide moral grounding, but the connection between their theoretical analysis and any essential ethical or political position resulting from it seems highly arguable. For example, to derive a love of neighbor from a belief in a loving God is relatively straightforward. To derive anything approaching love of neighbor from a belief that all relationships are based on power, or structures that are beyond individual control, would seem counterintuitive. Here, Nietzsche's bleak and atomistic vision seems far more the logical conclusion of postmodern thought than a commitment to radical political activism, which, based upon a logical post-modern analysis, seems merely to substitute one hypocritical set of power seekers for another. Of course, one could say that a true postmodernist would not be bound by the tyranny of logic as we modernists might understand it, but that would merely reinforce the point that we are now in the realm of the mystical where claims need to be taken on the basis of faith.

Jumping from Augustine to a thinker who is more contemporary and closely associated with the roots of English and American conservative thought, Edmund Burke left us with ideas that do not seem quite so distant from us in their assumptions and their expression. While there is an argument to be made that Burke was very much an Enlightenment thinker,[165] it may be something of an overstatement. Burke's view was

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163. Phillip E. Johnson, *Nihilism and the End of Law*, FIRST THINGS, Mar. 1993, *available at* http://www.firstthings.com/article/2008/05/002-nihilism-and-the-end-of-law-49.

164. *See, e.g.*, M. FOUCAULT, THE HISTORY OF SEXUALITY (1976) (in three Volumes, An Introduction, The Use of Pleasure, and The Care of the Self).

165. GERTRUDE HIMMELFARB, THE ROADS TO MODERNITY, at ch. 3 (2004).

that a wise society retains its beliefs in the traditions and precepts of the past even if they are not susceptible to rational proof.[166]

Classical conservatism is suspicious of overarching theories and, in that sense, it is the antithesis of Enlightenment thinking, which had more confidence in the triumph of reason, rationalism, and science. Burke's most famous work was his book-length letter "Reflections on the Revolution in France."[167] In this work, he expressed his disapproval of the theoretical and he insisted that everything must be judged in its historical context:

> I cannot stand forward, and give praise or blame to anything which relates to human actions and human concerns on a simple view of the object, as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction. Circumstances (which with some gentlemen pass for nothing) give in reality to every political principle its distinguishing color and discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind.[168]

His metaphysics was based on the experimental.[169] He was not a reactionary, but he believed change must be done deliberately, with respect for tradition and precedent.[170] He had an "organic" view (that is, traditions and conventions grow naturally as a part of their surroundings) that was evolutionary, not revolutionary, and that respected custom.[171] Policies that made sharp changes with the past based upon ideas that had not stood the test of time were anathema to him.[172]

His views were also consistent with the conventions and presumptions of the English Common Law. Precedent is important. Old ways should not be lightly disregarded.[173]

Conservatism of this kind is suspicious of pure democracy, that is, direct decision-making by all citizens on a one-person, one-vote basis. It is far more comfortable with republican institutions, where citizens elect

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166. *Id.*

167. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, *reprinted in* EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 511 (Peter J. Stanlis. ed., 1963).

168. *Id.* at 514.

169. JOSEPH PAPIN, THE METAPHYSICS OF EDMUND BURKE (1993).

170. Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 390-92 (2007).

171. *Id.* at 411-12.

172. BURKE, *supra* note 167, at 511-14.

173. *See* Stephen A. Conrad, *James Wilson's Assimilation of the Common-Law Mind*, 84 NW. U. L. REV. 186 (1989).

wise men to make the actual decisions. It is also very much inclined towards constitutional rules protected by a vigilant judiciary that is independent of the sentiments of "the mob." It is expected and assumed that the judiciary will be a brake on the pace of change, taking traditional views and holding tightly to precedent, because judges usually came from the upper classes, so they should be expected to uphold the values of the propertied classes.[174] Accordingly, one of the traditional complaints about conservatism is that it is elitist and merely perpetuates the views (and the ascendancy) of the educated and aristocratic class. Conservatism is also comfortable with religious sensibilities and finding a role for religion in civic life.

It should be noted that American conservatism has diverged in important ways from its English or continental cousins. As Clinton Rossiter (one of those conservative thinkers that interested young John Engler) argued,

> [I]n proclaiming a political faith framed largely in Jeffersonian phraseology, the American Right ceased to be consciously conservative.[175] The old Conservative tradition sank even deeper into lonely disrepute, while a new kind of anti-radicalism moved in to take its place and provide the Right with comfort and inspiration. *Laissez-faire conservatism*, the label we shall apply to this new philosophy, rose to prominence between 1865 and 1885, to ascendancy between 1885 and 1920, to domination—to virtual identification with "the American Way"—in the 1920s.[176] I recognize that this label is something of a contradiction in terms, but that is exactly why I have chosen to use it: a paradoxical political theory deserves a paradoxical title."[177]

The classic American expression of republican ideals is found in the Federalist Papers, a series of pamphlets written by Madison, Hamilton,

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174. *Id.* Another set of those assumptions and expectations that do not always turn out to be true, however. *Id.*

175. CLINTON ROSSITER, CONSERVATISM IN AMERICA, THE THANKLESS PERSUASION (2d ed. 1962). Rossiter provides what is, in his view, a comprehensive, three-page list of "Principles of Conservatism." *Id.* The four principles with which he argued that the American conservative seems to agree are "the superiority of liberty to equality; the fallibility and potential tyranny of majority rule; the prime importance of private property for liberty, order, and progress[; and] the essential role of religious feeling in man and organized religion in society." *Id.* at 198-200.

176. *Id.* at 198-200.

177. *Id.*

and Jay in support of the ratification of the Constitution in 1787.[178] These works reconciled American democratic principles with a constitutional framework that was republican and reflected a common law background.

The Federalist Papers were hard-headed in their view of human nature. They saw men pursuing their own interests in various factions, and they sought to find institutions and methods to keep the natural tendencies toward the abuse of power under control.[179] The idea of hidden agendas and the pursuit of personal preference disguised as principle would not have been foreign to these authors.

The continuing vitality of the Federalist Papers with conservatism in general, and with respect to Michigan law in particular, is demonstrated by the growth in the 1980s and 1990s of the Federalist Society. This group was created in 1981 by three law students: future Northwestern University law professor Steven Calabresi at Yale University, and at the University of Chicago, by future member of the U.S. House of Representatives (Rep., Ind.) David McIntosh, and future assistant counsel to President George H.W. Bush, Lee Liberman Otis.[180] Their goal was to counteract what they perceived as an overwhelming left wing bias in the nation's law schools and universities.[181] That same spring, chapters were also formed at Harvard and Stanford. The Harvard chapter included E. Spencer Abraham, then a Harvard law student editing the Journal of Law and Public Policy and a close friend of Bill Kristol.[182] Abraham was later elected as U.S. Senator from Michigan and appointed Secretary of Energy by George W. Bush.[183] Kristol worked for Education Secretary Bill Bennett in the Reagan administration and went on to become editor of the influential conservative magazine, The Weekly Standard.[184] Future Supreme Court Justice Antonin Scalia was the faculty advisor at the University of Chicago.[185] From its modest beginnings, the Society has developed a substantial following, especially

178. THE FEDERALIST NOS. 1-85 (James Madison, Alexander Hamilton & John Jay).

179. *Id.*

180. *See Lee Liberman Otis*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y, http://www.fed-soc.org/publications/author/lee-liberman-otis (last visited Mar. 12, 2014).

181. To some extent, this has been quantified by the American Enterprise Institute in its study of political affiliations of academics. *Id.*

182. NINA J. EASTON, GANG OF FIVE: LEADER AT THE CENTER OF THE CONSERVATIVE ASCENDANCY 68 (2000).

183. *Secretary of Energy Spencer Abraham*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH, georgewbush-whitehouse.archives.gov/government/abraham-bio.html (last visited Oct. 12, 2013).

184. *William Kristol*, FOX NEWS, www.foxnews.com/on-air/personalities/william-kristol/bio/#s=h-1 (last visited Oct. 12, 2013).

185. *Biographies of Current Justices of the Supreme Court*, SUPREME CT. U.S., www.supremecourt.gov/about/biographies.aspx (last visited Feb. 1, 2014).

among political conservatives, and an almost larger than life reputation.[186]

Governor Engler's reference to his discussion with the President of the Federalist Society was, therefore, significant.[187] The Society has become the talisman of conservative thought with respect to the American judiciary.

Nonetheless, the conservatism of Burke or that expressed in the Federalist Papers and the approach to law admired by Governor Engler may not be as similar as they appear.

Governor Engler's remarks came back again and again to the role of the courts as protectors of democratic decision-making.[188] He sounds positively Jacksonian in his concern that the decisions of the people, as expressed by the legislature, be given force. However, as we have noted, the view supporting direct democracy, which involves as little mediation between "the people" and the institutions of government as possible, has traditionally been viewed as the antithesis of the view of those like the authors of the Federalist Papers or Burke who believe in a more republican system, where the people vote to select representatives to handle government, with these representatives exercising independent judgment and not merely mirroring the views of the electorate. Quite a paradox!

This is also true in his unbridled approval of reliance on the text of statutes and the Constitution.[189] The belief in the "plain meaning" approach, has, in fact, become something of an article of faith. It is almost a religious conviction held against the postmodernists, who are intensely skeptical of the objective meaning—let alone the "plain" meaning—of language.

One might have expected quite the opposite out of a "conservative" governor with an interest in classical conservative thought, but as Oliver Wendell Holmes so correctly told us, "[t]he life of the law has not been logic: it is experience."[190] The idea of judicial "conservatism" as articulated by the governor, and even more as practiced by the Michigan Supreme Court majority that was constructed out of his appointees, is, in many ways, more a reaction to the postmodern climate and the evolution of common law modes of decision-making that was influenced by this

186. *About Us*, FEDERALIST SOC'Y, http://www.fed-soc.org/aboutus/ (last visited Feb. 1, 2013).

187. MSCH NEWSLETTER, *supra* note 1, at 2.

188. *Id.*

189. *Id.*

190. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

postmodern climate than it is an expression of traditional conservative principles. What follows is a rough sketch of how this came to be.

E. The Conservative Reaction to Postmodernism in Law

The understanding of what law is has always been a subject of intense philosophical debate. At the risk of grave oversimplification,[191] much of this has been about whether law is objective. That is, are legal decisions determined by coherent, consistent, verifiable, rational rules, or are they merely outcomes of a system that can only be explained by extrinsic economic factors, underlying political realities, the values of a ruling elite, prejudice, or any number of other things that have nothing to do with the express language and logic of the rules? Political scientists, historians, and critics, for example, attempt to use these latter factors to predict judicial decisions, while lawyers have traditionally looked to the former.

The dominant "modern" view until the last forty years or so was that law was—or at least could be—objective.[192] While the problems with the actual performance of a legal system (what came to be called the "gap" between expectations and performance) was always a subject of concern to reformers, the ability to achieve a very high level of objectivity was assumed.[193]

During the twentieth century, however, skepticism about this assumption increased steadily. Not only did the Legal Realists of the 1920s and thereafter draw more attention to "Gap Studies"—they also began to question whether law could measure up to the kind of criteria that the ever more prominent scientific method used to judge objectivity.[194]

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191. In artistic terms, this is intended to be a sketch—or perhaps I should say a "cartoon"—the term originally used for the preliminary artistic rendering for a fresco or a tapestry. In modern parlance, a cartoon is often a caricature—a drawing that distorts certain prominent features of its subject to make them more instantly recognizable with less detail than otherwise necessary—truly a paradox that distortion can enhance recognition, and ironical that understanding the complex is often easier with simplification.

192. Philip J. Closius, *Rejecting the Fruits of Action: The Regeneration of the Waste Land's Legal System*, 71 NOTRE DAME L. REV. 127, 131-32 (1995).

193. *Id.*

194. *Id.* at 144-45. As a professor at Yale Law School during the 1930s and 1940's, Myres McDougal had a front row seat from which to view legal realism. Despite ups and downs in the orientation of its faculty, legal realism was very much in the air at Yale during this period. *See* LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960, at 115-76 (2011). McDougal began as an ardent realist but concluded that it was necessary to build a positive approach to law based on realist insights rather than merely to poke holes in

By the 1940s, one school of thought, led by Myres McDougall and Harold Lasswell, tried to address this issue by seeking to identify fundamental values that a desirable system of law should promote (for example, personal autonomy, democracy, religious freedom, and so forth) in order to address this problem.[195] Their premise was simple: unless one posited the underlying assumptions, objectivity as demanded by scientific standards was not possible.[196]

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traditional models. *Id.* at 177. Collaborating with political scientist Harold Lasswell, who moved from Chicago to join McDougal at Yale, they developed an approach to both law and legal education in which the range of potential values to be embraced was made explicit, and they argued for positing what were essentially the democratic values of World War II America. Their views were articulated in an article entitled *Legal Education and Public Policy Professional Training*, 52 YALE L.J. 203 (1943), and expanded upon their work over many years. For a comprehensive overview, see John Norton Moore, *A Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968). Based on these premises, McDougal and Lasswell emphasized the study of policy and the use of social science as an indispensable addition to technical legal skills in understanding how to read cases and make legal arguments. Both sadly and ironically, the fact that their work tended to be heavily laden with jargon, and written in a style that even those accustomed to the numbing style of much social science found off-putting and tendentious, their work tended to be ignored and then forgotten, other than in the international law arena, where it retained its vitality. *See* KALMAN, LEGAL REALISM AT YALE, at 182-87; A. Clark Arend, *In Appreciation of McDougal and Lasswell: A Response to Bainbridge and Manne*, ANTHONY CLARK AREND (Mar. 6, 2013), http://anthonyclarkarend.com/humanrights/in-appreciation-of-mcdougal-and-lasswell-a-response-to-bainbridge-and-manne/; Moore, *supra*, at 674-76 (giving a spirited defense of their use of terminology).

Instead, the academy ultimately embraced deconstruction, structuralism, and other postmodern theories that entailed a good deal more peculiarly academic prose, jargon, and outright incomprehensibility than anything they had written, but which lacked both its solid structure based upon the careful identification of the values upon which legal systems are grounded and, perhaps even more importantly, its optimistic and robust embrace of the democratic and individual values that America proudly trumpeted in the post World War II era. In the interest of full disclosure, I was trained in the methods of McDougal and Lasswell as a political science student of Ron Brunner, one of their disciples, at the University of Michigan in the early 1970s and wrote my honors thesis using their taxonomy. One of the valuable lessons this has taught me (just like VHS v. BetaMax!) is that the success of an approach is often dictated by how well it is explained and popularized and that the inherently better is not always that which earns approbation and adoption.

195. Siegfried Wiessner, *Professor Myres Smith MacDougall: A Tender Farewell*, 11 ST. THOMAS L. REV. 201 (1999).

196. In this they anticipated—and answered—the concern articulated by Professor Fish that although there may be objective truth, we cannot know what it is. *See supra* notes 148-52. Lasswell and McDougal took the pragmatic view that it is sufficient to agree on the basic values and reason from there. While Fish would respond that agreement on these values is difficult, if not impossible, Lasswell and McDougal would say that certain facts, such as the general consensus in favor of the U.S. Constitution or agreement on the U.N. Declaration of Human Rights, suggest otherwise. Fish would respond that while

Of course, one could posit the underlying assumptions to be religious, like Augustine. Despite the immense intellectual changes since the fifth century, most Americans accepted an evolved variation of Judeo-Christian principles as the accepted norm on which the legal system sits.[197]

The academic world, however, like Lasswell and McDougall, found itself increasingly uncomfortable with this state of affairs. By the 1960s, in a logical extension of the view from the Enlightenment forward, an agnostic (if not atheist) starting point seemed increasingly necessary for a "modern" understanding of law. Unlike Lasswell and McDougall, however, there was much less rigor in spelling out an agreed upon framework of values or going on record as to what those values ought to be.[198] Instead, there tended to be a more generalized and amorphous reliance upon concepts of "due process" and "fairness."[199] This was an agnostic application of the common law tradition, in which general principles of equity, fairness, reasonableness, and the like were often called upon to justify decisions as opposed to a constitutional system that assumes a set of fixed principles to govern the political order.

The Warren Court was the ultimate expression of this mode of legal thought. Doctrinal consistency and concern for fixed constructions was subordinated to the desire to achieve results that seemed consistent with hard to define large principles, such as "due process" and "equal protection." Nonetheless, by and large, the Warren Court was eventually successful in achieving popular and professional acceptance of most, but by no means all, of its specific decisions.

Today, virtually no one disagrees that its most famous decision, *Brown v. Board of Education*,[200] was not only "correct" in its outcome but also fundamentally sound in terms of our current conception of the American Constitution and American values. Other decisions, such as

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there may be agreement on those texts, in any given case, especially the "hard cases," there is little agreement on what the texts actually mean. *See supra* notes 148-52.

197. Bruce Ledewitz, *Up Against the Wall of Separation: The Question of American Religious Democracy*, 14 WM. & MARY BILL RTS J. 555, 569-75 (2005).

198. As Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229 (1979), pointed out, without God, there is no fundamental value system that will sustain scrutiny. "The so-called death of God turns out not to have been just *His* funeral; it also seems to have affected the total elimination of any coherent or even more-than-momentarily convincing ethical or legal system dependent upon finally authoritative, extra-systemic premises." *Id.*

199. *Id.*

200. 349 U.S. 294 (1955).

Gideon v. Wainwright,[201] guaranteeing the right to counsel for the indigent, or *Griswold v. Connecticut*,[202] recognizing a right to privacy,[203] are no longer subject to serious question in terms of general agreement that they are "good law." The Court's decisions in the area of criminal law, such as its adoption of the exclusory rule in *Mapp v Ohio*[204] or its *Miranda* rule,[205] have remained intact, although with various revisions, clarifications, and limitations.

However, this tends to be a function of political consensus, not agreement with respect to jurisprudence. Because the intellectual underpinnings of these decisions were ambiguous, hard to limit in their application, based upon factual claims that have not always stood the test of time, and sometimes contrary to longstanding legal precedent, they created important legal controversies that have carried on to the present day.[206]

Much of the professional legal scholarship of the 1960s, 1970s, and 1980s in the academic community, where the Court's decisions found overwhelming support—except where they were not perceived as having gone far enough—consisted of an effort to explain why the decisions of the Warren Court era were not only correct in result but also justifiable in terms of legal method—either the Court's own or one that the Court should have followed had it been a bit more skillful, careful, logical, or prescient.[207] Nonetheless, there seemed to be a nagging concern that something important needed to be resolved about the intellectual underpinnings of the Warren Court's decision-making, articulated by Judge Learned Hand, probably the most revered judge of his day.[208] The concerns that he raised about the process of judicial decision-making did

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201. 372 U.S. 335 (1963). The case was immortalized by Anthony Lewis in his book, GIDEON'S TRUMPET (1954). Lewis went on to be an influential columnist for the New York Times and one of the preeminent lay analysts of legal affairs.

202. Griswold v. Connecticut, 381 U.S. 479 (1965).

203. *Id.* Judge Bork was a sharp critic of *Griswold*, which he believed was based upon conceptions of a "right to privacy" that is not found in the constitutional text.

204. Mapp v. Ohio, 367 U.S. 643 (1961).

205. Miranda v. Arizona, 384 U.S. 436 (1966). These decisions were the subject of much debate within the Reagan Justice Department and were to receive considerable attention from, among others, a young Steve Markman. *See infra* notes 278-80.

206. See *supra* notes 200-05. *See also infra* note 207.

207. David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 862-79 (2007).

208. However, the doubts of Hand and other respected scholars about the Court's methods (as opposed to the moral and social appropriateness of integration) continued to arouse intense study. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 251 (1994); KALMAN, *supra* note 134, at 26-59.

not go away. A huge literature developed on *Brown v. Board of Education* devoted to the question of whether it was legally justified and, if so, how.[209] The famous effort by Herbert Wechsler to argue for adherence to neutral principles is one important example.[210] The vitality of the issue is shown by a book based on the question of how the opinion in *Brown* should have been written[211] as well as the ongoing debate about the usefulness of the "neutral principles" approach,[212] which, as we shall see, is referred to frequently by the Engler appointees to the Michigan Supreme Court. As aptly summarized by Laura Kalman,

> neutral principles and process theory led to a peculiar sort of doctrinal scholarship.
>
> It was easily parodied as always resulting in a call for the "functional balancing of the relevant interests." Even leading legal process advocate [Alexander] Bickel acknowledged judges had to choose among "enduring values." Yet the very act of balancing might leave "far too much to the individual judge's predilection." Neutral principles were all well and good, but they did not guarantee neutral attitudes towards the principles.

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209. Judge Hand, then near the end of his career, criticized *Brown v. Board of Education* in his Holmes Lecture at Harvard in 1958 and harmed his reputation in the process. LEARNED HAND, THE BILL OF RIGHTS 54-55 (1958). See the scathing comments in Richard A. Posner, Book Review, *The Learned Hand Biography and the Questions of Judicial Greatness*, 104 YALE L.J. 511, 518-20 (1994).

210. Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

211. WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin, ed., 2001). The Kirkus review of this book has one of the great lines about my beloved law school:

> The three judges from Yale—Balkin, former Solicitor General Drew Days, and media hound Bruce Ackerman—concur and form the plurality. Their opinions, commonly rooted in a revival of the "citizenship" and "privileges and immunities" clauses of the 14th Amendment, are very much Yale opinions: brilliant, subtle, technically masterful, and totally divorced from reality.

Kirkus Reviews, *What Brown v. Board of Education Should Have Said*, BARNES & NOBLE, http://www.barnesandnoble.com/w/what-brown-v-board-of-education-should-have-said-jack-balkin/1100624540?ean=9780814798904 (last visited Mar. 14, 2014).

Dear reader, while I despair of having imbibed these virtues during my law school days, I hope I have not succumbed to the vice; but you are forewarned.

212. *See, e.g.*, Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978); Frederick Schauer, *Neutrality and Judicial Review*, 22 LAW & PHIL. 217 (2003); Pamela S. Karlan, *What Can Brown Do For You? Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1049 (2009). As Karlan's article points out, as of 2009, Wechsler's article on neutral principles is the second most cited law review article in history.

> Balancing simply underlined the extent to which those who subscribed to process theory accepted realism's revelation of the role of idiosyncrasy in the decisional process.[213]

Similarly, the other decisions of the Warren Court, and then the Berger Court that followed it, have been analyzed in terms of their fidelity to various methods of legal interpretation. While most of the academy devoted itself to defending or harmonizing the methods of the Warren Court (and its progeny in the lower federal courts and the state courts), or seeking to expand its approach,[214] a small but tenacious group of critics continued to question the intellectual underpinnings of the Court's approach to deciding cases. Perhaps preeminent in the group was Robert Bork, first a professor at Yale Law School, later solicitor general, ultimately a judge, and most famously, defeated as a candidate for the United States Supreme Court.[215] The criticism was by no means limited

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213. Kalman, *supra* note 134, at 42. In the collective memory of conservatives, it tends to be forgotten that a highly influential group of legal academics were critical of the Warren Court's opinions, although not the results reached. The "legal process" scholars such as Albert Sacks of Harvard and Alex Bickel and Harry Wellington at Yale were uneasy since they "emphasized the importance of rules and legal reasoning in judicial opinions, but the Warren Court was deciding cases without adequately explaining its reasoning process." FROM PREMODERNISM TO POSTMODERNISM, *supra* note 77, at 126. For many of these scholars, their quest came to be the justification of the Warren Court's decisions in a way that was more intellectually defensible and would lead the way towards a jurisprudence that reached the same kinds of conclusions with a method that could more easily be explained and defended. *Cf.* Kalman, *supra* note 134, at 30-42. Alex Bickel, the most dedicated to a more modest conception of the Court's role, died far too young in 1974, and the old guard of Hart, Sacks, and Weschler were of an older generation soon to be passing from the scene with their judicial heroes, Felix Frankfurter and Learned Hand. Harry Wellington, who went on to be Dean of Yale Law School, worked hard to find principled rationales for opinions that were increasingly untethered from the craftsmanlike and compelling work that they considered ideal; after spending much of a year discussing ideas with one of his law school classes in which I happened to be a student, he wrote an article on *Roe v. Wade* that struggled mightily to make sense of what is probably the preeminent example of an opinion that fails every test to which the legal process school might have subjected it. *See* Harry Wellington, *Common Law Rules and Constitutional Double Standards*, 83 YALE L.J. 221 (1973). Many other academics labored in the same vineyard; see a partial list in Kalman, *supra* note 134, at 58.

214. *See, e.g.*, Frank Michaelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). *See also* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 999-1002 (1998).

215. *Robert H. Bork*, HUDSON INST., www.hudson.org/learn/index.cfm?fuseaction=staff-bio&eid=borkrob (last visited Feb. 1, 2014). Bork gained his initial academic fame for his work in antitrust law. His article, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), was his most famous constitutional effort before he wrote his post-nomination books.

to legal scholars. Unhappiness with the Warren Court was a significant spur to conservative political thought in general.[216]

During the 1960s and 1970s, Bork and the other critics hammered away at the theme that the methods of the Warren Court diverged too far from those traditionally used by the courts.[217] In pursuit of results that seemed proper to the Court's majority, they argued, it ignored principle, precedent, and process.

Judge Bork was in agreement with Wechsler's concept of neutral principles,[218] although not always with its most famous application in *Brown*, where Judge Bork did not agree that the decision was difficult because he believed that it was consistent with the original understanding of the Fourteenth Amendment.[219] Calling *Brown* a "great and correct decision,"[220] he also felt it was supported by "a very weak opinion,"[221] for he believed that the rationale put forward for it was disingenuous, which meant that cases later relying on it for the straightforward proposition that "racial segregation by order of the state was unconstitutional under all circumstances" had nothing to do with the rationale of the decision.[222] For Judge Bork, "[t]his was massively ironic, because the result in *Brown* is consistent with, indeed is compelled by, the original understanding of the 14th Amendment's equal protection clause."[223] That view, however, as Judge Bork points out, was not the prevailing wisdom, since segregation seemed to coexist with the passage of the amendment. Judge Bork's response to that concern was that while true to an extent, the amendment also was designed to create equality. By the time *Brown* was decided, "[t]he Court's realistic choice . . . was either to abandon the quest for equality by allowing segregation or to forbid segregation in order to achieve equality. . . . Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that." Since those who ratified the amendment

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216. GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA 205-06 (1998).

217. For an analysis of Bork's constitutional theories, see DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 10-28 (2002).

218. *See* ROBERT BORK, THE AMERICA: THE POLITICAL SEDUCTION OF THE LAW 78-84, 143-53 (1990).

219. *Id.* at 74, 84.

220. *Id.* at 75.

221. *Id.*

222. *Id.* at 76.

223. *Id.*

could not have foreseen this result, the Court needed to choose; it was thus free to choose wisely.[224]

In Bork's view, the Warren Court consistently took the wrong approach. Rather than being bound by the words of the Constitution and statutes, the Court put too much faith in its own ability to shape the Constitution to the modern world, devaluing the meaning of constitutional government and failing to give proper deference to the legislature, which is the basis for democratic government.[225]

Similarly, in the 1970s, Raul Berger helped revive the argument that legal decisions about matters of constitutional law needed to be consistent with the original meaning of the Constitution for a constitution to be effective.[226] The Warren Court was in many ways the culmination of the view that had gained currency during the earlier part of the century that the Constitution was a "living document" that evolved through the interpretive process.[227] Like so many intellectual concepts that became slogans, the idea of the "living constitution" actually exists in several forms that are by no means all alike.[228] The more extreme forms of this approach, of course, seem to encourage (or take as a fact that, however undesirable, could not be wished away) an expansive reading of constitutions and statutes based upon contemporary policy, social science, or value choices, and not some fixed understanding. To Bork and Berger this meant, in practice, that the Constitution was now subject to amendment by the Courts and not the people, which was putting the legal system on the road to perdition—or slouching towards Gomorrah, if one prefers Bork's more arcane metaphor.[229]

That these criticisms both resonated and stung were clear from the responses they generated. Bork's good friend and colleague on the Yale faculty, Alexander Bickel, had already been musing about the problem

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224. BORK, *supra* note 218, at 82.

225. *See, e.g., id.*

226. RAUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN 3 (1987).

227. A history of the development of that view is found in G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 198-239 (2001).

228. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007). William H. Rehnquist, *The Notion of a Living Constitution*, 29 Harv. J. L. & PUB. POL'Y 401 (2006), identifies two types of living constitutional theory. The first he identifies as non-controversial: "The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live." *Id* at 402. The second, which he disparages, is that "[b]ecause of the general language used in the Constitution, judges should not hesitate to use their authority to make the Constitution relevant and useful in solving the problems of modern society." *Id* at 407.

229. ROBERT BORK, SLOUCHING TOWARDS GOMORRAH (1997).

that he identified as "the counter-majoritarian difficulty."[230] That is, how does one reconcile democratic principles with a system in which unelected courts make the final decisions about an ever-wider variety of legal matters? Bickel's work became a classic and, as the years went by, the subject became an obsession with constitutional scholars of a liberal bent.[231] After all, liberal tradition is sympathetic to more, rather than less, decision-making based upon direct democracy (i.e., popular vote). It has always been conservatives who have been in favor of some degree of elite rule and have been fearful of the fickle populace whose passions are easily swayed by demagogy. Yet, here was a complete role reversal.[232] William Kristol, one of the most influential conservatives of the last twenty years, explained this seeming contradiction as follows:

> One of the paradoxes of being conservative in the late twentieth century is that you're supposed to be for the elites, but today the elites are more liberal [than the people], so you end up being for "the people." And that can degenerate into a kind of dumb populism.[233]

The conservatives presented their liberal colleagues the following conundrum: elitist courts, answerable to nobody, were making unpopular decisions protecting various minorities (including alleged criminals, pornographers, and radicals as well as ethnic and religious minorities) based upon interpretations of the Constitution that were difficult to locate in the text and seemed inconsistent with precedent.[234] What happened to liberals' faith in democracy?

The high water mark of liberal jurisprudence came with *Roe v. Wade*,[235] which built upon the concept of privacy that the Court found broadly implicit in the Constitution, although not articulated in the text, in *Griswold*.[236] Upon that penumbral foundation, the court constructed a right to obtain an abortion without government restriction or control.[237] This wrenched the debate on abortion out of the democratic arena where

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230. BICKEL, *supra* note 146, at 16.

231. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-Majoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002); Kalman, *supra* note 134.

232. *Cf.* NASH, *supra* note 216, at 233-35.

233. EASTON, *supra* note 182, at 45-46.

234. *Id.*

235. Roe v. Wade, 410 U.S. 113 (1973), *modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

236. Griswold v. Connecticut, 381 U.S. 479 (1965).

237. *Roe*, 410 U.S. at 113.

it was then hotly in play and gave total victory to the liberal side. By resting the decision on principles that were at least one step removed from the general language, two steps removed from the text of the Constitution, and wholly inconsistent with the long established practice of regulation of abortion by the state legislatures, the U.S. Supreme Court had pressed the concept of constitutional interpretation to its limit, and critics angrily charged that this was rewriting the Constitution by an unelected group of five people accountable to no one. Conservatives argued that the decision could not be justified by any reasonable interpretation of the Constitution. Some liberal scholars, like Harry Wellington, made game efforts to justify *Roe v. Wade*, but their arguments seemed strained at best.[238] A few liberals led by John Hart Ely, despite their complete sympathy with the result in *Roe*, ripped the decision with devastating force.[239] He also posed the question that would emerge in the late 1980s and 1990s: where would liberals be if "conservative" judges again became ascendant and were armed with the tools to flexibly interpret the Constitution in less congenial ways?[240] The result was that Supreme Court appointments became political flashpoints. When Bork was nominated to the Supreme Court in 1987, he was relentlessly attacked in a strident, distorted, and viciously personal way.[241] Bork's intellectual accomplishments were sterling as a professor at Yale Law School. He virtually created modern anti-trust theory.[242] However, he was an outspoken critic of the methodology of the Warren Court.[243] His vigorous critique of the *Griswold* decision, which was a fundamental building block in *Roe v. Wade*, suggested not merely a desire to halt the direction of the Court but a potential rollback of the jurisprudence of the prior twenty years,[244] something that his critics found totally unacceptable and justifying in their eyes a complete demonization of the man and a vilification of his character.

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238. *See* Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 297-310 (1973); Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law* 83 YALE L.J. 1315 (1974).

239. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

240. *Id.*

241. *See* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS 45-52 (1994).

242. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

243. BORK, *supra* note 229.

244. *Id.*

Originalism thus became a hot topic. In 1985, Attorney General Ed Meese gave a series of speeches attacking the Supreme Court's decisions and direction.[245] His version of originalism did not attract much public approbation, but it generated a heated liberal backlash.[246] Nonetheless, it laid down the gauntlet on the issue.[247] The Reagan Justice Department under Attorney General Meese had a number of like-minded young lawyers on the subject of original intent. They gathered for monthly Federalist Society luncheons fueled by Chinese food in downtown Washington, and they attended weekend retreats together.[248] One of these lawyers was Stephen Markman.[249]

Originalism received a sustained beating in the academy. Bruce Ackerman, among others, devoted years of sustained effort to demonstrate how the Constitution changes through a process of triumph of popular demand, without amendment, in an effort to solve the conundrum of a constitutional system and a "living constitution."[250] However, no matter how subtle or sophisticated the analysis, it is difficult to reconcile a constitutional system with a system of jurisprudence that does not admit the validity of some fundamental originalist ideas. While liberal scholars were able to offer up a host of issues that make originalist jurisprudence difficult, or inapplicable in certain cases where standards may have been intended to evolve, these important but marginal issues could not dislodge the bedrock problem that the essence of a constitutional system is to fix in an agreed-upon set of fundamental points of agreement. No matter how many practical interpretational problems exist, or are created or exacerbated by the passage of time, the fundamental legitimacy of the constitutional process consists of a public statement of fixed principles that are only to be changed in certain formally prescribed ways. That there can be unintentional deviations from this ideal is something that can be accepted as inevitable; to elevate the intentional deviation from the ideal into a virtue seems both underhanded and subversive. Thus, a grudging truce

245. ORIGINALISM: A QUARTER CENTURY OF DEBATE 3-6, 11-13, 20-23, 47-54, 71-81, 99-109, 317-31 (S. Calabresi ed., 2007).

246. *Id.* at 2.

247. EASTON, *supra* note 182, at 189-90. The speech, and a number of other early talks in favor of originalism, are reproduced in ORIGINALISM, *supra* note 245.

248. EASTON, *supra* note 182, at 188.

249. *Id.*

250. BRUCE ACKERMAN, WE THE PEOPLE: VOLUME I, FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: VOLUME II, TRANSFORMATIONS (1998).

has recently been offered by at least some of the Warren Court's defenders who have stated that we are all originalists now.[251]

In fact, in the legal academy, a significant group of liberal legal scholars sought to beat the new federalists at their own game by finding in the early period of the nation's history republican principles that would justify the philosophy and methods that animated the court 175 years later.[252]

This "Republican Revival" generated an enormous volume of writing,[253] but ultimately it did not seem to produce a coherent or compelling basis for a Warren Court-like approach to the law. Laura Kalman, a liberal historian of law, sympathetic to the philosophy and the values of the Republican Revivalists, wrote a devastating critique of the movement.[254] Coincidentally or not, around the same time, the revival, in its liberal incarnation, seemed to expire.[255]

However, there was an entirely different set of responses from others in the legal academy. Their approach was the postmodern one, or at least a precursor to it,[256] loosely grouped together under the heading of Critical Legal Studies. These scholars argued that their opponents were right about the philosophical incoherence and formalistic flaws of the decisions of the Warren Court (although they were unanimously in agreement with them). But, they also argued that their opponents were wrong to think that their ideas were any different. It is true that the Warren Court constructed an approach to legal decision-making that is dependent upon the values of the judges and is unconstrained by adherence to precedent or the language of the Constitution from the conservative perspective. On the other hand, in their view, the assumption that there is a better alternative is wrong. These scholars

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251. Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1184 (2011). *See also* ORIGINALISM, *supra* note 245.

252. *See supra* note 238.

253. A good place to sample the literature as well as to read some overviews is the Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988), as well as G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1 (1994). Professor White's article helpfully connects the Republican Revival with the interest in structuralism, the development of Critical Legal Studies (CLS), and the movement toward interdisciplinary scholarship in law schools. *Id.*

254. KALMAN, *supra* note 134.

255. Much of Kalman's critique is reworked in her later book, *supra* note 194.

256. Some writers draw a distinction between CLS and postmodernists per se. Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2577-82 (1992). However, CLS seem to be considerably more similar to the various "themes" of postmodernism thought than dissimilar, and I follow others who see CLS as a postmodern legal movement.

contended that it is not possible to separate values from decision-making; it is not possible to be constrained by language—constitutional or otherwise—because language is complex, malleable, and socially constructed. In short, there is no principled approach to legal decision-making. Everyone is looking out for their preferences and trying to disguise them in principled-sounding language. Bork and his friends are no more neutral or dispassionate or principled than anyone else. The only difference is that he is conservative and they are liberal. And (here is why the commentary starts to get nasty), they believe that Bork was a fraud because he was smart enough to know that the liberals are right and he was just faking.

More persuasive are Stanley Fish's observations on this point: The plain language will seem to have one obvious and clearly more compelling meaning based upon which "interpretative community" to which you belong. If you bring to the text certain assumptions about how a statute is intended to work, what purpose it might be seeking to serve, what context it relates to, and those assumptions are shared with others whom you know and respect, what the text means will be quite clear to you. The problem is that members of a different interpretative community who approach the same text with very different assumptions that are also shared by others that they know and respect will believe the text to be equally clear but with a different meaning.

This point aside, these scholars argued in opposition to Bork and his like-minded friends that democracy is not the idealized process that prior generations claimed.[257] It is dominated by special interest groups, money, and media manipulation, and only a small percentage of the population votes. The poor and minorities are disenfranchised. Racism and sexism are rampant and have been institutionalized into the legal system.[258]

Hence, if one accepts these arguments, the liberal focus on the democratic process becomes far less important than the search for satisfactory outcomes. Results are what count. Getting those results is a function of manipulating symbols and ideas in whatever fashion is needed. This is the heart of the critical postmodern movement's challenge. It is also the reason that some liberal scholars continue to look for a third way, because when the postmodern claim is put this plainly, it appears cynical, elitist, and discomfortingly compatible with rule by the most ruthless and unprincipled minority. This seems apparent, for

257. J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 U. MICH. L. REV. 1966, 1984-86 (1992).

258. Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 ST. JOHN'S L. REV. 120, 120-30 (1991).

example, in reading the summary of Richard Rorty's views on the two key decisions of the last fifty years, *Brown* and *Roe*:

> Rorty makes the interesting point that some of the best legal decisions of this century were aberrations and anomalies from a legal perspective because they circumvented settled areas of law. The Supreme Court decisions in *Brown v. Board of Education* and *Roe v. Wade* were the result of judicial activism in which the Court refused to defer to either preexisting case law or legislative solutions involving segregation and abortion. In both cases the Court could have followed racist or sexist precedents or passed the buck to state legislatures; instead it took a leap, creating a new social experiment by articulating a wider scope of fundamental rights. The justices could not have know[n] in advance that they had made the right decision, but they created an experiment that turned out well, and we can't seriously countenance a return to the era before these decisions were made.[259]

While Judge Bork failed to receive confirmation to the Supreme Court, Antonin Scalia did not. Justice Scalia is probably the most important current exemplar of the intellectual response to consciously postmodern legal thought. A legal scholar himself before his elevation to the High Court, he has written some highly influential articles articulating his understanding of law, *The Rule of Law as a Law of Rules*[260] being one and his Tanner lecture at Princeton on statutory interpretation another.[261] The connection between Bork and Scalia is personal as well as intellectual. Bork and Scalia worked together in the Justice Department in the 1970s, and Bork singled out Scalia in the preface to his book, The Antitrust Paradox, published in 1978.[262] Much of the conservative ferment in law had a relationship with the University of Chicago Law School. Bork had been a student there.[263] Scalia taught there, as did Richard Epstein, who became perhaps the greatest iconoclast of liberal constitutional theory.[264] Also from Chicago was

259. LITOWITZ, *supra* note 77, at 146.

260. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

261. Antonin Scalia, *Tanner Lecture at Princeton University* (Mar. 1995), *in* A MATTER OF INTERPRETATION (Amy Gutmann ed., 1997).

262. BORK, *supra* note 229, at ix-xi.

263. *Id.* at ix.

264. *Richard Epstein*, NYU LAW, https://its.law.nyu.edu/facultyprofiles/profile.cfm?personID=26355 (last visited Feb. 1, 2014).

professor and later Judge Richard Posner, and other future Judges Frank Easterbrook, Danny Boggs, and Ralph Winter too had Chicago connections.[265] When the Federalist Society was founded in 1981, Scalia served as faculty adviser at Chicago.[266] However, Yale Law was well represented, as Bork and Winter were the faculty advisers there, and co-founder Steve Calabresi was a student there.[267] Epstein was the first speaker at the Chicago chapter of the Federalist Society at Chicago in March 1982.[268] In April 1982, the Yale chapter[269] inaugurated its program.[270]

Bork, Scalia, Epstein, Posner, Easterbrook,[271] Steven G. Calabresi, Gary Lawson[272] of Boston University Law School (who clerked for Scalia and was Executive Director of the Federalist Society for a time), and Mary Ann Glendon[273] of Harvard have had a profound influence on contemporary conservative thought. As academics, they were engaged in various intellectual battles with their colleagues over one or another aspect of postmodernism. As judges, many of them have put their academic ideas into practice, and they have demonstrated the relationship between the two.[274] Thus, in analyzing their work, one can see that in some important ways, the arguments that they make are intended to avoid problems or arguments raised by the postmodernists. In other words, they do not merely restate the arguments of the past or adhere to prior conservative positions (although there is some of that in their work), but they also set out positions that, in some cases, assume the truth (or at least the cogency) of postmodern arguments, and as judges they show how their answers are carried out in concrete cases.[275] Thus, they are "postmodern conservatives." Their ideas are only fully

265. EASTON, *supra* note 182, at 64-69.

266. Eugene Volokh, *Our Flaw? We're Just Not Liberals*, WASH. POST., June 3, 2001, at B3.

267. Glen Eleasor, *Federalist Society Grows Into Conservative Big Shot*, CHI. TRIB. (Jan. 11, 1987), http://articles.chicagotribune.com/1987-01-11/news/8701030602_1_federalist-society-gen-edwin-meese-federal-judges.

268. *Id.*

269. *Yale Law Federalist Society*, YALE L. SCH., http://www.law.yale.edu/stuorgs/fedsoc.htm (last visited Nov. 9, 2013).

270. EASTON, *supra* note 182, at 67-68.

271. James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171, 1172-77 (1986).

272. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 39 DUKE L.J. 239, 255-63, 278-82 (2009).

273. Donald P. Kommers, *The Constitutionalism of Mary Ann Glendon*, 73 NOTRE DAME L. REV. 1333, 1336-40 (1998).

274. *See supra* notes 260-61.

275. *See supra* notes 260-61.

understandable against the background of the arguments to which they respond. Furthermore, to at least some of us, their allegedly "conservative" arguments do not seem very conservative at all, at least conceptually.[276]

Just like the Governor, these thinkers are in favor of "judicial restraint," which is also referred to as judicial conservatism by some. In an effort to eliminate some of the confusion created by this "conservative" labeling, the expression "judicial restraint" will be used whenever possible for this view. In order to achieve judicial restraint, they have focused, as did the Governor in his speech, on three key ideas: "originalism," "textualism," and the view of law as rule-based in a specific sense. There are also two other critical areas of legal theory that are implicated in a more complicated way by their thought: deference to the legislature and the role of precedent or *stare decisis*.

F. The Legal Philosophy of the Engler Appointees

Justices Markman, Young, and Taylor are intellectual disciples of Judge Bork, Justice Scalia, Judge Easterbrook, and the conservative academics. Unlike some judges whose philosophies of judging are found only in their opinions or who only published their thoughts after years on the bench, the three Engler appointees (as well as Maura Corrigan, who was to become a key member of the new majority) provided a clear written record of their views before their appointment (or immediately afterward in connection with their election campaigns, in speeches, and in academic writings), and in keeping with standard academic and legal practice, these conservative intellectuals are the authorities that they cite and echo.

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276. *Cf.* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996). Merrill agrees that there is a middle way between a non-original approach and originalism that he believes is more in keeping with conservative values, such as the rule of law, protection of the democratic process, preserving continuity with the past, and demonstrating skepticism about the power of pure human reason. He calls this approach "conventionalism," which he associates with Burke in contrast to Bork's originalism. Conventionalism seeks the present consensus view of the meaning of an ambiguous provision, rather than the past, original view. The value of Merrill's argument is not that it is completely persuasive in claiming that taking a "conventional" view is always the sound conservative approach, but rather that it highlights a more important aspect of Burke's argument, namely that insistence upon a particular theoretical perspective is itself an example of the elevation of the hubris of reason over experience and context. Originalism offers important insights, and respect for the conventional has its place as well, but comprehensive "*a priori*" theories of any kind pose dangers that Burke would tell us are best avoided.

In fact, all three Engler appointees felt that they had an obligation to the public to expound their judicial philosophy with clarity. In an AP interview in 2000, all the Michigan Supreme Court candidates were asked, "Should Supreme Court candidates give voters a clearer idea of their judicial philosophy and beliefs before the election?" Here are their responses:

> Markman: "Absolutely. . . . The public is entitled to know what kind of philosophical point of view he'll bring to bear in making his decisions."
>
> Taylor: "Yes. I have spent the better part of three years giving speeches around the state on my judicial philosophy."
>
> Young: "Absolutely."[277]

1. Stephen Markman

After graduating from the University of Cincinnati Law School in 1974, Justice Markman went to Washington where he served as Legislative Assistant to the ranking member of the House Committee on the Judiciary, and then for seven years he was Deputy Chief Counsel to a United States Senate Judiciary Committee.[278] Thereafter, he was tapped to serve as an Assistant Attorney General of the United States for the Department of Justice's Office of Legal Policy in the Reagan Administration.[279] In this role, he had a critical part in the judicial selection process.[280]

As noted earlier, Justice Markman was involved in the conservative intellectual ferment of the Reagan Justice Department, and he was and remains very involved with the Federalist Society. When he was in Washington as an Assistant Attorney General, he chaired the Washington Chapter.[281] He continues to be active in many Society events; he became

277. *Candidates Discuss Supreme Court Election Issues,* Associated Press, Oct. 21, 2000.

278. *About Justice Markman,* JUSTICE STEPHEN MARKMAN: SUPREME CT., www.markmanforjustice.com/about-justice-stephen-markman (last visited Feb. 1, 2014).

279. *Id.*

280. *Id.*

281. Community Rights Counsel, *Ch. 3: The Origins of the Takings Project,* TAKINGS PROJECT 21, http://communityrights.org/PDFs/TakingsProject/chapter3.pdf (last visited Mar. 14, 2014).

associated with the Mackinac Center, a Michigan-based conservative think tank.[282]

In the late 1980s when he was working as an Assistant Attorney General for Legal Policy for the U.S. Department of Justice, Markman was very much involved with criminal law issues. He developed a perspective, well-illustrated in an article for the University of Michigan Journal of Law Reform,[283] that looked at the criminal law from the viewpoint of the citizen seeking protection as well as that of the victim of crime. He wrote,

> Today the threat of crime affects our decisions about where to live, where to travel, where to send our children to school, where to let them play and how to teach them to relate to strangers. According to one poll of Florida residents, more than half of all respondents are afraid to walk outside their home in the evening. This rampant criminality seriously undermines the "blessings of liberty" that the Constitution was meant to secure, and may sometimes make them wholly illusory.[284]

The answer to the problem he believed was according "the highest priority to accurate fact-finding" and demanding "the strongest and clearest justification for any departure from that objective."[285] But, he lamented, "What one finds instead is a system of rules that reflects a pervasive willingness to subordinate the truth-seeking function to other interests."[286] While acknowledging that this result may be unavoidable in some circumstances, he noted that "[i]f it is alleged that the Constitution imposes strictures that sometimes facilitate the efforts of criminals to defeat justice, careful scrutiny is required to ascertain whether the restrictions reflect the actual dictates of the Constitution or recent judicial innovations that are dubiously portrayed as being of 'constitutional' dimensions."[287] In that spirit, the Foreword introduced eight reports developed in the Office of Legal Policy in the Justice Department, each of which argued for a change in the rules of criminal procedure that

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282. EVENT AUDIO/VIDEO: AN ORIGINALIST JUDGE AND THE MEDIA, *available at* http://www.fed-soc.org/publications/detail/an-originalist-judge-and-the-media-event-audiovideo; *An Evening with the Mackinac Center*, MACKINAC CENTER (Nov. 16, 2011), http://www.mackinac.org/16037.

283. Stephen J. Markman, *Foreward: The Truth in Criminal Justice Series*, 22 U. MICH. J.L. REFORM 425 (1989).

284. *Id.* at 427.

285. *Id.* at 428.

286. *Id.* at 428-29.

287. *Id.*

would have reversed a number of decisions of the United States Supreme Court, such as the *Mapp v. Ohio* exclusionary rule and the restrictions imposed on police investigations by *Massiah v. United States.*[288]

Subsequently, Markman went on to serve as the United States Attorney for the Eastern District. He was praised for his work both by law enforcement for his efforts—including longtime Attorney General and noted Democrat Frank Kelly—and by at least one prominent member of the criminal defense bar for his open mindedness, honorable behavior, and intellectual honesty.[289]

Notably, when he spoke at his investiture ceremony after taking the oath as a new Michigan Supreme Court Justice, Markman emphasized his concern for those who he noted are sometimes "invisible to the judicial process."[290] He said, "I promise never ever to lose sight of the victims of crime. The first responsibility of government—one in which all three branches have responsibilities—is the protection of 'we the people' from violent criminal predators."[291]

Markman was thinking about matters of judicial philosophy for many years before he became a judge. As an Assistant Attorney General for Legal Policy with the Office of Legal Policy in the U.S. Department of Justice, he was involved with a key group in the recommendations for judicial selection for the federal bench.[292]

He wrote a number of articles for the National Review, a leading conservative publication created by William F. Buckley, Jr., the American Spectator, another conservative journal, as well as several law review articles.[293] It was clear that his background caused him to think a great deal about the significance of judicial philosophy in the selection of judges. For example, in one of his articles for the National Review in 1993, he posed ten questions for then judicial nominee Ruth Bader Ginsburg.[294]

In many respects, that article is a model of civility, beginning with the comment that Judge Ginsburg "is an honorable and sincere woman who has demonstrated considerable intellectual energy and scholarship on and off the federal bench."[295] He went on to argue that "[i]nstead of attempting to impugn the nominee's integrity, something that has regrettably dominated the confirmation process in recent years . . .

288. *Id.* at 430-35.
289. Investiture Ceremony, *supra* note 55.
290. *Id.*
291. *Id.* at 538.
292. *See supra* note 261.
293. *Id.*
294. Stephen Markman, *Ten Questions for Justice Ginsburg,* 45 NAT'L REV. 38 (1993).
295. *Id.*

Committee conservatives should engage in some intelligent constitutional inquiry."[296] While going on to state that Judge Ginsburg's view is that "the Senate may not properly inquire into a judicial nominee's 'particular policies or ideological philosophies,'" he concluded that the experience of the last ten years from Bork through Thomas established that in-depth questioning on such matters is "entirely acceptable."[297]

In one of his questions, he asked, "While no faction has a monopoly on [judicial] activism, will you acknowledge a legitimate concern on . . . not placing upon the bench persons who fail to appreciate the limitations of the judicial role?"[298] He went on to comment that while a term such as judicial activism "may not be susceptible of easy definition, the concept is essential in demarcating the line between proper and improper judicial decision-making."[299]

In another question, he noted that Judge Ginsburg had said that an originalist jurisprudence of the Constitution was "unworkable," and he asked what would be "a more 'workable' and appropriate standard of interpreting the words of the Constitution?"[300] Further, would her "alternative standard lead to more predictable decision-making? If not, in what way is it more 'workable'?"[301]

He also stated a further concern: "[t]he debate over how the Constitution should be kept responsive to changing times lies at the heart of our system of self-government."[302] For Markman, the question is why constitutional change effected by judges is preferable to such change only through the process of constitutional amendment.

After his service in Washington, Justice Markman returned to Michigan as an Assistant U.S. Attorney, and became the U.S. Attorney for Michigan in 1989.[303] Following a brief stint at the Detroit firm of Miller Canfield Paddock & Stone, he spent four years on the court of appeals before his appointment by Governor Engler to the supreme court.[304]

Speaking at a conference of the Federalist Society in 2005 on a panel with respect to originalism and precedent, Justice Markman commented that

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296. *Id.*
297. *Id.*
298. *Id.* at 40.
299. *Id.*
300. Markman, *supra* note 294, at 39.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*

> a majority of the Michigan Supreme Court, four of its seven justices, are self-described Federalists and indeed are quite passionately committed to the judicial values that are often identified with this Society, in particular, a commitment to giving faithful meaning to the words of the law. It is a court on which fine jurisprudential matters, such as, for example, the existence of an "absurd results" rule, the significance of legislative acquiescence as an interpretative tool, and uses and abuses of legislative history are routinely, and I hope thoughtfully, addressed in our conferences and in our opinions.[305]

Justice Markman was very candid and straightforward in his discussion of the Michigan Supreme Court's majority in its attitude toward following precedent, describing its response to what one conservative scholar referred to as the "one-way ratchet problem."[306]

> What in my experience most differentiates the Michigan Supreme Court during the past six years from other state courts, including those routinely described as "conservative" or "judicially restrained" or "strict constructionist," has been the Michigan Supreme Court's treatment of precedent. Although respectful of precedent, as any judicial body must be, in the interests of stability and continuity of the law, the court has also been straightforward in its view that regard for precedent must be balanced with a commitment to interpreting the words of the law in accordance with their meaning. That is, what most distinguishes the Michigan Supreme Court from other such courts has been its unwillingness to serve as a mere foil for those who have previously served on the court who, like Justice Douglas, preferred to "make precedent, rather than to follow precedent." We have been unwilling to allow this ratchet process to operate in Michigan by which periods of punctuated equilibrium periodically occur where the law lurches in the direction favored by Justice Douglas and his philosophical allies, in which new precedents are adopted that bear little relationship to the language of the law, then to be followed by interregnum

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305. ORIGINALISM, *supra* note 245, at 228. These comments are also reproduced in an article by Stephen J. Markman, *Resisting the Ratchet*, 31 HARV. J. L. & PUB. POL'Y 983 (2008).

306. John C. Eastman, *Stare Decisis: Conservatism's One-Way Ratchet Problem*, *in* COURTS AND THE CULTURE WARS 127 (Bradley C.S. Watson ed., 2002).

> periods of conservative judicial rule in which these new precedents are affirmed and institutionalized. Rather, the Michigan Supreme Court has been committed to resisting the ratification of recent precedents that are clearly incompatible with the language of the law and the constitution of Michigan. The court's dominant premise has been on "getting the law right," moving toward the most accurate interpretations of the law, rather than acquiescing in decisions that essentially reflected little more than the personal preferences of predecessor justices.[307]

Nonetheless, Justice Markman also commented that "getting the law 'right' is only our 'default' position."[308] He went on to explain,

> Just as it seems to me the liberal judicial temptation is to do justice . . . the conservative judicial temptation, one that occasionally needs to be resisted, is to perfectly define that law . . . . [T]here are considerations that sometimes argue in favor of adherence to precedent, even when that precedent is wrong.[309]

The principle considerations here are "effective institutionalization within the law" and bona fide reliance interests.[310] Interestingly, he also noted that "respect for precedent is more indispensable in the realm of the common law where there is no definitive external standard, i.e. the text of the law."[311]

Justice Markman also made the argument that a more textualist approach to the law is more consistent with democratic ideals, both in being more consistent with what the statute or the constitution literally appears to say and by making "the law increasingly . . . more accessible to 'we the people,' and less exclusively the domain of lawyers and judges."[312] Using the example of a thirty-day rule, he went on to explain, if thirty days means "thirty-one days" if there is an intervening holiday,

> "thirty two" days if your car broke down on your way to the registration office, "thirty three days" if you have been in the hospital, and "thirty four days" if you are a particularly

307. *Id.*
308. *Id.* at 231.
309. *Id.*
310. *Id.*
311. *Id.*
312. ORIGINALISM, *supra* note 245, at 229.

> sympathetic character, then the only way to understand that law and its various unwritten exceptions is to consult an attorney. To read the law consistent with its language rather than with its judicial gloss is not to be harsh or crabbed or Dickensian, but is to give the people at least a fighting chance to comprehend the public rules by which they are governed."[313]

From a postmodernist perspective, it seems fair to say that Justice Markman and his colleagues were very much engaged in the conscious construction of their identity. The justice remarked,

> [It] has been this court's understanding of precedent that, more than anything else probably, [it] has been at the heart of several multi-million dollar campaigns directed at the four justices in the majority, including one campaign in which three of us were joined together on the ballot and over ten million dollars was spent to defeat us. We have been the subject of academic and popular studies focused upon our alleged lack of regard for the rule of law. We have been characterized as "judicial activists" and "renegades." We have been subject to invective from our dissenting colleagues. And, of course, we have been accused of being corrupt, partisan and beholden to the special interests. Most dastardly, we have even been accused of being members of a conspiratorial legal cabal [the Federalist Society].[314]

Justice Markman also maintains that the interpretive process is not mechanical and that reasonable people can disagree on reasonable meaning.[315] But too many judges are too quick to declare a provision "ambiguous" and "thereby short circuit the traditional interpretive process."[316] He said,

> The better approach . . . is to use every available interpretative tool—including looking to dictionary definitions, looking to the context of words and provisions, parsing punctuation and grammar and syntax, assessing the structure and organization of a law, understanding a statute's purpose as defined by its language, considering default rules as set forth in various

313. *Id.* at 229-30.
314. *Id.* at 232.
315. *Id.* at 240.
316. *Id.*

> maxims of law, and ascertaining the most reasonable, although imperfect, interpretation of the law.[317]

In 2010, in a speech later reproduced in Hillsdale College's Imprimis monthly publication,[318] Justice Markman summarized his concerns about the trend of judicial developments in the nation at large:

> Proponents of a "21st century constitution" or "living constitution" aim to transform our nation's supreme law beyond recognition—and with a minimum of public attention and debate. Indeed, if there is an overarching theme to what they wish to achieve, it is the diminishment of the democratic and representative processes of American government. It is the replacement of a system of republican government, in which the constitution is largely focused upon the architecture of government in order to minimize the likelihood of abuse of power, with a system of judicial government, in which substantive policy outcomes are increasingly determined by federal judges. Rather than merely defining broad rules of the game for the legislative and executive branches of government, the new constitution would compel specific outcomes.[319]

In the face of these deep concerns, the principal focus of which appears to be at the federal level, one might wonder how the comparatively minor role of a single state supreme court could have significance. His further comments suggest an answer to that question:

> This radical transformation of American political life will occur, if it succeeds, not through high-profile court decisions resolving grand disputes of war and peace, abortion, capital punishment, or the place of religion in public life, but more likely as the product of decisions resolving forgettable and mundane disputes—the kind mentioned on the back pages of our daily newspapers, if at all.[320]

Sentiments such as this suggest our study of the court is worth pursuing.

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317. *Id.* at 240.

318. Stephen J. Markman, *The Coming Constitutional Debate*, 39 IMPRIMIS 4 (2010). Justice Markman has served as a professor of constitutional law at Hillsdale College since 1993.

319. *Id.*

320. *Id.*

2. Robert Young

Justice Young was a 1977 Harvard Law graduate.[321] He is married to Linda Hotchkiss, a prominent psychiatrist.[322] Governor Engler had appointed Young to the Michigan Court of Appeals during his first term.[323]

There was never a doubt in the case of Justice Young that his judicial philosophy was fundamental to his conception of his future role. He made that clear in his comments at his investiture ceremony when he took the oath of office as a supreme court justice. He said,

> I am concerned that over a period of time the public has come to regard the judiciary as merely another public arena, an alternate forum in which to make public policy. However, our constitution assigns each of the three branches of government specific responsibilities, and each branch must jealously guard the boundaries that separate them. While the judiciary provides an important check on unconstitutional actions by the other two branches of government, I do not believe that the judiciary is an auxiliary legislature. Nor is the judiciary free to intervene in public policy decisions of the political branches and remake them.[324]

In so saying, he was evidencing his disappointment with the prevailing trends in the judiciary and legal interpretation and defining his views as being in reaction to them. He articulated four principles that he indicated would govern his judicial views:

> [M]y judicial philosophy requires that I first give deference to the political branches of government, that is, the legislative and executive branches, by avoiding policymaking in the guise of deciding cases and by interpreting the constitution and statutes consistent with the plain meaning of their language. Second, that I consider the impact of my decisions beyond the case at hand. Third, that I craft decisions with concern for the ease with which they can be applied. And, fourth, that I decide cases on the

321. *About Bob Young*, CHIEF JUSTICE BOB YOUNG: MICH. SUPREME CT., http://justicebobyoung.com/about/ (last visited Feb. 1, 2014).

322. *Id.*

323. *About Chief Justice Robert P. Young, Jr.*, MICH. SUPREME CT., http://courts.mi.gov/Courts/MichiganSupremeCourt/justices/Pages/Chief-Justice-Robert-P-Young-Jr.aspx (last visited Feb. 1, 2014).

324. INDEX TO SPECIAL SESSIONS, *supra* note 57, at 449.

> narrowest basis possible in order to reduce the incidence of adverse, collateral, and perverse unintended consequences.[325]

Governor Engler lauded his new justice at the investiture for his judicial philosophy, prefiguring many of Justice Young's remarks and stating that "Bob Young understands that it is the job of the legislature to write the law and the job of the judiciary to interpret it."[326] He also included a comment that is heard more frequently about judges of a different interpretive style, saying that not only did Justice Young have a passion for the law but that he also had "a compassion for people that makes him ideally suited for this challenge."[327] Justice Young also had a notably bipartisan set of speakers expressing their admiration for him, including future Democratic Governor Jennifer Granholm (who was then the Attorney General of Michigan), Judge Damon Keith of the Sixth Circuit, a "liberal" judge who clearly did not share Justice Young's judicial philosophy, and Democratic Detroit Mayor Dennis Archer.[328]

Because he was appointed to fill an unexpired term, Justice Young was up for re-election only a year after his investiture in 2000. After an expensive, bitter, and bruising campaign, Justice Young looked back on it shortly thereafter in an article for the Center for Legal Policy of the Manhattan Institute.[329] Once again, judicial philosophy was the central theme. He asked,

> Why, after decades of quiescence, have state judicial campaigns become such fractious, expensive (but apparently interesting) political affairs? . . . The simple answer, I think, is that . . . people now recognize that judicial philosophy matters . . . precisely because, for the past 40 or so years, the courts at the state and federal levels have transformed themselves into "auxiliary legislatures."

Judges like himself who apply the "actual text" "have been eclipsed by judicial activists who believe that judges should serve as a counter-majoritarian hedge against legislative actions that they believe to be insufficiently 'just.'"[330]

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325. *Id.* at 449-450.

326. *Id.* at 444.

327. *Id.* at 443. One is reminded of the controversy surrounding the nomination of Justice Sotomyer to the U.S. Supreme Court when much was said about using "compassionate" as a recommendation for her nomination to the Court.

328. *Id.* at 431-51.

329. Robert Young, *Reflections of a Survivor of State Judicial Election Warfare*, CIVIC JUST. REP. (June 2001), http://www.manhattan-institute.org/html/cjr_2.htm.

330. *Id.* at 2.

In a particularly interesting observation for these purposes, Justice Young saw this liberal trend not in the traditional terms of a conservative judiciary battling liberals demanding more popular rule, but the opposite, a liberal elite ignoring the will of a less enlightened majority:

> It is my belief that the "judicial culture" of the last 40 years has fully embraced judicial activism—a philosophy that is fundamentally elitist and which is unquestionably founded on the belief that we judges, being more intelligent and better educated than the rabble who are elected to our legislatures, are in a superior position to make refined social policy judgments about the critical questions of the day.[331]

According to Justice Young, this same "judicial culture" had taken root in Michigan as well: "For the past 40 years, the Michigan Supreme Court has been dominated by politically liberal judicial activists."[332]

In reflecting on what had been a very personalized and nasty judicial campaign featuring highly negative media attack ads,[333] Justice Young nonetheless expressed the view that it did offer the opportunity to bring the issue of judicial philosophy to a wider audience:

> [The health of the judiciary] is sustained whenever the public is treated to a robust discussion of the issues, no matter how unseemly it may appear to elites who purport to be concerned about protecting the public from its own naiveté. While it is certainly true that you cannot cram a lot of deep philosophical issues into a 30 second television ad, it is possible, in a general way in a campaign, to raise the public's consciousness about the difference that judicial philosophy makes. Furthermore, my colleagues and I went to every major newspaper editor in the state and offered to talk about the philosophical issues of our

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331. *Id.* at 3.

332. *Id.* at 6.

333. Justice Young explained,

> The Democratic Party's effort, financed almost exclusively by the Trial Lawyers, began attack ads on the three incumbent justices in July, a month before the nominating conventions. The Republican Party responded in kind with attack ads directed at the Democratic nominees. Other attack ads were sponsored by nonparty independent campaigns. Needless to say, no candidate was legally able to direct these efforts, even when we felt that their ads were "off message" or frankly damaging to our own campaigns.

Id. at 9.

> campaign in greater depth. However, what I found interesting and almost invariably true, was that few newspaper editors wanted to talk about the substantive issues, rather than the tenor of campaign ads.[334]

Subsequently, Justice Young has more fully summarized his views on judicial philosophy in a chapter entitled *Active Liberty and the Problem of Judicial Oligarchy* found in a collection of essays on constitutionalism.[335] In Justice Young's view, there are marked differences between the Constitution of 1789 and today that are largely due to "a judicial oligarchy that rules our nation in a manner never intended by the framers and ratifiers of our Constitution."[336] Justice Young notes that the title of his article is a play on the name of the book by Associate United States Supreme Court Justice Stephen Breyer, "Active Liberty." Justice Young finds the theme of that book, that courts should "take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts," to be anathema. "[T]hematic interests simply should not inform an interpretation of the words of our Constitution."[337] As this animating idea well illustrates, Justice Young's philosophy is very much a reaction against the popular intellectual climate that has washed over the judiciary, just as it has over virtually all other fields.

As Justice Young put it,

> Our legal academics almost universally embrace and teach the Rorschach philosophy [that the Constitution gives license to jurists to project onto the Constitution social, political, and moral beliefs unexpressed in the Constitution]. The United States Supreme Court, our bellwether court in America, has over time, also increasingly embraced the Rorschach school as illustrated by Justice Breyer's thematic active liberty jurisprudence.[338]

In this regard, the nomination of Judge Bork to the United States Supreme Court was a watershed moment with respect to judicial philosophy in the eyes of Justice Young. It was an "ugly manifestation" of the debate, one which he views in Manichean terms:

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334. *Id.*

335. KAUTZ, MELZER, WEINBERGER & ZINMAN, THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM (2009).

336. *Id.* at 170.

337. *Id.* at 171.

338. *Id.* at 174.

> [W]hether judges in our society play an important, but limited, role interpreting the Constitution—to act as "umpires" as Chief Justice Roberts so simply described it—or whether judges ought to function in our constitutional republic as an unelected oligarchy deciding major social policies guided by personal 'themes' unexpressed in the constitution.[339]

Justice Young rejects the postmodern postulate that one cannot separate the judicial from the political. While conceding that jurists can be motivated by political goals and accordingly reach partisan results, he points out that this can be equally true of judges of all political persuasions. Nonetheless, he argues that judicial philosophy is essentially a matter of whether a jurist is constrained by the text or instead "feels free to apply non-constitutional values that might have nothing to do with the text."[340]

The antidote to the "Rorschach philosophy" is what Justice Young calls the philosophy of the "judicial traditionalist," the philosophy to which he believes he subscribes. Judicial traditionalists, he writes, are guided by three fundamental principles: judges act within a republican form of government, it is the legislature that has "the exclusive role of 'law-maker' in matters of public policy," and finally, beyond the rights enumerated in the Bill of Rights, public policy is to be determined by the executive and legislative branches. More distinctively, however, for many jurists who would not consider themselves in philosophical agreement with Justice Young [but] would accept those three principles, he goes on to state that traditionalists give meaning to the text of the Constitution as the words were understood by its ratifiers and refrain from deciding matters of public policy committed to the majoritarian political process.[341] The judicial traditionalist views the Constitution as having "an ascertainable meaning that is rooted in the history of its creation," and perhaps most importantly, because it is the most limiting

339. *Id.* at 172-73.

340. One might argue that Justice Young seems to be contradicting himself with this formulation, since Justice Breyer's theme of democratic values is clearly a constitutional one, but I think the fair reading of his statement is that he means "non-constitutional" values as those which are strictly embedded in the particular words of the particular part of the text at issue. As we will later discuss in Part II, this is a difficult distinction to maintain in practice, but if we are to understand Justice Young's point of view, it is important to start with a sympathetic reading of his text; if that sounds a bit ironic in interpreting a textualist, that seems appropriate to our subject, does it not?

341. KAUTZ ET AL., supra note 335, at 173-74.

of his tests, the judicial traditionalist "cares only about the policies specifically expressed in the text of the Constitution itself."[342]

Justice Young is quite clear in his concrete discussion of cases, especially recent case of the United States Supreme Court, as to his disagreement with their reasoning that he fails to find supported by the text of the Constitution.[343] He also includes a discussion about the *Dred Scott* case as an early example of the Rorschach philosophy, but the myriad deficiencies of that opinion dealing with a constitution that still allowed for slavery would seem more convincingly dealt with in a less conclusory discussion.[344] He is less definitive, and perhaps less persuasive, in explaining how this approach is "traditionalist" based upon the methods and philosophy of prior courts.[345]

3. Clifford Taylor

In one of his many articles prior to becoming a judge, Stephen Markman wrote about the selection of Justice Brennan by Dwight Eisenhower.[346] Eisenhower was thought to be looking for a conservative nominee for the Supreme Court, but he took a recommendation[347] from an adviser who had heard Brennan deliver a solidly conservative speech.[348] The trouble was that the speech was not Brennan's own but rather was delivered by him for his conservative colleague who was not available.[349]

Governor Engler knew his nominees much better than President Eisenhower. The person on his staff making the recommendations was Lucille Taylor.[350] There can be no doubt that she knew her husband's judicial philosophy when advising the Governor.

Clifford Taylor was Governor Engler's first appointee to the Supreme Court in 1997.[351] His wife, Lucille Taylor, was the Governor's

342. *Id.* at 174.

343. *See id.* at 187-97.

344. *Id.* at 185-87.

345. *Id.* at 182-85.

346. Stephen Markman & Alfred Regnery, *The Mind of Justice Brennan: A 25-year Tribute*, 36 NAT'L REV. 30 (1984).

347. *Id.*

348. *Id.*

349. *Id.*

350. *Marriage of Supreme Court Justice and Governor's Chief Attorney Disputed* (AP), OWOSSO ARGUS-PRESS (MICH.), Sept. 6, 2000, at 9, *available at* http://news.google.com/newspapers?nid=1988&dat=20000903&id=7T4iAAAAIBAJ&sjid=sqwFAAAAIBAJ&pg=1551,403646.

351. Victor E. Schwartz, *A Critical Look at the Jurisprudence of the Michigan Supreme Court*, 85 MICH. B.J. 38 (2006).

legal counsel, a fact that raised a few eyebrows.[352] She was also active in the Federalist Society.

Clifford Taylor attended the George Washington University Law School, served in the U.S. Navy, was an assistant prosecutor, and was a practicing lawyer in a Lansing firm.[353] He ran unsuccessfully for Congress as the representative for Ingham County. Spencer Abraham was his campaign manager. He was appointed to the court of appeals in 1992.[354]

Justice Taylor wrote about his judicial philosophy in a 1998 article in the State Bar Journal.[355] In this article, which is essentially the same as one published the year before by the Detroit College of Law[356] written early in his tenure on the Court, Justice Taylor discussed his thoughts on judicial review of constitutional questions. He put forward two approaches. The first was a "common-sense" approach "to determine the understanding of the words used . . . at the time of adoption" of the Constitution, using "the dictionary or common law tradition."[357] The second was the use of "highly debatable and novel theories" that allowed "courts to read into the Constitution their own ideas as to what constituted wise policy and strained to find statutes that offend their notion of what people should want unconstitutional."[358]

Justice Taylor approvingly cites Robert Bork, agreeing that there has been a dangerous movement toward "government by judiciary with decisions further and further removed from the moorings of original meaning and the intent of the drafters of the Constitution."[359] This removes decision-making from the people and the legislature and puts it into the hands of the judiciary. "This precludes effective debate, discussion and compromise."[360]

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352. *See supra* note 350.

353. *Clifford W. Taylor*, MILLER CANFIELD, http://www.millercanfield.com/clifftaylor (last visited Oct. 12, 2013).

354. *Id.* At his investiture on the Michigan Supreme Court, Spencer Abraham, then the United States Senator from Michigan, spoke about his long-time friend, Cliff Taylor. He commented, "He taught me actually how to be a good lawyer, because after I came out of law school I actually practiced with Cliff for a while. . . . He was a great mentor to me when I was a fledgling law student and then in my initial years as a practitioner." INDEX TO SPECIAL SESSIONS, *supra* note 57, at 345.

355. Hon. Clifford Taylor, *Who's in Charge Here?: Some Thoughts on Judicial Review*, 77 MICH. B.J. 32 (1998).

356. Clifford W. Taylor, *Who's in Charge: A Traditional View of Separation of Powers*, 1997 DET. C. L. REV. 769 (1997).

357. *Id.* at 770.

358. *Id.*

359. *Id.* at 771.

360. *Id.* at 771-72.

In 2005, Justice Taylor gave a talk about his judicial philosophy that demonstrates how much he was influenced by the currents in legal thinking discussed earlier.[361]

He cited Justice Cooley as the exemplar of the "traditionalist" view of judging, which he summed up as seeking to determine what the law is, not what the individual judge thinks it ought to be, and equating that approach with the method used by Antonin Scalia of seeking an "objectified" meaning.[362]

Justice Taylor contrasted this "traditionalist" view with that of both the Legal Realists and "the most notorious" group, Critical Legal Studies. With regard to his approach to these matters, he expressly acknowledged his "reliance . . . on the trenchant and thoughtful discussion of these matters by Judge Robert Bork in his book of a decade and a half ago, The Tempting of America."[363] He also harkened back to the approach of Herbert Wechsler in his famous effort to find neutral principles of constitutional law.[364] In contrast, the approaches suggested by academics like Ronald Dworkin or living constitutionalists like Justice Brennan depend entirely upon the judge for the outcome of the matter. "[T]hese non-textualist standards are in my view flawed because they are little better than giving judges license to decide cases on the basis of their view of what is right."[365] From this he concludes that "[i]t is for this reason—the problems with subjectivity—that all non-traditional methods of interpretation are untenable, and one is lead as a judge to be a believer in the Cooley approach."[366]

4. Maura Corrigan

Although not an Engler appointee, Justice Corrigan came to the bench in 1998 as the "non-partisan" nominee of the Republican party of which the Governor was the clear leader. She had served on the court of appeals from 1992-1998.[367] Her husband, who tragically died during her term on the court, was a noted professor of law at Wayne State University who was known for his conservative views.[368] Perhaps his

361. Clifford W. Taylor, *A Government of Laws, and Not of Men*, 22 T.M. COOLEY L. REV. 199 (2005).

362. *Id.* at 201-02.

363. *Id.* at 203-04.

364. *Id.* at 206.

365. *Id.* at 207.

366. *Id.*

367. *Maura Corrigan*, MICH. SUPREME CT. HIST. SOC'Y, http://www.micourthistory.org/ justices/maura-corrigan/ (last visited Oct. 12, 2013).

368. Wayne R. LaFave, *Plain Joe Grain*, 46 WAYNE L. REV. 1271 (2000).

most famous article was a critique of the exclusionary rule, one of the famous legacies of the Warren Court.[369] Justice Corrigan was ultimately a conservative jurist, but she began her intellectual odyssey as a liberal.[370]

Justice Corrigan was one of the speakers at the investiture of Clifford Taylor as a new Michigan Supreme Court Justice. She had come to know him and admire him during the five and a half years that they served together on the Michigan Court of Appeals. She noted that "in some quarters" Justice Taylor was considered "controversial," but in her view, it was his "firmly grounded and finely honed notion of what is good" that was perceived as threatening.[371] Clearly, by that point, September 1997, the future Justice Corrigan had come to share the philosophy that would soon give shape to the court.

Justice Corrigan reflected on her judicial philosophy in a 2003 law review article that she wrote with J. Michael Thomas, then serving as one of her clerks on the Michigan Supreme Court,[372] and later in a November 2003 speech to the Saginaw County Chamber of Commerce.[373] In both the article and the speech, she spelled out in detail her admiration and adherence to what she viewed as the textualist principles advocated by Justice Scalia, citing his 1997 article on textualism,[374] as well as a skepticism for certain traditional rules of statutory interpretation that Justice Scalia had also found wanting, citing his Case Western Reserve article on the subject.[375] In fact, the *Dice Loading* article is essentially an extended riff on the discussion in Scalia's article, applying its analysis to Michigan rather than federal law.[376]

In the article, she criticized "the use of preferential rules" that allow interpreters "to disregard the text of a statute." She also criticizes as "equally illegitimate" the use of legislative history "to discern the

369. Joseph D. Grano, *Crime, Drugs, and the Fourth Amendment: A Reply to Professor Rudovsky*, 1994 U. CHI. LEGAL F. 297 (1994).

370. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1804-06 (2010).

371. INDEX TO SPECIAL SESSIONS, *supra* note 18, at 347-48.

372. M.D. Corrigan and J.M. Thomas, *"Dice Loading" Rules of Statutory Interpretation*, 59 N.Y.U. ANN. SURV. AM. L. 231(2003) [hereinafter *Dice Loading*].

373. *See* Paul Wyche, *Chief Justice: Judges Often Overstep Bounds*, SAGINAW NEWS, Nov. 19, 2003 [hereafter November Speech to C of C] (copy of the speech on file with the author).

374. *See* Scalia, *supra* note 261.

375. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1990).

376. *See* Scalia, *supra* note 261, at 27-29.

meaning of a clear statute," another point on which she and Justice Scalia are in harmony.[377]

Justice Corrigan also reflected on the work of the Michigan court in her article, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*.[378] The article defends the textualist approach against what she rightly viewed as heavy criticism from the academic community (Justice Corrigan herself did some law teaching) as well as those with other philosophical approaches to judging. She alludes in passing (as have some of her colleagues) to the theory of "dynamic" statutory interpretation, but she does not discuss it directly. It would appear to be an allusion to the work of Professor Eskridge of Yale, who wrote a book called *Dynamic Statutory Interpretation*,[379] which is an in-depth discussion and critiques of various interpretative theories. Professor Eskridge actually co-taught a class on interpretation with Judge Scalia when Eskridge taught at Georgetown,[380] so the contrast may have seemed an obvious one to those who knew of the connection.

III. THE BIG FOUR AND THE GREATEST COURT

Governor Engler compared the current court to the only famous court in Michigan history: the Michigan Supreme Court of Thomas Cooley, James Campbell, Benjamin Graves, and Isaac Christiancy.[381] It was a celebrated court in its day.[382] Furthermore, Cooley, Campbell, and Christiancy were the creators of the University of Michigan Law School, which promptly became a leader in legal education.[383] Finally, Cooley

377. *Id.* at 29-37. Justice Scalia's criticism of the use of legislative history is very interesting in that in part it relies upon a "legal realist" type critique of the legislative process, culminating in this observation: "[W]ith respect to 99.99 percent of the issues of construction reaching the courts, there is no legislative intent, so that any clues provided by the legislative history are bound to be false." *Id.* at 32. Justice Scalia, in this regard, is therefore like other postmodern theorists in responding to the challenge of the rejection of classical models—in this case of the legislative process and the uncomfortable realist critique of it as akin to a "sausage factory"—by insisting upon a theoretical approach that cannot be attacked as inconsistent with that reality.

378. Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 TEX. REV. L. & POL. 261 (2004).

379. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

380. *Id.*; Scalia, *supra* note 261.

381. Alan Jones, *Thomas Cooley and the Michigan Supreme Court: 1885-1889*, 10 AM. J. LEGAL HIST. 2 (1966).

382. *Id.*

383. *Thomas M. Cooley*, U. MICH. L. SCH., http://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/Cooley_ThomasM.aspx (last visited Feb. 1, 2014).

was a towering legal figure during the post-civil war era as judge, teacher, writer, leader of the bar, and governmental appointee.[384]

The Governor described Michigan's great court as textualist and restrained.[385] He also identified it as seeking out original meanings and not dedicated to a social agenda.[386] While there is certainly some support for the Governor's view of the great court, it is far from a complete picture. Of course, the context in which that court operated was enormously different from that of today. It is terribly anachronistic to apply today's labels to a court of 125 years ago without a great many explanations and clarifications. However, it is also true that these were extraordinary legal thinkers, especially Cooley, who had a profound influence on American law. Their ideas and views do have enduring interest. Their thinking is also not susceptible to simple categorization. The Governor has drawn a portrait of their work that, in the style of our postmodern art, is stylized and abstract. Perhaps a more nineteenth century realist style will produce something closer to a three dimensional and detailed portrait.

A. Cooley and the Construction of Judicial Reputation

Justice Cooley was one of America's most distinguished teachers and writers as well as a judge. He was the most important and influential member of the University of Michigan Law School as teacher and dean from its founding in 1859 and for a generation thereafter.[387] He was the author of many accomplished and respected works, the most notable of which was his book *Constitutional Limitations*—a work that Governor Engler pointed out in his remarks still sits on a shelf in the White House.[388] By 1886, this book was in its fifth edition and was admired as the most scholarly and authoritative book ever written on American law.[389] It was Cooley who, in that same year, delivered the address at Harvard to commemorate the school's 250th anniversary (while Oliver Wendell Holmes merely looked on).[390] It was Cooley who became chairman of the experimental and highly influential Interstate Commerce

384. *Id.*
385. MSCH NEWSLETTER, *supra* note 1.
386. *Id.*
387. *Cooley*, *supra* note 383
388. MSCH NEWSLETTER, *supra* note 1.
389. Carrington, *supra* note 68, at 496-97. Ultimately, the book would go through eight editions, the last of which was published in 1927. THOMAS M. COOLEY & WALTER CARRINGTON, CONSTITUTIONAL LIMITATIONS (8th ed. 1927).
390. PAUL CARRINGTON, STEWARDS OF DEMOCRACY 7 (1999).

Commission in 1887.[391] It was Cooley who in 1890 was asked to deliver the first Storrs Lecture at Yale Law School.[392] In 1893, Cooley was elected President of the American Bar Association, and by that date, his works were the most frequently cited of any author by the United States Supreme Court.[393]

One can also argue that in the 1860s and 1870s Cooley's Michigan was the premier law school in the country.[394] Only after Langdell arrived at Harvard with his case method did that school become the model for all others (and that was after a substantial period of transition and no little controversy).

Unfortunately, the reputation of the Big Four has diminished with the passing of the years. The decisions of the Massachusetts Supreme Court during Holmes' term or the New York Court of Appeal of Cardozo are still studied, but not those of Michigan.[395]

Some of this may have to do with their chosen style of writing. It has been said that Cooley and his colleagues were noted for the clarity of their writing but not for literary quality, but that may be unfair. While the aphorisms of Holmes or Cardozo are missing from the Michigan jurists' work, they could turn an eminently quotable phrase, as will be illustrated subsequently.

More likely the reason is that the reputation of Justice Cooley, the court's most eminent member, has been in eclipse for most of the last seventy-five years because, unfairly, Cooley has been tarred with the brush of *Lochner v. New York*,[396] which was probably the most vilified

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391. *Id.*

392. ELIZABETH FORGEUS, THE HISTORY OF THE STORRS LECTURESHIP IN THE YALE LAW SCHOOL: THE FIRST THREE DECADES, 1890-1920, at 7-13 (1940).

393. Carrington, *supra* note 68, at 497-98.

394. For whatever reason, Michigan's early prominence seems to be slighted these days. Alfred Reed points out that Cooley's publications in the years 1868-1880 were the most notable contributions to legal scholarship outside of Harvard. ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 184 n.2 (1921). However, one must ask, what were the Harvard contributions that eclipsed *Constitutional Limitations*, or Cooley's path breaking work on Torts (still used by Cardozo when he was a law student at Columbia in 1889), or any number of other works that Cooley produced and that law students devoured? The school "assumed the lead in number of students and in reputation throughout the northern and middle west" after 1864, and Michigan had four law professors in 1866 while Harvard had but three. *Id.* at 182. Nonetheless, it takes a reasonable amount of sleuthing to assemble these disparate facts. Professor Stevens omits any references to Michigan during this period in his well-known work. *See* STEVENS, *supra* note 141.

395. *See, e.g.*, John F. Hagemann, *Looking at Holmes: A Review Essay*, 39 S.D. L. REV. 433 (1994) (describing Holmes' legacy as a judge and legal thinker).

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

decision of the last one hundred years other than *Plessy v. Ferguson*.[397] Cooley's comments in *Constitutional Limitations* were cited as a justification for the majority decision in *Lochner*, a 1905 case overruling a statute limiting the number of hours New York bakers were allowed to work.[398] The theory upon which the decision was based was a broad statement of the doctrine of what is now called "substantive due process."[399] Ironically, Justice Holmes' dissent in *Lochner* (in which he stated that the Constitution did not enshrine Herbert Spencer's philosophy of social statics) did as much to make Holmes' reputation as the majority's reference to Cooley damaged his.

This was doubly unfair. First, Cooley had no role in the case and no control over citation to his work—he had been dead for seven years when the decision was rendered. Second, and even more importantly, Cooley's thought overall was not of this stripe. In fact, the citation is to a passage that does not clearly support the position that the Court adopted.[400]

Nonetheless, Cooley in particular,[401] and other judges of his era, have been held up—not in a flattering way—as exemplars of legal formalism. As Brian Tamanaha has recently argued, this is not a fair or accurate characterization of Cooley or his judicial contemporaries.[402] The notion that Cooley was what might be called an extreme formalist (since law by

397. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

398. *Lochner*, 198 U.S. at 64.

399. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 736 (6th ed. 2009).

400. *Lochner*, 198 U.S. at 64.

401. William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519 (1992).

402. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE (2009). Tamanaha's book is quite refreshing in its willingness to reexamine the received wisdom with respect to judges of the so-called "formalist era." He points out that much of the scholarship on which the conventional wisdom of that era is based contains serious errors, or relies on sleight and partial evidence, and ignores a large body of evidence that is contrary to its thesis. Perhaps the most cautionary statement in the book is his conclusion that "the story that circulates today has a relatively recent provenance, resurrected by leftist legal historians and theorists in the 1970s, motivated by contemporary political concerns." It is not surprising that when lawyers write history, they tend to show their legal training, writing something more akin to legal briefs that drive home their points with the selective use of evidence and the caricature of the views of those with whom they disagree, which is what Tamanaha essentially finds in reviewing the writers on the subject. For reviews of Tamanaha's book, see Marin Roger Scordato, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*, 46 U. RICH. L. REV. 659 (2012) (largely positive); Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, LEGAL THEORY (2010) (highly qualified, acerbic, and backhandedly positive).

definition in our judicial system is formalist in that it entails a fidelity to certain procedures and rules, specified roles, forms of reasoning, explanations for decisions, and a hierarchy of decision-making), on the theory that within this formal system he also believed that judges merely derived correct answers to legal questions by applying a logical, syllogistic system that "mechanically" could achieve certain results, is not justified by an analysis of his work. As Tamanaha points out, Cooley was very clear that law provides ample opportunity for uncertain outcomes, differences of opinion, and, accordingly, differences in judicial outcomes.[403] Although Cooley figures prominently in Tamanaha's book, Tamanaha refers to a relatively small sample of Cooley's very substantial output of legal writing. However, the more one reads Cooley's work, the more compelling Tamanaha's analysis is shown to be.[404]

Surely this makes a postmodernist point. Cooley's reputation, and that of the Big Four Court, is based not on their "objective" achievement but rather on the story that has come to be written about them. The "narrative" of Cooley is of an exemplar of laissez-faire constitutionalism;[405] beyond that, until recently there has been little interest in a provincial court in a state newly emerged from the primeval forest. In other words, the reputation of a scholar, or a court, is a social construction of subsequent generations. Cooley's place in history has been created by the political agenda of those who wished to deride the jurisprudence prior to 1930 (in which Cooley held first place) and replace it with the conception of jurisprudence that could be construed out of the work of Oliver Wendell Holmes, whose writings and world-view were more congenial to their agenda.

In the last few years, led by Professor Paul Carrington, former Dean of Duke Law School, there has been a resurgence of interest in Justice Cooley and reappraisal of his work. In fact, Carrington has extolled Cooley as an exemplar of the type of judge who best fits the needs of the American system.[406] In many ways, Professor Carrington sounds like Governor Engler in his praise of Cooley's virtues. In a way, however, this too may not be the best thing for Cooley's reputation, for Carrington

403. TAMANAHA, *supra* note 402, at 55.

404. *See* Cara Shelly, *Republican Benchmark, The Michigan Supreme Court, 1858-1875*, 77 MID-AMERICA 93 (1995) [hereafter *Republican Benchmark*]. *See also* Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism*, 53 J. AM. HIST. 4 (Mar. 1967).

405. *See generally*, Matthew J. Lindsay, *In Search of "Laissez-Faire Constitutionalism,"* 123 HARV. L. REV. F. 5 (2010).

406. Carrington, *supra* note 68, at 497-98.

is something of a maverick in the academy,[407] and as a result, the opinion about the subject may be influenced by the opinion about his champion. As Professor Patrick Gudridge has perceptively argued, there is much in Cooley's work that foreshadows aspects of postmodernist thought.[408] Like the old joke about book reviews, Carrington may be telling us more about Carrington than he is about Cooley.[409]

Nonetheless, Professor Carrington makes a number of points about Cooley that fit his thought at the intersection of classical conservatism and postmodernism: "In all that he taught, Cooley emphasized the historical and cultural origins of law and the social and political aims it is shaped to serve."[410] Thus, Cooley was no Langdell (or perhaps more accurately the prevailing picture that has been painted of Langdell), who believed that law was purely scientific and could be taken out of its historical and cultural context.[411]

Cooley, in the view of Professor Carrington, believed that law was based upon concepts of morality. Cooley did not attempt to define in detail, however, what those moral principles were or should be. He did not, like Augustine, look directly to faith. Nor, like Burke, did he attempt to tease them directly out of custom and practice as he understood them. Rather, his was of the view that they should be derived secondarily from the prevailing custom and morality, the "commonplace thoughts of men."[412] Generally speaking, however, he embraced Burke's communitarian and incremental views.[413] Like Burke, he was distrustful of "the man in advance of his age" who

> will insist in forcing upon the world now what only a patient training of generations can fit it for; who sees in every people a present adaptability to his ideal, and who scoffs at all experience that does not conform to his preconceived notions as to what, under the circumstances, should have taken place.[414]

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407. See the discussion of Carrington's critique of "new scholarly movements" in the law and the reaction in MINDA, *supra* note 77, at 208-12.

408. Patrick O. Gudridge, *Carrington, Cooley, Kennedy, Klare*, 22 CARDOZO L. REV. 837, 841 (2001).

409. And if you suspect that the description of Cooley's thought on the following pages tells you more about the author than about Cooley, you have clearly picked up the postmodernist approach.

410. Carrington, *supra* note 68, at 516.

411. *Id.*

412. *Id.* at 500.

413. *Id.* at 530.

414. *Id.* at 531-32.

Cooley liked to justify his view with references to Thucydides,[415] but it is a view that fits well with the American ideal. Look to the best instincts of the community as understood by the majority of the people. There you will find the underlying principles that law must remain in touch with, not in the thinking of an academic or aristocratic elite. As Rossiter has pointed out, he put the American democratic twist on the traditional conservatism of Burke.[416]

Of course, such community sentiments are easier to express in the abstract than they are to describe in the particular. How do judges know what the commonplace thoughts of men are, particularly in hard cases where respected principles conflict?

Carrington suggests that, in practice, this meant that Cooley favored judges who were "safe," not innovative or transformative.[417] Perhaps this is why his work is not much studied today. Law professors prefer to discuss cases that demonstrate change, not stability. However, this conclusion about Cooley also does not do justice to Cooley's thought. In fact, he was very insightful about the nature of change in the law.

Cooley also stands for judicial restraint.[418] Hence it is a cruel irony that *Lochner*, which has always stood for lack of judicial self-restraint (or, at least lack of self-restraint by a conservative judiciary), has been laid at the doorstep of his intellectual edifice.

How, then, are we to reconcile these discordant strands of Cooley's thought? The postmodernist might claim that the explanation is simple. Whether he was being consciously hypocritical or merely insensible to his own biases, Cooley was merely manipulating doctrine to forward his own agenda, which was to preserve the status quo, would run this argument. In fact, the postmodernist might praise Cooley for his recognition that his basic premise was that law was rooted in the shared assumptions of the group with whom he identified, although whether that group would be accepted as the "common man" as opposed to a more defined social and political elite is subject to some doubt. A not dissimilar claim would be that Cooley saw "judicial self-restraint" as a virtue but of lesser value than protection of property rights, which he perceived to be constitutionally protected in ways that a fair reading of the Constitution do not support.

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415. *Id.*

416. Carrington, *supra* note 68, at 530.

417. *Id.* at 523-24.

418. Paul D. Carrington, *Deference to Democracy*, *in* THE HISTORY OF MICHIGAN LAW 109 (Paul Finkelman, Martin J. Hershock & Clifford W. Taylor eds., 2006).

B. Cooley's Legal Thought

Putting aside the temptation to dwell only on the question of whether the only relevance of Cooley's thought is in what others understand it to mean, let us suspend our postmodernist sensibilities, put on our modernist hats, and do our best to reconstruct what Cooley's actual views appear to have been. While it is true that Cooley advocated deference to the legislative judgment and respect for the plain meaning of a text, it also appears to be the case that Justice Cooley did not share some of the Governor's other views of the law, for many of Cooley's basic premises run counter to a strictly rules-based conception of law.

First, Cooley, like any other thinker, must be understood in the context of his times. Cooley seems to be uniformly pictured as a product of the Jacksonian tradition. Professor Carrington sees in him the product of the New York Barnburners, the political and cultural environment in which he was born in 1824.[419] Perhaps so, but the evidence is more persuasive that his politics reflected the amalgam of intermingled viewpoints that coalesced in the early Republican Party, with the Jacksonian strain being only part of a larger and much more diverse picture.

Cooley moved to Michigan in 1843 to commence his career. Michigan had become a state only six years earlier; Cooley himself was only nineteen.[420] By the 1850s, he had left the Democratic Party of his family and New York neighbors to join the Free Soil Party.[421] Thereafter, like Lincoln, he became a Republican, in the state that was the birthplace of the Republican Party (in Jackson, Michigan in 1854).[422]

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419. *See* COOLEY & CARRINGTON, *supra* note 389, at 18-21. *See also* Carrington, *supra* note 68, at 108 (arguing that numerous Cooley decisions reflect a "Jacksonian" perspective).

420. William J. Fleener, Jr., *Thomas McIntyre Cooley: Michigan's Most Famous Lawyer*, 79 MICH. B.J. 208 (2000).

421. *Id.*

422. BRUCE CATTON, MICHIGAN, A HISTORY 176 (1976). The view that Cooley and his colleagues reflected a Republican court is documented in a fine paper by Cara Shelly, *Republican Benchmark*, *supra* note 404.

> "The Free Soil, Free Labor, Free Men" ideology of the Republicans resonated with each of the justices; they joined the party because it mirrored social, economic, and political principles already rooted in their heads and minds. The depth of their convictions, coupled with a strong sense of judicial integrity, kept them from conscious partnership in their decisions and held them to the archetypical Republican ideal of free-laborism as the party became mired in Grantism. At the core of their philosophy lay a commitment to rights and responsibilities, whether vested in the individual or in the aggregate. Liberty required maintenance of an open field of free choice and opportunity; order demanded that people be held responsible for their decisions and pursuits."

Cooley was only moderately successful as a legal practitioner, but he was politically active. In 1857, he was appointed by the Republican Legislature to compile the state's statutes and, shortly thereafter, the reporter of the decisions of the Michigan Supreme Court.[423] In 1859, President Tappan of the dynamic and virtually new University of Michigan (which, as one distinguished scholar has written, was the best university in the country at the time[424]) selected him as one of the three founding members of the new law school he was creating in Ann Arbor, the other two being his future judicial colleagues, Campbell and Christiancy. At age thirty-five, Cooley was the youngest of the three.

And then the war came.[425]

The American Civil War, including the tensions that led up to it and its long and painful aftermath, were the central experiences of Cooley's day. The magnitude of that conflict is almost inconceivable to us. It claimed as casualties an astonishing two percent of the population.[426] Michigan, a state with a population of 749,113 in 1860,[427] "sent 87,000 men into federal service and 14,700 of them lost their lives."[428]

The issue of slavery that was so inextricably linked to the war, and that was so difficult to undo, dominated the nation's political life. The events of the war and reconstruction were so momentous and all-encompassing that they worked vast legal change in addition to all else.

One cannot help but be struck by the direct and bold statements made by the still relatively young (thirty-eight year old) Cooley in 1863

Id. at 2. For her further careful illumination of how the different aspects of Jacksonian, Whig, Free Soil, and other strains of political thought varied among Cooley and his Republican colleagues, see *id.* at 21-22, 27-29.

423. This was a more important position than it may sound to modern ears. Court reporting everywhere was uneven, sporadic, and often inaccurate. As a result of war conditions, even this low level lowered. "It was hard enough to keep the [state] court within bounds when . . . decisions were reported," grumbled George W. Paschal. "What shall we have when they are dependent upon memorys [sic] . . . . Heaven knows." HAROLD HYMAN, A MORE PERFECT UNION 351-52 (2d ed. 1975).

424. ALLAN NEVINS, ORDEAL OF THE UNION, VOLUME I 53-54 (1947) "[I]n many respects the best university of the country during the fifties was Michigan, where Henry Tappan applied European methods and ideas, opened in 1857 the nation's first chemical laboratory, and established an efficient civil engineering course." *Id.*

425. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865). "Both parties deprecated war, but one of them would *make* war rather than let the nation survive, and the other would *accept* war rather than let it perish, and the war came."

426. DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR xi (2008).

427. *Michigan in Brief*, MICH. IN BRIEF, www.michiganinbrief.org/edition07/chapter1/chapter1.htm (last visited Oct. 9, 2013).

428. CATTON, *supra* note 422, at 149.

at the dedication of the new law building at the Michigan university.[429] In hearkening back to the founding of the school in the midst of a forest, he was recalling recent, not ancient, history; Michigan was still a "western state."[430] The nation was in the midst of the awful civil war that was claiming young lives at a pace that is almost unfathomable to us today.[431]

Cooley also saw law as fundamental to the American experience, from its creation ("[a]nd thus insensibly by the silent operation of legal presumptions a nation in large part bondsmen became the freest on earth"[432]) through the present calamity. In fact, he saw the Civil War in legal terms:

> The battle which our brothers are waging in Virginia, and Tennessee, and Arkansas, is one of constitutional law. The question at issue is one for the proper determination of the Courts, but it has been forcibly wrested from their control. Lawyers engaged in this strife are merely settling a point of national law. They have gone to knit together with the points of their swords the Union which conspirators have vainly claimed to have severed.[433]

And, again, "[t]o teach the law in America is to teach loyalty to the union."[434]

This type of rhetoric may be many things, but it is not a conventional claim that law and politics are separate and distinct.

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429. Address by Hon. Thomas M. Cooley and Poem by D. Bethune Duffield, Esq., on the Dedication of the Law Lecture Hall of Michigan University (Oct. 1, 1863) [hereinafter Dedication Lecture].

430. As, in a certain sense, it has remained to this very day thanks to Harry Elbell and his college fight song *The Victors*: "Hail to the Victors Valiant, Hail to the Conquering Heroes, Hail! Hail! To Michigan, the champions of the West," written after a football victory over the University of Chicago in 1898. MGOBLUE.COM, http://www.mgoblue.com/genrel/062909aaa.html (last visited Oct. 9, 2013).

431. In a particularly poignant passage, he said,

> Even now as we meet, rejoicing at the commencement of a new college year, there comes up from Chattanooga the sound of mourning for another of our cherished comrades, and the brave and chivalrous Wells is added to the list of those who have freely given their blood because they loved their country, and would not see the banner of their fathers robbed of its beaming stars.

Dedication Lecture, *supra* note 429, at 15.

432. *Id.* at 13.

433. *Id.* at 15.

434. *Id.* at 14.

Cooley was elected to the Michigan Supreme Court in 1865, the year the Civil War ended.[435] He would be reelected twice more, in 1869 and 1877, but he lost in 1885 and retired from the bench.[436]

The Fourteenth Amendment was adopted in 1868; that was the year Cooley published his treatise *Constitutional Limitations*. The Fifteenth Amendment was adopted in 1870.

Harold Hyman suggests that it was the maelstrom of postwar social development that led Cooley and others to assert limitations upon government that defended property rights.[437] The destruction of slavery had worked a massive change in property rights—as heinous as rights in persons are, they had been embedded in the constitutional order for over eighty years. Cooley argued that nothing had changed except slavery; it is hard to agree with that proposition in many respects. Yet as a lawyer, teacher, and judge who believed in moving at a careful, deliberate pace, his approach was not surprising. Hyman argues that Cooley "[h]armonized old values with the post-Appomattox scene. He admired the implicit limitations on prewar governments that derived from their relative torpidity; after Appomattox he championed explicit limitations because of state's activities."[438] As Hyman also points out, in this context, Cooley's supposed embrace of "Laissez-Faire Constitutionalism" as embraced by the *Lochner* court some thirty-seven years later, looks very different:

> Stands taken by the Fourteenth Amendment's framers and by writers such as Cooley have been construed as defenses only of property; a crusade to tie laissez-faire to the Constitution. As was true of the framers of the Fourteenth Amendment, Cooley hoped to protect individuals' rights, including property rights, against unwise exercise of states' powers; to prevent excess accumulation or undesirable exercise of public power on any level of the federal system. To Cooley and most men of his generation, property was the base of all civil and political privileges. This base was less secure because of the War's impact. Their way was to preserve government's purity and neutrality by restraining its functional excesses when they intruded too far into vital private relationships.[439]

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435. CARRINGTON, *supra* note 389, at 108.
436. *Id.*
437. HYMAN, *supra* note 423, at 352.
438. *Id.* at 374.
439. *Id.*

Cooley's democracy was republican, not a Jacksonian "mobocracy." As Gudridge points out, Cooley argued against mere "sentiment" as a guiding force: "It is no doubt wise to take notice of prevailing sentiments, and utilize them in government so far as may be practicable, but reason and the teachings of experience have first place."[440] Burke would have agreed. In fact, Cooley quoted Burke in his 1878 monograph on *Changes in the Balance of Governmental Powers* as to "the chief excellency of the British constitution": it has "'not been struck out at one heat, by a set of presumptuous men, like the assembly of pettifoggers run mad at Paris.['] 'Tis not the hasty product of a day, but the well-ripened fruit of wise delay.'"[441]

Cooley also had a view of the judicial role that was much more nuanced and complex than Carrington's model. To Cooley, deference to the legislature did not mean that there is no place for what he frankly referred to as "judicial legislation." Cooley was compellingly clear and logical in describing his belief that it is a matter of reality that law must deal with constant change, even if the formal legal model posits that the law is unchanging.

> [R]ights have grown up under judicial regulation, and through judicial definition, much more than under legislation properly so designated. *The code of to-day is therefore to be traced rather in the spirit of judicial decisions than in the letter of the statute.* The process of growth has been something like the following: Every principle declared by a court in giving judgment is supposed to be a principle more or less general in its application, and which is applied under the facts of the case, because, in the opinion of the court, the facts bring the case within the principle. The case is not the measure of the principle; it does not limit and confine it within the exact facts, but it furnishes an illustration of the principle, which, perhaps, might still have been applied, had some of the facts been different. Thus, one by one, important principles become recognized, through adjudications which illustrate them, and which constitute authoritative evidence of what the law is when other cases shall arise. But cases are seldom exactly alike in their facts; they are, on the contrary, infinite in their diversities; and as numerous controversies on differing facts are found to be within the reach of the same

440. Gudridge, *supra* note 408, at 842 (quoting from unpublished lectures of Cooley delivered at Johns Hopkins in 1879).

441. THOMAS M. COOLEY, CHANGES IN THE BALANCE OF GOVERNMENTAL POWER 7 (1873).

> general principle, the principle seems to grow and expand, and does actually become more comprehensive, though so steadily and insensibly under legitimate judicial treatment that for the time the expansion passes unobserved. But new and peculiar cases must also arise from time to time, for which the courts must find the governing principle, and these may either be referred to some principle previously declared, or to someone which now, for the first time, there is occasion to apply. But a principle newly applied is not supposed to be a new principle; on the contrary, it is assumed that from time immemorial it has constituted a part of the common law of the land, and that it has only not been applied before, because no occasion has arisen for its application. This assumption is the very ground work and justification for its being applied at all; because the creation of new rules of law, by whatsoever authority, can be nothing else than legislation; and the principle now announced for the first time must always be so far in harmony with the great body of the law that it may naturally be taken and deemed to be a component part of it, as the decision assumes it to be. *Thus a species of judicial legislation, proper and legitimate in itself, because it is absolutely essential to a systematic adjudication of rights, goes on regularly, and without interruption . . . .*[442]

Cooley justifies this "species of judicial legislation" in essentially Burkean terms as having advantages over the work of the legislature itself:

> In this steady and almost imperceptible change must be found the chief advantages of a judicial development of the law over a statutory development; the one can work no great or sudden changes; the other can, and frequently does, make such as are not only violent, but premature. A large share of the value of any law consists in the habitual reception and the spontaneous obedience which the people are expected to give to it, and which they will give when they have become accustomed to and understand its obligation. The people then may be said to be their own policemen; they habitually restrain their actions within the limits of the law, instead of waiting the compulsion of legal process. A violent change must break up, for the time being, this spontaneous observance, and some degree of embarrassment is

442. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 13-14 (2d ed. 1888) (emphasis added).

> always to be anticipated before that which is new and strange becomes habitually accepted, and its advantages appreciated, and before that which remains of the old is adjusted to it.[443]

If this sounds familiar, it may be because Cooley's Torts textbook was used in Columbia Law School for many years, including by a student named Benjamin Cardozo. Cardozo went on to be a famous judge and gave a famous series of lectures that became known as *The Nature of the Judicial Process*. With that work, Cardozo was credited with popularizing and giving credence to the notion that judges, at least in a certain number of difficult cases, made law rather than merely interpreted it.[444] After reading these passages from Cooley's *Law of Torts*, it seems to me that he was recalling the lessons learned as much as he was breaking new ground.

After seeing Cooley's views with regard to "judicial legislation," it comes as perhaps less of a shock to see that Cooley did not see the Constitution as a document that remains unchanging because of the need to adhere to original intent or otherwise hew to a timeless construction of the words of the text: "The Federal Constitution, though it is the same in words is not, as a living and effective instrument, the same today that it was when made. There has been change and there will be change, whether we approve and assent to it or not."[445]

With similar perceptivity, Cooley saw the immensity of judicial power that a constitutional system like ours bequeaths to the judiciary as time drives a wedge between original understandings and contemporary interpretation. He did not mince words about the judicial as opposed to the legislative power. The bar has awesome responsibilities; the "responsibility of framing new statutes is for the most part thrust upon the legal profession," and further "the expounding of new laws is entirely so."[446] Then he continued,

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443. *Id.* at 15-16. Says professor Gudridge,

> If it is "principles" and not decisions as such that matter most in "judicial legislation," we may wonder whether Cooley's professed intention in his *Constitutional Limitations* to "state clearly . . . the principles to be deduced" was so humble after all. . . . Thomas Cooley's *Law of Torts*, like his John Hopkins lecture, is surprising work. The preoccupations and emphases are plainly not Paul Carrington's. Cooley, in fact, seems to celebrate a process very much like that described in Duncan Kennedy's *Critique*.

Gudridge, *supra* note 408, at 848.

444. *Id.* Cardozo's use of Cooley's *Law of Torts* is described in ANDREW L. KAUFMAN, CARDOZO 47-48 (1998) (although Kaufman's disparagement of Cooley's book is disappointing).

445. COOLEY, *supra* note 441, at 18, 22.

446. Dedication Lecture, *supra* note 429, at 7.

> *In the persons of their representatives upon the bench they declare what the law is; as expounders their power is perhaps even greater than as legislators* . . . . Upon legislative powers are numberless restraints, designed to check hasty and improvident action; and to shield private rights against legislative usurpation. We have our two houses of the legislature; each operating as a restraint upon the other, and thus guarding the State against those temporary excitements which sometimes sweep over the people, and from which no single body of men can at all times hope to be free . . . . But we have, further and better, constitutional bounds set to legislative power, limiting it in all directions to the proper subject of legislation, and bounding it even in regard to those subjects. *No similar restraints upon judicial power are practicable; and so while courts may sit in judgment upon legislative action, and annul whatever is done in excess of rightful jurisdiction, the judiciary must decide upon its own authority, and the judge must find within his own breast those restraints against hasty and unjust action which the legislature has in the constitution and the courts.*[447]

Perhaps even more surprising to modern ears, Cooley then noted,

> But the courts are only the mouth-pieces of the Bar. At best, the judges are only selected from leading members of the profession, and are not a distinct class of men placed high above the bar, and declaring the law as oracles. They are only good representatives of the learning, virtue and wisdom of the profession, and the decisions they deliver are only deductions from the learned arguments had before them. It is the business of the bar to instruct them, rather than be instructed by them, and justice is blind indeed if her advocates supply her with no light.[448]

Cooley thus saw lawyers as "loaded with responsibilities"[449] to society and to the law. But this admonition should not obscure the underlying point that Cooley is clearly conscious of—law is largely the result of the activity of a narrow elite, and its preferences, hopefully wise, but potentially not, will out. Strip away postmodernist jargon and the similarities are clear.

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447. *Id.* at 7-8 (emphasis added).
448. *Id.* at 8.
449. *Id.*

Though a pioneering and immensely influential scholar, Cooley was no "academic" in the sense of someone with a theoretical rather than a practical orientation. He was very much a realist, just as Burke was a realist, who understood politics and who had a jaundiced view of human nature. The point is well illustrated by his comments on the growth of federal power—a subject that has been very much a theme throughout our country's history. Why, he asked, has the federal power increased regardless of party?

> No government is likely to abandon ground already occupied and conceded to it by competent authority or by acquiescence. When the party of strict construction succeeds the party of liberal construction, it takes up the reins of government with the wheels in motion, and a beaten track before it, and it is too much to expect of human nature that men will deliberately reject and refuse to enjoy a legacy of dignity, importance and power, which, if wrongfully acquired by predecessors, has come without wrong on their part to their hands. At most, what can be expected of the new administration is this: that it will apply its own principles, in its own future action: and when its opponents again recover power, the process of liberal construction and acquisition will go on before. Thus, the pendulum: when it moves at all can only move one way . . . .[450]

Thus, Cooley eloquently identified, 125 years before it became again the subject of discussion, the "conservatives' one-way ratchet problem."[451]

In sum, Cooley was a conservative in the mold of Burke but with the American twist in favor of popular democracy; a judicial conservative in his own words because of his belief in the importance of law as a conservative institution; and a practical and hard-headed thinker. His belief in deference to the democratic process came against the background of a sense of both the importance and the inevitability of a vital role of the judiciary in interpreting both the statutes and the constitution. He believed that law needed to be seen in its historical and cultural context and could not be separated from it. His colleagues seem to have been cut from similar cloth.

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450. COOLEY, *supra* note 441, at 15.

451. *See, e.g.*, John C. Eastman, *Stare Decisis: Conservatism's One-Way Ratchet Problem*, *in* COURTS AND THE CULTURE WARS 127 (Bradley C.S. Watson ed., 2002).

C. Campbell and the Broad View of Law

In 1866, James V. Campbell, then a Justice of the Supreme Court and Marshall Professor of Law, delivered an address to the graduates of the Michigan University Law Department.[452] It is delightful to read. Its central points include the idea that law must be broadly viewed as a complementary part of a broader community of knowledge.

> The law concerns all the interests of human life and conduct; and its principles are so interlaced in our fabric, that each depends on, and is supported by, the rest . . . . Unless we realize at the outset the connection and inter-dependence of the various parts of the law, we can never make any satisfactory progress.[453]

Thus, knowledge of the law alone is inadequate. "All liberal culture is a positive and direct aid to legal knowledge; and some degree of acquirement has always been considered a necessity."[454]

He saw law as a particularly noble calling because "the plan of our Commonwealth has made its security depend very much upon the learning and integrity of those who have devoted themselves to the study of the law."[455] (Again, like with Cooley, note the implicit acknowledgment of the role of the elites.) Furthermore, the specialized study of law was vitally important, because while the nation's

> framework is simple enough to be understood by all men of common intelligence, . . . no institution framed by men—still less one made perfect by the teachings of History—can be known by intuition. It is based on sense and virtue; and where those are wanting it can never be fairly comprehended. No question can arise, concerning the correctness of any form of public action, which does not in this country, present combined issues of law and statesmanship.[456]

Like Cooley, Campbell saw law as a matter of first principles: "In approaching questions of public law, the lawyer must always remember that they do not belong to the arbitrary and technical portions of legal science, but are governed by broad fundamental rules, which can only be

452. JAMES V. CAMPBELL, LAW AND LAWYERS IN SOCIETY (1866).
453. *Id.* at 5.
454. *Id.* at 5.
455. *Id.* at 6.
456. *Id.* at 7.

applied with a knowledge of human nature, and some correct notions of statesmanship."[457]

He strongly urged broad learning by lawyers and praised the great men of law for the breadth and depth of their general learning.[458] He also denied laws perfectibility: "Human laws can never be enforced in perfect principles, until men outgrow, in their perfection, the necessity of human laws at all."[459] Thus, he also saw law as the product of experience, not mere rational plan:

> The best proof of the value of human laws is in their result . . . . No one can understand human nature so well as to know what *will suit it*, as easily as to recognize what *has suited it*. But where there is an apparent demand for action, that wisdom which scorns to take into account the sentiments, and even the follies and caprices, as well as the interests of a community, is not a very exalted wisdom.[460]

In his *Judicial History of Michigan*,[461] Justice Campbell ruminates on the legal meaning of words and phrases in the law in a straightforward and sensible fashion:

> Those who have watched the course and causes of litigation know that a great share of it arises from misunderstanding. This is particularly so in matters arising out of agreements, and larger or smaller business relations. We do not appreciate the fact that while no rule of law can have more than one true meaning, it is not only possible but common for men to enter upon business relations with each other without having in their minds any complete identity of understanding. While courts and the State cannot under ordinary circumstances release any one from the obligations of informing himself what the law is—yet in law as in all other sciences the definitions are apt to be understood in the light of previous impressions upon the meaning of words and phrases, and the same maxim does not present the same idea to all minds. The most important advantage of the jury system is that juries understand and apply rules as they are commonly

457. *Id.* at 10.

458. CAMPBELL, *supra* note 452, at 12-13.

459. *Id.* at 17.

460. *Id.*

461. James V. Campbell, Judicial History of Michigan (1886) (unpublished manuscript) (on file with the University of Michigan Law Library).

> understood by the mass of society, and so harmonize legal obligations with the general sense of mankind. The beauty of the Common Law is that it is not abstract, but is found in practical applications of right and duty.[462]

However, he goes on to state that "with the advances and changes of society it very soon happens that men become separated in their habits and dealings, so that while familiar with their own surroundings they know little of what is done by those in other pursuits."[463] Thus, "[c]ourts and juries with all their care and diligence must often fail to understand what is not within their experience, and abstract justice is not always actual justice."[464] Thus he urged specialized courts—something that came to fruition in Michigan almost 150 years later with the creation of the business courts.[465]

Campbell noted too that "[o]ne class of laws has given occasion for much contention. There is too little uniformity and too frequent change in the laws which regulate the condemnation of property for various easements and corporate uses."[466]

Campbell's words on this subject could be quoted by the current supreme court without edit:

> Few of the Statutes contain specific provisions for compensating owners for property practically destroyed in value but not appropriated bodily, and in some cases, under the pretext of benefits they take it away without any compensation at all. The power is one very necessary, but justice requires that one part of

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462. *Id.* at 47-48.

463. *Id.* at 48.

464. *Id.* at 48.

465. Michigan trial courts are taking significant steps toward obtaining predictable, informed outcomes in business-related litigation through the creation of Specialized Business Dockets (SBDs) across the state pursuant to Michigan Public Act 333, effective October 17, 2012. 2012 Mich. Pub. Acts 333.

While business courts have been up and running in Macomb and Kent counties for the past year, the initiative was launched in Oakland County effective June 3, 2013. Several others will follow suit by July 1, 2013, as Public Act 333 requires circuit courts with three or more judges to create a specialized business court docket. Each of these circuits has designated judges who will be the exclusive jurists for business disputes as defined in the statute, a term that encompasses most commercial litigation. *Id.* § 8031.

An important mandate of the statute is that as many of these judges' business decisions as possible be published. *Id.* § 8039(3). This requirement is designed to create an available body of consistent precedent that practitioners and clients can examine and analyze as part of their business decision making process.

466. CAMPBELL, *supra* note 452, at 52.

> the state should not have different laws for other parts, and that property should not be disturbed without plain necessity, or confiscated without recompense. Municipal condemnations have made the most trouble in this way.[467]

D. Christiancy and Distrust of the Abstract

Isaac P. Christiancy was born in New York in 1812 and moved to Michigan in 1836 where he became active in politics.[468] He was a vital moving force in the creation of the Republican Party. First, as a Free-Soiler, he was its candidate for Governor of Michigan in 1852. He then played a leading role in the combination of the Whigs and Free-Soilers in 1854. He was a delegate to the first national Republican convention in 1856.[469]

Christiancy believed that law was a science, not an art. The view of law as the science of deriving conclusions through the study of cases is what Langdell and Harvard were to become famous for. Yet, for Christiancy, the conclusion from that belief is the opposite of what we might presume, for he believed that law was to be learned by the proper study of principles, not particular cases or transactions.[470]

> The abstract rules of law, without reference to the reasons upon which they are founded, are merely arbitrary and technical. They are but the dry bones of the law, and represent the law about as faithfully as the dry, bony skeletons, to be found in another department of this institution, represent the living man.[471]

Thus, the law was for Christiancy, as well as for Cooley and Campbell, a search for broad principles and not the search for dispositive precedents:

> The student is set to copying legal papers from drafts furnished him, or to drawing from, or merely filling up, printed forms, before he has sufficiently acquired and classified the legal

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467. *Id.*

468. Henry A. Chaney, *The Supreme Court of Michigan*, 2 GREEN BAG 389 (1890).

469. *Id.* For a more detailed history of Christiancy's political odyssey from Democrat to alleged Whig to Free-Soiler to Republican, see *Republican Benchmark*, *supra* note 404, at 14-16.

470. I.P. Christiancy, Address to the Graduating Class of the Law Department of the Michigan University (Mar. 28, 1860).

471. *Id.*

> principles which govern them. He is too apt to take it for granted that there is some mysterious potency in certain forms of words. He does not stop . . . to analyze them, and to apply the principles of law which alone give them efficiency . . . . The same habit of mind leads him to stretch the application of abstract rules to cases not within their spirit, and which, upon principle, should constitute exceptions or qualifications; and when a question is presented for his opinion, to look for a precedent, rather than the principle which should govern its solution.[472]

Like Campbell, Christiancy did not believe that law could be perfect, yet he also sensed the potentialities of adopting a Nietzschean view of law as subordinate to mere human impulse:

> Man is an imperfect being, and all his laws, and all his efforts, will partake of his imperfections. There are shades and gradations of wrong which no human laws can undertake to redress; because these laws must be administered by men, and through the aid of human testimony. Nothing short of omniscience can see the truth and the bearings of human transactions precisely as they are; nor judge, with certainty, all the motives of men. And he who acknowledges no higher obligation than human laws, proclaims himself a villain at heart, who, but for those laws, would not hesitate to commit the foulest crimes.[473]
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> . . . .
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> . . .[A]s in civilized society, business transactions, social relations and duties, become almost infinitely various and complicated, and the more so, the more civilization advances, so in corresponding ratio, must the laws which apply and regulate them, become various and complicated also. To ascertain the nature of these various transactions and duties, their relation to each other, the principles involved in, and the laws applicable to each—to acquire that thorough knowledge and accurate discrimination necessary to a ready, practical application of those laws, in such a manner as to secure the rights of the parties and the public welfare—to accomplish this requires years of careful study and preparation.[474]

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472. *Id.*
473. *Id.*
474. *Id.*

E. Graves and the Triumph over Partisanship

Unlike his three "Big Four" colleagues, Benjamin F. Graves was not part of the University of Michigan Law Department faculty.

He did not leave the scholarly output of Cooley or Campbell nor did he have the colorful political history of Christiancy, with his senatorial ambitions. Rather he was very much the lifetime jurist. Poor health was a cause for his turn to law as a profession.[475] Born in New York, he moved to Michigan in 1843. He apparently disliked practicing law, and was "uncommonly shy" but scholarly.[476] He served as a justice of the peace and a Master in Chancery in Battle Creek; in 1857, he was first appointed then elected to a circuit court judgeship.[477]

Like his future Big Four colleagues, politically he had changed his allegiance in the political turmoil of the antebellum atmosphere of the Northwest. Originally a Democrat, with a recollection of meeting Andrew Jackson as a young man in 1841 that is reminiscent of the experience of those of our era who met John F. Kennedy in their youth, he voted for the Free-Soilers in the 1840s and joined the Republican Party at its founding.[478]

He was briefly on the Michigan Supreme Court in 1857 prior to its reorganization into what is much closer to its current form. The circuit court judgeships of those days were true "circuits" that imposed great physical demands, and it appears that Graves was particularly hard working and conscientious, handling sixteen circuits a year, keeping his own minutes, and even holding evening sessions of the Court.[479] With his poor health, it was too much for Graves, and he resigned.[480]

However, Graves appears to have won the trust of both Democrats and Republicans, for there were objections to his resignation from both quarters.[481] In 1867, he was the Republican nominee for the reformed supreme court. When it came time for reelection in 1875, he was the nominee of both parties.[482]

The court of Cooley, Campbell, Christiancy, and Graves, was to earn an enviable reputation for independence and fidelity to its conception of the governing legal rules over partisan outcomes.[483] "In its day, the

475. *See Republican Benchmark*, *supra* note 404, at 23.
476. *See* Wise, *supra* note 43, at 1547.
477. *See Republican Benchmark*, *supra* note 404, at 23.
478. *Id.* at 22; Wise, *supra* note 43, at 1547.
479. *Republican Benchmark*, *supra* note 404, at 404; Wise, *supra* note 43, at 1547.
480. *Republican Benchmark*, *supra* note 404, at 404; Wise, *supra* note 43, at 1547.
481. *See Republican Benchmark*, *supra* note 404, at 23.
482. *Id.* at 24.
483. *See* Wise, *supra* note 43, at 1560.

Cooley court had a considerable popular reputation for independence. Several early decisions contributed to the lasting impression that the court was above politics." Graves seems emblematic of the court in that regard. His reputation was one of skill in procedure and evidence, gained in his years as a circuit judge,[484] skills that are useful in dealing with charged political issues on the bench.

IV. CONCLUSION TO PART I

In a well-known speech, Judge Bork said, "Law is an intellectual system. It progresses, if at all, through continual intellectual exchanges. There is no reason why members of the judiciary should not engage in such discussion and, since theirs is the ultimate responsibility, every reason why they should."[485]

The conservative majority created by Governor Engler on the Michigan Supreme Court were all highly influenced by Judge Bork and the conservative intellectual ferment that resulted in the creation of the Federalist Society. One member of the court, Justice Markman, might justly be said to have been "present at the creation," while Justices Taylor, Young, and Corrigan all came to share the same philosophical disposition. They have taken up Judge Bork's charge to engage in intellectual exchanges about the law and have been forthright in their expression of their judicial philosophy.

The general outline of that philosophy was also shared by Governor Engler, who personally assured that those he appointed to the court would share the views in which he believed. In his case, those views were shaped by his own experience as a legislator and one who came to law school after being deeply involved in politics and government, not as a young student unfamiliar with the ways of the real world.

All of the members of the conservative majority describe themselves as textualists and originalists. They see their philosophical approach as consistent with representative democracy and as demonstrating judicial restraint in deferring to the legislature and faithfully carrying out the statutory and constitutional texts that they are asked to interpret by focusing on language, syntax, grammar, and what they refer to as "plain meaning."

While textualism and originalism as understood by these members of the court are certainly widely embraced by contemporary conservatives, in historical terms they seem somewhat removed from the philosophy of

484. *See id.* at 1547.

485. Judge Robert Bork, The Great Debate, Speech at the University of San Diego Law School (Nov.18, 1985), *reprinted in* ORIGINALISM, *supra* note 245, at 83-84.

the members of the Cooley court. Certainly, aspects of these concepts appear in the work of the Big Four. However, although the Governor and the members of the current court view the Big Four as role models, because those four were more traditional conservatives, the approach of the Cooley court as expressed in their views about legal matters generally reflects a much less rigid view towards the work of the judge and seems to embrace greater openness towards the use of a broader set of considerations in deciding cases.

An enormous amount of intellectual water has gone over the dam since the days of the Big Four. Three of them were creators of one of the great new law schools that have played such a leading role in the intellectual life of the law, and Justice Cooley was one of the greatest of the early academics. Yet they probably could not have conceived that the law schools—influenced by the universities of which most of those schools are a part—would go on to create so many schools of legal thought. Legal Realism, Legal Process, Republican Revival, and Critical Legal Studies, among others, would be the creation of the legal academic world as it sought to find intellectual coherence, and then later despaired of the possibility of attaining it, in the law. It was in reaction to these various schools of thought that textualism and originalism developed as ways to respond to the seemingly unlimited discretion of courts to act without external constraint in interpreting statutes and the constitution.

In engaging in the comparison between the court created by Governor Engler and the "great court" of the Big Four, one senses the differences between a judicial philosophy that seems ultimately defensive—pushing back against the academic and cultural trends of the day—and the more straightforward conservatism of the past, which on careful review shows great sophistication (without the benefit or, perhaps, burden of as much jargon) in understanding the inherent issues with the judicial role in a constitutional and democratic system. The Big Four showed as much practical understanding of the uncertainties inherent in judging and the political dimension of their work as any postmodern scholar; they simply took it as part of the world as it is and moved on with confidence that they would do their best.

In Part Two,[486] we will see if the philosophy of the Engler Court carries through in its decisions, compare its decisions to those made by the Cooley Court, and see what the sum of all these hopes and fears tells us about conservative judicial philosophy. Now that we have passed through the portrait section in our judicial museum of art, there are some fascinating comparisons between the abstractions of the postmodern

486. To be published in Volume 60 of the *Wayne Law Review*.

conservatives and the nineteenth century realism of the Big Four. I hope you will join me for the rest of the tour.