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RIGHTS AND RIGHT-WING LAWYERS

Michael A. Magee*

AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION*. (OXFORD UNIVERSITY PRESS 2015). PP. 264. HARDCOVER \$31.95.

JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* (OXFORD UNIVERSITY PRESS 2016). PP. 298. HARDCOVER \$105.00. PAPERBACK \$29.95.

Scholarship on the post-New Deal American right has proliferated in recent years. Given the current political landscape, such an explosion in popularity could not be more timely or vital. Amanda Hollis-Brusky's *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* and Jefferson Decker's *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* present two novel additions to this burgeoning literature. Rather than emphasizing the role of the timeless dynamics of conservative ideology or business elites as the key players animating the rise of new conservatism, as works on the new right have done in recent years,¹ both authors instead look to a woefully under analyzed group: conservative lawyers and their professional organizations. In this review, I first summarize the arguments of each work. I then put the works into conversation with each other, which reveals the weaknesses and strengths of each and demonstrates how they contribute to the broader literatures in American political development and studies of the new American right.

In *Ideas with Consequences*, Hollis-Brusky looks to the Federalist Society – a professional association and network of conservative law students, practicing attorneys, and judges – as the lynchpin and catalyst for much of the new right's political agenda and theories of jurisprudence. Adapting a concept from international relations scholarship, Hollis-Brusky calls the Federalist Society a “Political Epistemic Network” (“PEN”) or “an

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1. For paradigmatic examples of each, respectively, see COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN* (2013), and KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL* (2010).

interconnected network of professionals with expertise or knowledge in a particular domain.”² According to Hollis-Brusky, the statement of purpose of the Federalist Society, “the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, now what it should be,”³ encapsulates its status as a PEN because it contains four key characteristics: (1) a shared set of normative commitments by which society ought to be organized, (2) a shared understanding of the practical (causal) means by which to achieve those normative ends, (3) shared interpretations of externally contested sources of validity (in this case, a shared originalist hermeneutic of the U.S. Constitution), and (4) a shared set of policy prescriptions to achieve the group’s political vision.⁴ Hollis-Brusky organizes the empirical chapters of her book, analyzing the political issues central to the Federalist Society including revisionist readings of the Second and Tenth Amendments, around this theoretical edifice to argue that the Federalist Society generated the resources, provided necessary accountability over judges, and created the broader political conditions necessary to revolutionize American jurisprudence and, by extension, American politics writ large.

Drawing on her previous work, Hollis-Brusky argues that much of the influence of the Federalist Society on the courts can be traced to its ability to provide “intellectual capital” to conservative justices who challenge longstanding liberal precedent. The chapter concerning revisionist interpretations of the Second Amendment provides a clear example of this dynamic. The Federalist Society took up the cause outlined in Robert Sprecher’s 1965 essay concerning the Court’s egregious misconstrual of gun rights with gusto, and its members wrote a number of articles and books condemning the Court’s interpretation of the Second Amendment as inconsistent with the vision of the Founders and individual freedom.⁵ For example, Eugene Volokh, a Federalist Society member, wrote in a 1998 law review article that, in contrast to standard liberal interpretations of the Second Amendment which emphasize the justificatory “well-regulated militia” clause, a proper reading in its original historical context would instead emphasize the operative “right of the people” clause.⁶ This reading of the Second Amendment was then lifted nearly verbatim, and Volokh’s article directly cited, by Justice Scalia in the majority opinion of *District of Columbia v. Heller* that famously did away with the reigning interpretation of the Second Amendment as a collective right in favor of the conservative, individual right view.⁷

Such examples of conservative justices making use of the intellectual resources and arguments of Federalist Society members, whether through citations in court opinions or even unabashed plagiarism, abound in Hollis-Brusky’s account. In a telling and creative passage, she argues that perhaps the best evidence of the power Federalist Society scholarship has had on conservative judges is that they no longer need to directly cite

2. AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* 13 (2015).

3. *Id.* at 16.

4. *Id.* at 13.

5. *Id.* at 31; Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 665, 669 (1965).

6. HOLLIS-BRUSKY, *supra* note 2, at 37. See Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

7. 554 U.S. 570, 576–81 (2008).

originalist scholarship in their decisions because they can simply refer back to Federalist Society inspired decisions, now established as precedent, where that citational work was already done.⁸

While these examples are compelling and, to some degree, demonstrate her main theoretical point, Hollis-Brusky fortunately does not rest her case on a simple profusion of citations on the part of conservative justices. The Federalist Society *qua* PEN also functions as a means of judicial accountability, keeping conservative justices – often themselves members – true to their principles and avoiding the well documented phenomenon of “judicial drift” where conservative justices moderate their positions over time.⁹ While conservative justices may not be accountable to the Federalist Society in the formal sense of the word (they will not be voted out of office or have their campaigns defunded like a member of Congress), they must reckon with the informal court of opinion and esteem of their conservative colleagues if they wish to continue participating in the Federalist Society and be seen as its standard bearer on the bench.

In an interesting example of this dynamic, a concurrence with the majority penned by Chief Justice John Roberts in *Citizens United v. Federal Election Commission* argued for a uniquely originalist (that is to say, Federalist Society-derived) understanding of “judicial restraint.”¹⁰ While legal conservatives often argue for the importance of *stare decisis* on quasi-Burkean, incrementalist grounds, many members of the Federalist Society developed an understanding of original intent consistent with judicial “activism” and overturning precedent (though not all, and Hollis-Brusky does an excellent job describing this internal debate in detail). If the extant precedent violates the principles of an originalist Constitution, they argue, then the best way to save the rule of law is to overturn such precedent and reestablish a legal interpretation consistent with the original intent of the Founders. Roberts, Hollis-Brusky argues, did just that in *Citizens United* when he claimed that “fidelity” to an unconstitutional precedent does violence to the “constitutional ideal.”¹¹ According to Hollis-Brusky, Robert’s opinion is best understood as a kind of signal to the Federalist Society that he is willing to take on board their creative reformulation of judicial restraint, thereby encouraging Society members to try more originalist cases, all the while keeping himself in the Federalist Society’s good graces.¹²

These claims of pseudo-oversight on the part of the Federalist Society are intriguing and intuitively compelling, but difficult to prove. While Hollis-Brusky gestures toward an interesting dynamic at work between judges and the Federalist Society, I would have liked her to spend more time empirically demonstrating this accountability. As it stands, she only demonstrates this through remarks from interviews of Federalist Society members who claim to have chided Scalia, for example, after he ruled in a way they found unfavorable.¹³ Or, as is the case with Roberts in *Citizens United*, generally minimalist justices adopting originalist positions. One can imagine a host of other plausible

8. HOLLIS-BRUSKY, *supra* note 2, at 113.

9. *Id.* at 156.

10. 558 U.S. 310 (2010).

11. HOLLIS-BRUSKY, *supra* note 2, at 86 (quoting *Citizens United*, 558 U.S. at 378–79 (Roberts, C.J., concurring)).

12. *Id.*

13. *Id.* at 155.

explanations for the latter beyond “signaling” (perhaps Roberts was simply convinced), and it is unclear what concrete effects the condemnation from Federalist Society members, even prominent ones, would have on a conservative giant like Scalia which would compel him to change his mind. Put another way, this aspect of her argument suffers both from selection bias and an unclear sense of the mechanisms of influence. These points are not damning critiques by any measure, but are instead born of a desire to have seen more from Hollis-Brusky to flesh out this novel, if controversial, aspect of her argument.

The third, and arguably most important, aspect of her argument is fortunately far more compelling. Not only does the Federalist Society generate the intellectual resources and oversight necessary for a conservative “counter-revolution” – it also creates the broader political and intellectual climate necessary for this change by normalizing once stigmatized sets of intellectual commitments. Originalism, once widely condemned and chastised as an incoherent and wholly unworkable set of jurisprudential commitments, has taken on new life and a new sort of respectability thanks in no small part – and perhaps the largest part – to the work of Federalist Society members and their influence on judges. This new lease on intellectual life has been the catalyst for fundamental constitutional changes that reverberate throughout the whole of American political life. Conservative law students, once stigmatized for holding originalist views, now have access to a national organization of likeminded students and practicing attorneys. Once those students themselves become lawyers, judges, or politicians, they further naturalize conservative and originalist jurisprudence as a respectable form of constitutional interpretation.

Perhaps the clearest example of this is the extent to which even liberal justices have started to both seriously contend with originalist arguments and make originalist claims of their own. Justice Stevens, for instance, made a spirited dissent in *Citizens United*, arguing that moving too quickly to overturn precedent violated the original intent of the Constitution.¹⁴ For Hollis-Brusky, this is evidence that the Federalist Society has radically changed the nature of the discourse circulating at the Supreme Court and in constitutional proceedings around the country. Liberal justices are unlikely to quaff the originalist Kool-Aid anytime soon, but they are increasingly submerged in it, and so must contend with its ideas and arguments, often on its own terms. As conservative, libertarian, and Tea Party styled politicians take this originalist discourse into the mainstream, Hollis-Brusky makes a strong case that these ideas would not have the force or discursive currency they do on the contemporary right (and, increasingly, in the broader polity) were it not for the efforts of the Federalist Society and its many members.

Jefferson Decker’s *The Other Rights Revolution* presents a richly textured and meticulously researched look into the development of conservative public interest law firms throughout the 1970s and 1980s, and their effects on the direction and shape of the new conservative movement. His central argument provides a fresh take on the development of the new right’s policy agenda: much of what we now take for granted as paradigmatically “conservative” policy positions, such as a firm commitment to individual property rights and free markets at the expense of government regulation, has its roots in the local politics of western states that pitted environmentalist groups and their public

14. HOLLIS-BRUSKY, *supra* note 2, at 87 (citing *Citizens United*, 558 U.S. at 948–58 (Stevens, J., concurring in part and dissenting in part)).

interest legal allies against business interests in the latter quarter of the twentieth century. Conservatives then adopted the tactics of their enemies, creating their own public interest firms and creatively reformulating the rights discourses of the “new left” social movements of the 1960s to instead defend the economic rights of individuals to free exchange in the marketplace. Once conservatives came into national power under President Ronald Reagan, the leaders of these conservative public interest firms were placed in positions of influence in Washington, thereby shaping the Reagan administration’s policy priorities and commitments – policy commitments that have since become naturalized by conservative politicians nationwide.

Decker’s account begins with a description of the well-known story of the development of the Great Society regulatory state. Under President Lyndon Johnson, American liberals began thinking about more than mere economic prosperity, turning their attention toward social problems like poverty and environmental degradation that were often seen as a negative byproduct of excessive affluence. Part and parcel of this shift was the creation of so-called “public interest” law firms like Ralph Nader’s “Public Interest Research Groups” that took on issues like product safety regulation and environmental protection at the expense of business interests.¹⁵ These firms soon developed into a cottage industry, attracting idealistic law school graduates who rejected the corporate law track, and often made cozy alliances with liberal bureaucrats and judges. Their success resulted in no small part from “fee shifting,” whereby public interest firms were entitled to attorney’s fees and other expenses related to a victorious suit so long as it was demonstrated that the result served the public good, which alleviated the imbalance of financial resources between big business and these upstart non-profit firms.¹⁶ It was in response to these new liberal public interest firms that conservative-minded lawyers began to organize their own with the intent to fight liberals at their own game.

Through the 1970s, following the lead of conservative lawyers (and former Supreme Court Justice) like Lewis F. Powell and free market businessmen like Joseph Coors, conservative lawyers in California and Colorado formed their own public interest firms to challenge the constitutional basis of social and economic regulation. In California, attorney and Reagan aide Ronald Zumbrun formed the “Pacific Legal Foundation” to combat environmental regulations, which he and other likeminded conservatives argued impinged on the rights of individuals and businesses. His first, ultimately failed, case involved challenging the California Coastal Commission’s restriction on Viktoria Consiglio, a private citizen, that prevented her from building a house on coastal property. Meanwhile, in Colorado, Joseph Coors bankrolled the creation of the “Mountain States Legal Foundation,” led by James G. Watt, as part of the so-called “sagebrush rebellion” of western states against the heavy hand of federal regulation of public lands. Their opening salvo was *Valdez v. Applegate* where Mountain States demanded review of the environmental impact statements related to the reduction of grazing leases to ranchers.¹⁷ The courts agreed, thereby opening a space for conservative firms to make use of the same

15. JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* 27 (2016).

16. *Id.* at 33.

17. *Id.* at 85 (citing *Valdez v. Applegate*, 616 F.2d 570 (10th Cir. 1980)).

delaying and reviewing tactics of the public interest left to challenge federal regulation.

These cases, Decker argues, demonstrate that the conservative political commitment, that “America need[s] less public property and more private property, and that private property needed better protection against government interference in its owner’s rights,” emerged from the particular political conditions of these western states and their battle against federal regulation of public land, a political contest impossible to reproduce in other areas of the country like the south and east where federal land holdings are minimal.¹⁸ Conservative anti-statism, at least in terms of its specific policy content, owes its origins to these legal battles initiated by conservative public interest firms in the 1970s where they turned the tactics of the public interest left against state regulation of private individuals.

This political jiu-jitsu continued with the election of Ronald Reagan, and many of the leaders of these conservative public interest firms found themselves in positions of political influence in Washington. As conservative firms expanded and conservative lawyers took up prominent positions in the bureaucracy, they began to articulate “an almost dizzying number of conservative counter-rights” that would defend the interests of majorities, aggrieved by imposition of minority rights, from the “original” rights revolution of the 1960s.¹⁹ The assertion of counter-rights troubled many legal conservatives, however, as they feared biting the fruit from the tree of liberalism – using state power to enforce individual rights – would undo the very foundational principles of restraint that conservatives had sought to instill in government all along. This internal division among conservative lawyers was never fully resolved, but those in favor of judicial and state activism prevailed, redefining the concept of rights through a series of successful court cases and bureaucratic policies to include an individual’s right to economic exchange in a marketplace free from most government regulation.²⁰ As Decker puts it in the book’s concluding paragraph, “Conservatives could not turn back the clock on the rights revolution. But they could make a rights revolution of their own.”²¹ Conservative lawyers had successfully transformed the political machinery and discursive resources of the new left to undo the regulatory state it helped build on the basis of a reformulated notion of economic rights.

Since its formal designation decades ago, American political development (“APD”) has had an uneasy relationship with the dominant strains of political science scholarship. Often derided as “mere” description or a-theoretical antiquarianism by those who emphasize the “science” side of political science, Hollis-Brusky’s account demonstrates that the choice between theory building and thick description is a false one. She combines the methods of historically oriented scholars – in-depth interviews, archival research, and an attention to discursive meaning – with a clear and well-reasoned theoretical apparatus in the PEN. Every major case is accompanied by a chart demonstrating the lines of influence at work between the Federalist Society, academic journals, judges, and their aides. These numerical correlations are bolstered by thick contextual evidence from the

18. *Id.* at 94.

19. *Id.* at 108.

20. DECKER, *supra* note 15, at 181–82.

21. *Id.* at 227.

actors themselves within the Federalist Society. This evidence is, in turn, used to further refine the theoretical apparatus around which her argument is structured. While at times the connection between her empirical evidence and theory building project is strained, such as the unsatisfying argument concerning judicial accountability, on the whole she produces a compelling argument, inducted from the evidence, as to why the Federalist Society ought to be considered a PEN. Other APD scholars interested in the ideological and discursive influence of elite social groups like the Federalist Society will find the notion of a PEN quite useful in making sense of their own pet influence groups. The concept of a PEN itself represents a bridge to other sub-disciplines, like international relations, and can serve as a means for better intra-discipline communication and cooperation.

If Hollis-Brusky represents the more “theoretical” side of APD scholarship, then Decker’s work stands firmly at the other pole. It is a full-throated, detailed narration of the rise of the new legal right that lets the argument emerge from the details and eschews any theoretical scaffolding. This is at once the greatest strength and weakness of *The Other Rights Revolution*. On the one hand, Decker’s account is packed full of historical nuance, detail, and the rich inner lives of his eccentric conservative protagonists. These features produce an engaging, insightful, and often times entertaining narrative. On the other hand, it is often unclear to what end all of this historical detail is aimed. It is not until the final chapter that the reader begins to gain a sense of the central argument of the book: that conservative lawyers developed a new concept of individual economic rights, derived from the political battles of western lawyers who took up the tactics of the public interest left, that was used by conservatives in power to push back against the regulatory state. As a result, this argument gains the appearance of an afterthought, rushed in at the last minute to tie a too-neat bow around a bursting bundle of historical detail. This is not to say that the argument is unconvincing. Rather, the work would have benefitted from a clearer sense of the payoff of Decker’s wonderfully researched narrative at its outset, and throughout its various episodes.

In terms of their contributions to the ever-growing literature on the rise of the new American right, both works share a number of strengths and novel contributions, but they also share, in my view, an unfortunate limitation. Perhaps the greatest strength of each is the extent to which they demonstrate the tension-riddled development of the conservative movement. All too often the new right is treated as an inevitable and cohesive monolith, unified in its ideological and political vision. In contrast, both works treat the new right and its lawyers as a collection of idiosyncratic individuals; unified to a certain extent, but far from wholly cohesive.

Perhaps the best example of this attention to ambiguity, present in both accounts, is the division between traditional conservative legal scholars who preached restraint and saw “judicial activism” as the cardinal sin of America’s liberal turn, and those on the new legal right who advocated an embrace of judicial activism for conservative and originalist ends. This split echoes a broader division within the conservative movement between the “traditionalists” and “libertarians” described by many scholars of the American right who

also analyze this time period.²² While both authors claim that the Burkean, traditionalist side lost that battle, to their great credit they do not then essentialize the legal right as *only* made up of judicial activists. Instead, they both demonstrate that this tension continues to exist, and in fact might now inform liberal justices' opposition to their conservative counterparts, as Hollis-Brusky describes in Justice Stevens' dissent in *Citizens United*.

Extending from this debate about judicial activism, both authors also detail the ways the new right grappled with the issue of state power generally. Once in office or in other positions of power, conservative lawyers tied themselves in philosophical knots about how to wield the very powers of a federal government they had made a career of resisting and trying to curtail. The results of this debate, detailed by both authors, demonstrates why we ought not take for granted the policy positions of conservatives as natural or necessary extensions of their philosophical commitments. For example, the notion that wielding state power can in fact further originalist ends is a counterintuitive position precisely because it was constructed and formulated within the heat of the internal debate among conservative lawyers about what, precisely, they ought to do with this newfound federal power. Scholars of the right who emphasize its high principles should learn from this example and refocus their attention to the political contestation among actors on the ground, rather than the supposedly fixed principles of their political theory.

In addition to their attention to tension, both authors spend a great deal of time emphasizing the interpersonal connections animating the new legal right. While ideas and beliefs are of course important, they are useless without actual individuals who hold them. Hollis-Brusky emphasizes time and again the critical importance of the ordinary personal interactions – the dinner parties, conferences, and conversations over drinks – that make the Federalist Society such a powerful force in American politics. Likewise, Decker continually demonstrates how the friendships, camaraderie, and business connections of western state conservatives translated into increased positions of influence for the budding group of public interest conservative lawyers. To their great credit, neither author indulges the impulse to abstract these connections to something like “social capital,” and instead emphasize the critical role of context and nuance that gives these connections their force. Other scholars, beyond those who study the American right, can learn from this focus on the power of the personal.

While the strengths described above are enough to merit serious attention to these two works from scholars of the American right, both books, ironically, suffer from their own inattention to the broader scholarship on American conservatism. Specifically, I am left unconvinced by both author's arguments when articulated in their most ambitious form: that the legal right and its various organizations, whether the Federalist Society or public interest firms, are the central motivating force behind either the new right's programmatic agenda or its ideological commitments. Both authors unnecessarily veer too far in this direction in an effort to distinguish their works as novel accounts of the rise of the new right. While this is true insofar as they address fresh empirical content in the form of conservative lawyers, neither spends much time situating themselves among other accounts of the conservative movement (though Decker comes close in his discussion of

22. For a classic analysis of this tension and an account of its resolution among conservative intellectuals, see JEROME L. HIMMELSTEIN, *TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM* (1990).

the importance of western states in his epilogue). As a result, their works appear as arguments in a vacuum, and the legal right by extension looks like an autonomous force free from influence or interaction with the broader conservative turn of the latter twentieth century. This de-contextualization of the legal right from the broader conservative movement is ironic and surprising, considering that both author's accounts spend so much effort to emphasize the importance of context in other ways.

To be fair, both authors also emphasize less ambitious claims about the role conservative lawyers played in the reformation of American jurisprudence and constitutional interpretation. Such arguments are compelling and surely valuable to those only interested in American legal development. However, insofar as these books attempt to explain something central to the rise of American conservatism, their lack of a firm sense of place within the literature on the modern American right makes that aspect of their work ring hollow. Attention to the legal right is surely a needed and novel intervention, but it is certainly not the whole story of America's embrace of conservative governance, just as conservative lawyers may not be the prime movers of conservative ideology. Put another way, it is difficult for a reader to accept their more ambitious claims in the absence of some sense why lawyers were more important to the rise of the new right than other commonly cited forces. Scholars of the American conservative movement will thus likely see these works as an unfortunate missed opportunity. Rather than using the lens of elite conservative lawyers as a means to better flesh out the story of the new right in conversation with other, potentially competing, accounts, Hollis-Brusky and Decker instead present two excellent, but atomized, stories of American conservatism.

In spite of this criticism, both works present superbly researched and clearly articulated accounts of the dynamics and development of the new legal right. Students of American political development, public law, and the American right will find these works both essential and stimulating. With these two books, no account of the modern American conservative movement will be complete without grappling with the clear and powerful role played by conservative lawyers and their professional organizations.