

# Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in *National Review*, 1955–1980

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*Contemporary conservatism places an affinity for, fidelity to, and defense of the U.S. Constitution at the center of its electoral, institutional, and movement politics. Through a survey of popular constitutional discourse in postwar conservatism's premiere magazine, National Review between 1955 and 1980—presented in the context of the development of (conservative) political thought and the institutional infrastructure for idea generation and propagation—I argue that that defense began to assume an ecumenically populist, antielitist, and antijudicial form only beginning in the mid-1950s, and a shared commitment to “originalism” only in the late 1970s. From the 1950s through the late 1970s, conservative constitutional argument was centered not on the judiciary, but rather on the (often divisive) constitutionalism of Congress and the executive, and on divergent views concerning structuralist versus moralist constitutional understandings. Over time, however, through dialogic engagement taking place over and through unfolding political events, the movement's diverse intellectual strands reframed and reinforced their relationship by focusing less on their differences and more on an ecumenically shared populist critique of judicial power emphasizing a virtuous demos arrayed against an ideologically driven, antidemocratic, law-wielding elite. During this formative period, besides advocating a particular approach to textual interpretation, constitutional discourse played a critical role in fashioning movement symbols and signifiers, forming hopes and apprehensions, defining threats and reassurances, marking friends and enemies, stimulating feelings of belonging and alienation, fidelity and betrayal, and evoking both rational logics and intense emotions—all of which motivate and inform the heavily constitutionalized politics of American conservatism today.*

This is a magazine-reading country.<sup>1</sup>  
We have long needed a good conservative  
magazine. . . . This is not it. . . . because it is  
neither good nor conservative.<sup>2</sup>  
— Dwight Macdonald

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## INTRODUCTION

It is apparent to observers of contemporary politics that American conservatives emphasize their affinity for, fidelity to, and defense of the U.S. Constitution, and distinguish Constitution-defending ordinary people like themselves from Constitution-defying elitist liberals and progressives. While conservatives hew faithfully to the Constitution as the Founders originally designed and understood it, liberals and progressives (and the judicial elite ruling under their sway) have unmoored the polity, weighing the

political science graduate students, provided additional research support.

1. Dwight Macdonald, “Masscult and Midcult II,” *Partisan Review* (Fall 1960): 589–631, 618.

2. Dwight Macdonald, “Scrambled Eggheads on the Right,” *Commentary* (April 1956): 367–73, 368–69 (“Culturally, a conservative is someone like Irving Babbitt or Paul Elmer More, not always the liveliest company . . . but a respecter and defender of tradition . . . . Politically, a conservative is someone like . . . the late John Marshall Harlan . . . whose respect for the Constitution was such that he insisted on interpreting the Fourteenth Amendment according to the clear intent of the Congress that passed it.”).

anchor dropped by the Founders in favor of relativist experimentation and the reading of ever-shifting and often dangerous modern notions of progress into the constitutional text.

This article argues that, while the defense of the Constitution was important for conservatives long before the mid-twentieth century, that defense began to assume an ecumenically populist, antielitist, and antijudicial form only beginning in the mid-1950s. That defense, moreover, was underwritten by a shared commitment to interpretive “originalism” only beginning in the late 1970s. The constitutionalism purveyed by today’s conservatives is thus best construed as a developmental phenomenon—as the dynamic product of the interaction of ideas with politics across time.

Through a survey of “popular” constitutional discourse in postwar conservatism’s premiere magazine, *National Review* (NR), between its 1955 founding through Ronald Reagan’s 1980 election, I chart the development of conservative constitutional argument over the course of the modern movement’s ascendancy. This survey suggests that, from the 1950s through the late 1970s, conservative constitutional argument was centered not on the judiciary, but rather on the constitutionalism of Congress and the executive, and on a debate concerning the respective places of structuralist versus moralist constitutional theories. This debate often pitted different strands of the movement against each other, sometimes bitterly. Over time, however, through dialogue taking place over and through unfolding political events—including, pivotally, the Supreme Court’s decisions in *Brown v. Board of Education* (1954) and *Roe v. Wade* (1973)—libertarians, traditionalists, and neo-conservatives reframed and reinforced their relationship by focusing less on their abstract philosophical differences and more on an ecumenically shared populist critique of judicial power emphasizing a virtuous *demos* arrayed against an ideologically driven, antidemocratic, law-wielding elite, in the process forging a potent communal political identity.<sup>3</sup>

I begin with a general discussion of the role that constitutional discourse—argument, the interpretation of events, and the construction of symbols—can play within social movement politics. Next, I outline the diverse intellectual and dispositional starting points of three important strands of postwar

3. *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding unconstitutional de jure racial segregation by public schools); *Roe v. Wade*, 410 U.S. 113 (1973) (announcing a woman’s constitutional right to terminate her pregnancy). My account here can be added to the list of critiques of Gerald Rosenberg’s argument against the significance of *Brown* and *Roe*: Gerald Rosenberg, *The Hollow Hope: Can the Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991). On the significance of popular constitutional discourse, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

movement conservatism: libertarianism, traditionalism, and neoconservatism. I describe the founding of NR as a venue for ecumenical discussion and debate among a diverse cross-section of conservatives and as an instrument of movement evangelism. I also describe the mobilization of resources and the construction of an institutionalized support structure to back the incubation and dissemination of conservative political and constitutional ideas and forge political and ideational networks. I then provide an empirical, interpretive account of the development of constitutional discourse in NR, emphasizing its role in fostering ecumenicalism through constitutionalism. I show how the discourse shifted toward a focus on the judiciary and how conservatives began to take up a “reactive originalism”—a set of sporadic and nonfundamentalist appeals to the principles of the Founders and a halting, conflicted critique of judicial power. In case studies tracking the trajectory of discourse concerning civil rights and abortion rights, I show the emergence of a more robust critique of judicial power characterizing judges as handmaidens of the cultural and intellectual elite. Even at this point, in the mid to late 1970s, constitutional debate in NR swam in broader currents, emphasizing not simply judicial excess, but the broader nature of the American political experiment. Only with the publication of Raoul Berger’s *Government by Judiciary* (1977) do we see the elements of the contemporary conservative constitutionalist ideology cohere, with a focus on activist, elitist judges imposing their (amoral) will on the polity, and simultaneous calls for a proactive originalism holding that fidelity to the Constitution’s original meaning is the only legitimate approach to constitutional interpretation.<sup>4</sup>

## CONSTITUTING IDENTITY DISCURSIVELY

In his study of the contemporary conservative movement’s “Wednesday Meetings” in Washington hosted by conservative activist Grover Norquist, Thomas Medvetz emphasizes the movement’s “peculiar combination of internal *heterogeneity* and *cohesion*” and the way in which such gatherings serve as sites for

4. I do not seek here to “prove” that the postwar conservative movement shifted from either a non- or a less-constitutionalist to a Constitution-focused paradigm. Because my research has surveyed only constitutional discussion, I cannot demonstrate that there is more or less of it than some other kind of talk (such as non-constitutional “policy” discourse). Moreover, because I did not survey earlier conservatisms, I cannot “prove” that constitutionalism became a more important part of conservative discourse in this period. My interest is in illustrating *the ways* in which that discourse was important to *this movement, at this time*. Given space limitations, I look only at constitutional discourse in the movement’s flagship journal, and focus on only a few illustrative areas: judicial power, race, and morals (abortion). —The article is suggestive, providing circumstantial evidence for its thesis, anticipating future scholarship on its subject.

the maintenance of alliances essential to conservatism's political success. In the formative 1950s and 1960s, Medvetz notes, conservative magazines served a similar cohesive function. It was there—as in Norquist's meetings subsequently—that core principles were forged, and a slate of enemies—"ideological foils"—were constructed.<sup>5</sup> As mass-produced commodities selling for a price, implicating "a socially organized technology of production and distribution," magazines are unique sites for the production of movement cohesion. And, as a magazine expressly conceived by its founder, William F. Buckley, Jr., as a crucible for such cohesion, and an engine of movement advancement, NR is an unusually interesting case study in the phenomenon.<sup>6</sup>

NR succeeded as a magazine in part because it *entertained*. Buckley's comic sensibility was legendary, and he consistently valued spirited presentation, humor, and wit. Moreover, NR *educated*. Political discussion in NR, while lively, was always serious. The impressive academic and intellectual pedigree of many of its writers was especially important in a context in which conservatism had been perceived as bigoted, ignorant, and provincial—of being unable to hold its own in the battle of new ideas that constituted political modernity. NR's initial readers had witnessed the end of World War II, the onset of the Cold War, and watched with increasing uneasiness the outbreak of the civil rights movement, the cultural upheavals of the 1960s, and the chaos and decline of the 1970s. Yet, as World War II ended, American men, in particular (many of whom, like Buckley, were veterans and G.I. Bill beneficiaries), were assuming relatively anonymous white-collar positions in large, bureaucratic corporations. Many moved from cities to stand-alone houses in the new suburbia, potentially taking them—so it felt—out of the game at a critical moment for the future of the free world, and the American

constitutional experiment. Magazines like NR drew these men back in, offering them intellectual community and camaraderie, and providing a thrilling sense that they remained vitally involved in the most significant contests and debates of their day. NR's readers were invited to imagine themselves as bulwarks of God, morality, Western civilization, and country—and defenders of the Constitution—at a time when, they were repeatedly reminded, all were under siege. NR gave these men an "opportunity to feel that education has not ceased for [them]," and that, their day jobs in grey flannel suits and the placid domesticity of Levittown and New Canaan notwithstanding, they remained denizens of the world of ideas and soldiers in their era's intellectual and political combat.<sup>7</sup>

Postwar movement conservatism thus offered these men (as George Santayana once observed of religion) "another world to live in." Its culture cultivated and constituted an "intersubjective world of common understanding" that animated this bounded community, and determined the terms of its engagement with the wider world. It provided "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forums by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life."<sup>8</sup>

That "intersubjective understanding" cohered through constitutionalism. While proponents of modern liberalism, and its progenitor progressivism, have long been ambivalent about their commitment to the Constitution—careering, at various points, from contempt to suspicion to critique to pride and back—modern conservatives have much more consistently championed it. They have cast themselves as defenders of the faith and portrayed progressives and liberals as Brutuses who stab the Constitution—and the Founders—in the back.<sup>9</sup> Ultimately, fidelity to the Constitution in the guise of "originalism" (that is, to the ostensible obligation of judges to interpret the Constitution according to its "original intent," subsequently refined as its "original meaning") became foundational to the public philosophy of conservatism-in-power, instantiated in an

5. Thomas Medvetz, "The Strength of Weekly Ties: Relations of Material and Symbolic Exchange in the Conservative Movement," *Politics and Society* 34 (September 2006): 343–68, 344–45, 347–48.

6. Janice A. Radway, *Reading the Romance: Women, Patriarchy, and Popular Literature* (Chapel Hill: University of North Carolina Press, 1991), 20, 96. Political magazines with strong identity-constructing and reinforcing ambitions—like NR on the Right, and *The Nation* on the Left—even offer cruise vacations where readers can rub elbows with editors, writers, and fellow devotees. See <http://www.nrcruise.com> and <http://www.nationcruise.com>. Boundaries are also maintained by shunnings, such as of Christopher Buckley (William's son), and former Reagan and George H.W. Bush administration Office of Legal Counsel lawyer and conservative law professor Douglas Kmiec, for their support of Barack Obama, and in Kmiec's case, for his ostensible challenge to the authority of the Catholic Church in arguing that Obama's pro-choice views shouldn't preclude Catholics from voting for him. See Howard Kurtz, "National Review Boots Buckley Son for Obama Boost," *Washington Post* (October 15, 2008); Douglas W. Kmiec, *Can a Catholic Support Him? Asking the Big Question About Barack Obama* (New York: Penguin, 2008).

7. Radway, *Reading the Romance*, 86, 111, 113–14.

8. Clifford Geertz, "Religion as a Cultural System," in Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 87, 89, 92; George Santayana, *The Life of Reason; or the Phases of Human Progress: Reason in Religion* (New York: Charles Scribner's Sons, 1905), 6.

9. See, e.g., Woodrow Wilson, *Congressional Government: A Study in American Politics* (Boston: Houghton Mifflin, 1885); Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913); Robert A. Dahl, *How Democratic Is the American Constitution?* (New Haven, CT: Yale University Press, 2002); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (New York: Oxford University Press, 2006).

aggressively vetted Office of Legal Counsel, Justice Department, and Judiciary.<sup>10</sup>

### CONTEXT: A FRAGMENTED LANDSCAPE—CONSERVATISM AT MIDCENTURY

The intellectual self-confidence and seeming imperiousness to intellectual critique of conservatism that many of its opponents—and some of its proponents<sup>11</sup>—find maddening is a sign of the deep substructure of ideas behind the modern conservative movement, and that substructure’s power to create both identities and communities. During the second half of the twentieth century, these ideas were set out and debated outside of the most vaunted institutional and cultural sites of liberal/progressive idea incubation—universities, think tanks, and urban bohémias—(where, as conservatives came to see it, their ideas were ignored—if not actively censored), and published in samizdat academic and journalistic work passed from hand to hand without any imprimatur from the powers that be. For this reason, the first experience of conservative movement recruits and adherents with these ideas felt Promethean. Recognizing that, even with elite educations under their belts, the “Truth” had been denied them, postwar movement conservatives become passionate autodidacts, assuming responsibility for their own educations. That their antagonists took them to be ignorant of modern thought only fed their passion for the pursuit of (uncontaminated) knowledge and steeled their resolve. This sense of themselves as embattled men and women of ideas fed their confidence and fortified their resistance.

During liberalism’s heyday, conservative intellectuals flew beneath the radar of the liberal intelligentsia to forge a powerful, unifying, antiprogressive political—and constitutional—counternarrative. Given the diverse intellectual strands feeding the movement, the contours of that counternarrative were largely up for grabs. The imperatives of successful coalition politics, however, pressured conservatives to unite around common principles and policy

10. See Steven Teles, *The Rise of the Conservative Legal Movement: The Battle for the Control of the Law* (Princeton, NJ: Princeton University Press, 2008); Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition* (Chicago: University of Chicago Press, 2008); Johnathan O’Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore, MD: Johns Hopkins University Press, 2007); Steven G. Calabresi, ed., *Originalism: A Quarter Century of Debate* (Washington, DC: Regnery, 2007) (foreword by Antonin Scalia); Reva Siegel, “Dead or Alive: Originalism as Popular Constitutionalism in Heller,” *Harvard Law Review* 122 (2008): 191; Robert Post and Reva Siegel, “Originalism as Political Practice: The Right’s Living Constitution,” *Fordham Law Review* 75 (2006): 546.

11. See, e.g., the contemporary debate about whether the movement is suffering from “epistemic closure.” Patricia Cohen, “‘Epistemic Closure’? Those are Fighting Words,” *New York Times* (April 27, 2010).

objectives and to regulate the emotional temperature of their disagreements. The movement was initially composed of three major intellectual strands: 1) libertarianism, 2) traditionalism, and 3) neoconservatism.

### The Three Strands of Postwar Conservative Thought

#### LIBERTARIANISM

Libertarian conservatives placed primary emphasis on the imperative of maximizing liberty and celebrating individualism. They believed that the overriding threat to both was government—that is, the state. Only through the imposition of strict limits on state power, and the attendant flourishing of virtually unregulated free-market capitalism, could individual liberty be maximized.

Libertarian intellectual life flourished in the postwar years, spurred largely by the impetus of Austrian School economists Ludwig von Mises and Friedrich von Hayek. Hayek’s seminal *The Road to Serfdom* (1944)—published serially in the United States in *Reader’s Digest*—became a movement landmark. The Austrian School of free-market economics was forged in Vienna by a coterie of scholars reacting to what they understood to be a powerful and all-but-unimpeded march toward socialism by Western European governments.<sup>12</sup> Another influence was a figure considered eccentric by many, Ayn Rand, whose (atheistic) Nietzschean celebration of the self-made, ultra-capitalist individualist assumed fascistic overtones (which seemed to especially enthrall budding adolescent male conservatives).<sup>13</sup> A third

12. See Brian Doherty, *Radicals for Capitalism: A Freewheeling History of the Modern Libertarian Movement* (New York: Public Affairs, 2007); Kim Phillips-Fein, *Invisible Hands: The Making of the Conservative Movement from the New Deal to Reagan* (New York: W.W. Norton, 2009), 34–45; Angus Burgin, “The Return of Laissez-Faire” (Ph.D. Dissertation, Department of History, Harvard University, 2009); George H. Nash, “Friedrich Hayek and the American Conservative Movement,” in George H. Nash, *Reappraising the Right: The Past and Future of American Conservatism* (Wilmington, DE: ISI Books, 2009), 47–59. This new anchor for laissez-faire economics all but severed the link between contemporary free-market proponents and their (politically repudiated) social Darwinist progenitors like William Graham Sumner (1840–1910). In more recent years, however—buttressed, no doubt, by the broader intellectual vogue for explaining social life through the lenses of evolutionary and sociobiology—that older social Darwinist anchor for libertarianism has once again been revived. For instance, The Liberty Fund—about which more presently—has reissued the writings of both Herbert Spencer and Sumner. Herbert Spencer, *The Man Versus the State, with Six Essays on Government, Society, and Freedom* (Indianapolis, IN: Liberty Fund, 1982); Herbert Spencer, *The Principles of Ethics* (Indianapolis, IN: Liberty Fund, 1978) (2 vols.); William Graham Sumner, *Liberty, Society, and Politics: The Essential Essays of William Graham Sumner* (Indianapolis, IN: Liberty Fund, 1992) (Robert C. Bannister, editor). The contemporary home for Austrian Economics is the Auburn, Alabama-based Ludwig von Mises Institute (founded in 1982). See <http://mises.org/>—

13. See Patrick Allitt, *The Conservatives: Ideas and Personalities Throughout American History* (New Haven, CT: Yale University Press, 2009), 164; Phillips-Fein, *Invisible Hands*, 68–70, 77; Jennifer

major figure was the University of Chicago economist Milton Friedman, whose *Capitalism and Freedom* (1962) provided a roadmap for much of the Republican policy world of the 1980s.<sup>14</sup>

Postwar libertarianism's pioneering journal was *The Freeman*, which, as early as the 1950s, was alighting upon the then-novel theme that libertarianism and constitutional fidelity were synonymous. In a notable 1956 article celebrating Constitution Day, Charles Hull Wolfe expounded on "the individualist philosophy of our Founding Fathers." He then asked "Who, then, remain . . . as the genuine upholders of 'that magnificent document'? It would seem that the most able supporters might well be the libertarians. . . ." They are thinkers who "entertain views closely allied to those held by the strict constructionists among the Constitution [sic] framers."<sup>15</sup>

Wolfe observed, however, that only "rarely . . . does the libertarian rise up today as a staunch and vocal champion of the U.S. Constitution. . . . He is apt to mention it seldom, and even then with only mild endorsement." Libertarianism had been hindered by "the conviction . . . that libertarianism and Constitutionalism conflict—that there is essential opposition between the philosophy of freedom and our national charter, and that hence, one cannot consistently be both a libertarian and a Constitutionalist." But, Wolfe insisted, "the libertarian philosophy and our Constitution as originally conceived and interpreted—can be viewed as an inseparable whole: cause and effect, idea and identity, a discovery and its founding." This, he admitted, would be a hard sell to many libertarians, who seem convinced that "the U.S. Constitution never was a direct manifestation of the libertarian philosophy." A truly libertarian Constitution "would [have] place[d] far more severe and specific limitation on the prerogatives of government—greater restrictions on its powers to tax and spend; and outright elimination of its now-presumed mandates to transfer wealth, to subsidize, to regulate the economy, and to engage in a host of business activities," they would believe.<sup>16</sup>

But Wolfe argued this libertarian understanding "proceeds either from insufficient recognition of

the extent to which the original Constitution *did* limit the federal government, or else from an inadequate appreciation of the actual (and desirable) *flexibility* of the Constitution." "Admittedly," he continued, "the Constitution as currently amended and interpreted, expresses the libertarian ideal only to a minimum degree. It has been twisted and bent to serve the purposes of collectivism. But this is no accusation against the original document," he maintained. "[J]ust because our Constitution has been mutilated . . . is that reason for the libertarian to abandon it? . . . Just because the original Constitution does not limit the federal government as severely as we might like . . . is that reason to dismiss it, especially at a time when the original document is still much nearer the libertarian standard than is popular opinion?" In appealing to the Constitution, Wolfe argued, "we would take ourselves out of the position that permits opponents to label one a 'quaint idealist' or a 'dreamy theorist' or a 'mere philosopher'; and we [would] bring to our lofty perceptions of freedom the virility of law and the realism of history. [We would] document the fact that libertarianism, to a remarkable degree, already has been embodied in the fundamental law of this land, as seen in a strict interpretation of the inspired charter . . ."<sup>17</sup> These themes were frequently revisited in *The Freeman*, with its writers lamenting that "we have veered from the course our fathers charted," and calling for the restoration of the Constitution "to its original purity and strength."<sup>18</sup>

### TRADITIONALISM

Traditionalist conservatives shared a primary commitment to the preservation of the traditional moral order. They condemned the modern drift toward relativism and insisted upon the existence of unchanging, time-tested moral truths that were most fully embodied in the Christian (sometimes Judeo-Christian) religious tradition. According to traditionalists, only a political order built on the foundation of these truths could be truly free (because political freedom lacking such a base would lead either to anarchy or tyranny).<sup>19</sup> Most American traditionalists

Burns, *Goddess of the Market: Ayn Rand and the American Right* (New York: Oxford University Press, 2009).

14. Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962). Although seminal to the movement, both Hayek and Friedman rejected the label "conservative," insisting they were liberals in the traditional (European) sense—i.e. "classical liberals." See, e.g., F.A. Hayek, "Why I Am Not a Conservative," in Frank S. Meyer, ed., *What Is Conservatism?* (New York: Holt, Reinhardt and Winston, 1964), 88–103. Burgin argues that Friedman's free-market liberalism was more doctrinaire than Hayek's and that, as Friedman's influence within the movement waxed, Hayek's waned. Burgin, "The Return of Laissez-Faire."

15. Charles Hull Wolfe, "Libertarians and the Constitution," *The Freeman: Ideas on Liberty* 6:9 (September 1956).

16. Wolfe, "Libertarians and the Constitution."

17. *Ibid.*

18. Samuel B. Pettengill, "If I Were King," *The Freeman: Ideas on Liberty* 10:9 (September 1960). "Twilight of Liberty?" *The Freeman: Ideas on Liberty* 8:7 (July 1958).

19. See, e.g., Richard Weaver, *Ideas Have Consequences* (Chicago: University of Chicago Press, 1948); Russell Kirk, "Prescription, Authority, and Ordered Freedom," in Meyer, ed., *What Is Conservatism?* 23–40. For this reason, the stark opposition commonly posited between the movement's libertarian and traditionalist wings can be overstated. Many libertarians either support this argument for moral traditionalism or implicitly acknowledge it by choosing to subsume their misgivings to forge serviceable political alliances. See Burgin, "The Return of Laissez-Faire." See also Ken I. Kersch, "Conservative Stories about the Common Law," Paper presented at the Annual Constitutional Law Schmooze, Program

believed that the American polity was anchored in such truths by its Founders, but that progressives, advocates of sociological jurisprudence, legal realists, and modern liberals had unmoored it from this base, leading to abominations like *Roe v. Wade* (1973). Politically active traditionalists saw themselves as having the high duty to rescue American society and restore it to its moral, religious, and constitutional foundations.<sup>20</sup>

The most widely read traditionalist journal was (and is) *Modern Age*, founded by Russell Kirk, and published by the Foundation for Foreign Affairs (FFA) in Chicago (created by William and Henry Regnery in 1945 and funded by the Regnery's family's Marquette Charitable Organization). When, in the mid-1970s, the FFA could no longer afford to support *Modern Age*, Henry Regnery arranged for the Intercollegiate Studies Institute (ISI) to assume its sponsorship, which it has continued to the present.<sup>21</sup>

Another traditionalist journal, though one that also acted more broadly as a clearinghouse for diverse perspectives, was *Human Events*, founded in Washington, D.C., by Frank Hanighen and Felix Morley.<sup>22</sup> Its first issue (February 2, 1944) was published as a newsletter broadsheet and was sent to only a few hundred subscribers. These subscribers, however, became opinion leaders. *Human Events* was incorporated in 1945, with Morley as its president, Hanighen as its vice president, and Henry Regnery as its treasurer. Each contributed \$1,000 of his own money to the venture and received one third of the corporation's stock. Regnery moved the magazine's offices to his base in Chicago and published a series of pamphlets to spotlight issues from the magazine he considered most important. He eventually separated the pamphlet publishing and magazine divisions of *Human Events*. Increasingly preoccupied with disseminating conservative ideas and frustrated that while liberals and leftists had many publishing venues, conservatives had few, Regnery quit the textile business (where he had made his fortune) and turned most of his attention to books, founding Regnery Publishers in Chicago. In time, Morley and Hanighen once again assumed full control of *Human Events* and moved the magazine's offices back to Washington,

though Regnery remained personally involved. *Human Events* is still published today, and Regnery is the leading publisher of conservative books.<sup>23</sup>

Traditionalism was also buttressed by a midcentury neo-Thomistic revival centered at the University of Notre Dame. The dean of the university's law school, constitutional law scholar Clarence "Pat" Manion, founded Notre Dame's Natural Law Institute in 1947 and launched the *Natural Law Forum* in 1956 (its name was changed in 1970 to the *American Journal of Jurisprudence*).<sup>24</sup> A refereed scholarly journal, the *American Journal of Jurisprudence* continues to be published (currently under the joint editorship of Notre Dame legal scholars John Finnis and Gerard V. Bradley) and serves as the leading outlet for traditionalist conservative Catholic legal and constitutional thought.<sup>25</sup>

Catholics and other traditionalists also found common ground with an elite group of academic political philosophers known as Straussians, who had studied under the émigré philosopher Leo Strauss at the University of Chicago (or at the New School

23. Hoplin and Robinson, *Funding Fathers*, 39–41; Allitt, *Conservatives*, 175.

24. See Clarence Manion, "Religion and American Law," *B.U. Law Review* 22 (1942): 261; Clarence Manion, "Founding Fathers and the Natural Law: A Study in the Source of Our Legal Institutions," *American Bar Association Journal* 35 (1949): Clarence Manion, *The Key to Peace* (Chicago: Heritage Foundation, 1950); Clarence Manion, *Let's Face It!* (South Bend, IN: Manion Forum, 1956). Manion's *Key to Peace* was a bestseller. The American Legion distributed free copies to high schools. Patrick Cassidy, "Catholic Natural Law Conservatism in Post-War America," B.A. Honors Thesis, Department of Political Science, Boston College (April 2010).

25. See also *Fellowship for Catholic Scholars Quarterly* (<http://www2.catholiccholars.org/>). A current hub for conservative Catholic constitutional thought is the Witherspoon Institute in Princeton, New Jersey (<http://www.winst.org>) (named, with studied symbolism, for John Witherspoon, an early president of Princeton University, teacher of James Madison, and the only clergyman to sign the Declaration of Independence). Witherspoon's Program in Political Thought and Constitutional Government is directed by the Catholic conservative Princeton professor Robert P. George. Gerard Bradley was the first director of its Center on Religion and Constitution (newly endowed by William E. Simon, it is now headed by Matthew J. Franck). The Institute is directed by an Opus Dei numerary. The Washington, DC-based Opus Dei priest John McCloskey—who is responsible for converting Sam Brownback, Robert Novak, Lawrence Kudlow, Alfred Regnery, and Robert Bork to Catholicism—served as a Catholic chaplain at Princeton from 1985–1990, and, following his controversial tenure there, as chaplain of the Princeton-based Opus Dei community, before moving to Washington in 1998. See Chris Suellentrop, "The Rev. John McCloskey: The Catholic Church's K Street Lobbyist," *Slate* (August 9, 2002) (<http://www.slate.com/id/2069194>); Joe Feuerherd, "Selling Orthodoxy to Washington Power Brokers: Opus Dei Priest Brings Conservatives to Catholicism," *National Catholic Reporter* (September 5, 2003). See also McCloskey's website (<http://www.catholicity.com/mccloskey/>). On George, see David D. Kirkpatrick, "The Right Hand of the Fathers," *New York Times Magazine* (December 20, 2009), 24. On the midcentury neo-Thomistic revival generally, see Edward A. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University of Kentucky Press, 1973).

in Law and Public Affairs, Princeton University (December 3–4, 2010).

20. See, e.g., Ken I. Kersch, "Roe and the Supreme Court in Thick Ideological Context: The Conservative Evangelical Documentary Films of Francis Schaeffer," Paper Presented at the Annual Meeting of the New England Political Science Association, Newport, R.I. (April 2010).

21. Nicole Hoplin and Ron Robinson, *Funding Fathers: The Unsung Heroes of the Conservative Movement* (Washington, DC: Regnery Publishing, Inc., 2008), 54; Allitt, *Conservatives*, 175. See [http://www.isi.org/journals/modern\\_age.html](http://www.isi.org/journals/modern_age.html)

22. Morley, a Rhodes Scholar and Pulitzer Prize-winning journalist, left his position as the editor of *The Washington Post* (1933–1940) to assume the presidency of his alma mater, Haverford College (1940–1945).

for Social Research, where he taught before Chicago). The leading Straussians were Joseph Cropsey, Herbert Storing, and Allan Bloom at the University of Chicago; Bloom, Walter Berns, and Werner Dannhauser at Cornell; Bloom, Berns, Thomas Pangle (now at the University of Texas) at the University of Toronto; Harry Jaffa and Ralph Rossum at Claremont McKenna College and the Claremont Graduate University; Hadley Arkes at Amherst College; Martin Diamond at Northern Illinois University; Ernest Fortin, David Lowenthal, Robert Scigliano, Christopher Bruell, and Robert Faulkner at Boston College; Michael and Catherine Zuckert at Notre Dame; and Harvey Mansfield, Jr. at Harvard. Other “second generation” Straussians were students of students of Strauss, and a third generation is now being trained (at these same institutions, plus a set of anointed feeder liberal arts colleges like Kenyon, Holy Cross, and St. John’s College at Annapolis and Santa Fe).

Straussians believe that the study of politics is fundamentally about the study of timeless truths, which are best apprehended through the close reading of Western civilization’s foundational texts. They believe, moreover, that with society’s transition to liberal modernity and its attendant positivism, relativism, and low political aims (peace, rather than justice or virtue), the understanding of politics as being about matters of truth and justice has been adulterated or lost. While not necessarily opposed to liberalism and modernity, Straussians are preoccupied with emphasizing its nature and limits and insisting upon the continuing, and surpassing, importance of the pursuit of truth—philosophy—for creating and sustaining a just political order.

### NEOCONSERVATISM

Neoconservatives were liberal Democratic intellectuals—mostly Jewish, and mostly based in New York City—who, during the 1960s and 1970s, became increasingly disillusioned with the direction liberalism, and the Democratic Party, were taking. In the face of increasing crime and urban disorder and in the context of the massive expansion of governmental ambition and power that characterized Lyndon Johnson’s Great Society, neoconservatives began to worry that the proliferation of liberal social programs, many associated with the War on Poverty, were doing more to empower an ideologically driven “new class” of policy intellectuals than achieve their designated objectives. As such, neoconservatives emphasized that, where public policy was concerned, good intentions were not enough. They came to believe that many of the government programs aimed at helping the poor and racial and ethnic minorities were actually harmful, encouraging reliance on government, a decline in initiative and self-discipline, and, through its corrosive effects on

the public and private morals indispensable to a free society, either encouraging, or doing nothing to mitigate, the drift towards a hedonistic counterculture, an extremist antimale and antifamily feminism, and a reflexive anti-Americanism. Over time, these policy intellectuals became increasingly preoccupied with the importance of the moral bases of free society as an essential component of the formulation of sound public policy.<sup>26</sup>

In foreign affairs, many neoconservatives (often followers of Hubert Humphrey (e.g., Jean Kirkpatrick) and Washington Senator Henry “Scoop” Jackson (e.g., Richard Perle and Paul Wolfowitz)) were Kennedy administration-style liberal anti-Communists. These neoconservatives reacted strongly against what they saw as the anti-American (and anticapitalist) rhetoric coming out of the New Left and many of the 1960s social movements, especially as they were increasingly radicalized in that decade’s latter half. Although most remained loyal Democrats from the Johnson administration through Humphrey’s presidential run, many neoconservatives were permanently alienated from the party by the subsequent McGovern takeover (and reforms) and, in turn, by the Carter presidency (characterized not simply by weakness in foreign affairs but by an anti-Israel bias that was anathema to many of these New York Jews).<sup>27</sup> A large number of these neoconservative Democrats joined the conservative movement by voting for Ronald Reagan in 1980, and then registering as Republicans (though some remain Democrats who vote Republican at the national level right to the present day).

The key neoconservative outlets were *The Public Interest* (founded in 1965 by Irving Kristol, Nathan Glazer, and Daniel Bell) and *Commentary* magazine (which had been a liberal magazine of the Left, but began its rightward drift in the mid-1960s under editorship of Norman Podhoretz). In addition to the work of these thinkers, many neoconservatives were influenced by the public policy scholarship of political scientists Edward Banfield and James Q. Wilson. As professors in the Harvard Government

26. See Ken I. Kersch, “Neoconservatism and the Courts: *The Public Interest*, 1965-1980,” in Bradley C.S. Watson, ed., *Ourselves and Our Posterity: Essays in Constitutional Originalism* (Lanham, MD: Rowman and Littlefield, 2009); Ken I. Kersch, “Courts and the Constitution in the Crucible of *Commentary*: The Genesis of the Neoconservative Vision, 1950-1970,” Paper presented at the Legal History Colloquium, University of Virginia Law School, Charlottesville, VA (November 2006). See also Murray Friedman, *The Neoconservative Revolution: Jewish Intellectuals and the Shaping of Public Policy* (New York: Cambridge University Press, 2006); Justin Vaïsse, *Neoconservatism: The Biography of a Movement* (Cambridge, MA: Belknap Press of Harvard University Press, 2010) (trans. Arthur Goldhammer); Benjamin Balint, *Running Commentary: The Contentious Magazine That Transformed the Jewish Left into the Neoconservative Right* (New York: PublicAffairs, 2010); Allitt, *Conservatives*, 203-14.

27. For a contemporaneous report, see Peter Steinfels, *The Neoconservatives: The Men Who are Changing American Politics* (New York: Simon and Schuster, 1979).

Department, Banfield and Wilson had the advantage of a prestigious academic perch that conferred the professional status that many other conservatives lacked (besides supplying them with a steady stream of brilliant graduate students who would carry their influence forward). This status was helpfully underwritten by Banfield and Wilson's positions not as political philosophers, but as social scientific empiricists who argued not from values (although often *about* values), but from data.

As a group, neoconservatives prided themselves on being nonideological and nondogmatic. They also didn't pay much heed to the bundles of set choices which tended to define people as either liberal or conservative, making the neoconservatives hard to pin down politically. When it came to taking political and policy positions, they ended up, as Ben Wattenberg later said, "choosing one from Column A and one from column B as on a Chinese menu."<sup>28</sup> Neoconservatives trafficked not in first principles, but in facts and common sense.

Neoconservatives remained distinctively preoccupied with stereotypically liberal policy areas, like urban policy, crime, poverty, education, civil rights, and with problems of public administration. For a long time they understood themselves not as conservatives, but rather as liberals willing to reject the stock liberal ideological texts that, in their view, had come to ossify the liberal mind, thwarting its efforts to confront intelligently the most importunate policy dilemmas of their time. The residual liberalism of the neoconservatives was evident in the fact that, at least until the 1980s (and, for most, afterward as well), neoconservatives almost to a man (and woman) favored the New Deal and the creation of the modern welfare state and were backers of (and sometimes participants in) the civil rights movement. Many understood themselves as favoring liberal objectives, but not the new set of ostensibly liberal post-1960s solutions.

By the 1980s, however, neoconservatives came to adopt the stock texts of the conservative movement with which they had become increasingly aligned and watched approvingly as that movement proceeded to adopt neoconservative positions as articles of faith. This coalescence over time ultimately ended neoconservatism's status as a distinctive intellectual movement. Today, neoconservative magazines like *Commentary* and the *Weekly Standard* (founded by Irving Kristol's son, William, a student of both Straussian Harvey C. Mansfield, Jr., and James Q. Wilson as an undergraduate and graduate student in government at Harvard) exist, but it is difficult to distinguish their substance from mainstream conservatism. Both are Republican Party organs, and neoconservatives

are now, with a few (typically aging) exceptions, reliable denizens of that party.<sup>29</sup>

Neoconservatives commented extensively on the law and the judiciary, but, unlike other conservatives, they approached the issue as a policy problem that was amenable to social scientific inquiry. However, they were skeptical of the politicized nature of such inquiry, such as that conducted by ideologically driven liberals at the Ford Foundation. As such, they emphasized matters of legal administration, judicial policymaking, and the burgeoning of a litigious society.<sup>30</sup>

### MOBILIZING RESOURCES TO CULTIVATE AND PROPAGATE IDEAS: HAYEK'S THOUSAND SHIPS

Many conservatives, David Brooks has observed, can readily cite a list of books that have ignited within them transformative political passions. From the 1940s on, the production of these life-changing books, and the cultivation of the ideas they advanced, were underwritten by a relatively small group of ideologically committed, wealthy donors. A striking number of these donors were galvanized into action by reading a single book: Friedrich von Hayek's anti-socialist *cri de coeur*, *The Road to Serfdom* (1944).<sup>31</sup>

One of the first was Harold Luhnow, the president of William Volker and Company of Kansas City (at one time the nation's largest wholesale distributor of

29. In the aftermath of the Democratic sweep in the 2008 presidential election and a perceived crisis of conservative intellectual life, a new neoconservative journal, *National Affairs*, was launched in fall 2009 by the publisher of the then-defunct *Public Interest* ([nationalaffairs.com](http://nationalaffairs.com)).

30. See Teles, *Rise of the Conservative Legal Movement*, 22–57.

31. James Piereson, "Investing in Conservative Ideas," *Commentary* (May 2005): 47. The move amongst conservatives toward big ideas and away from business apologetics thus dates from at least the mid-1940s. See also Phillips-Fein, *Invisible Hands*. This movement in conservative intellectual life long pre-dates the same movement amongst conservative legal scholars and advocacy groups, which Teles traces back only to the early 1980s. (Teles, *Rise of the Conservative Legal Movement*.) For a recent, representative list (with commentary) of landmark conservative books, see, Jeffrey O. Nelson, *Ten Books That Shaped America's Conservative Renaissance* (Intercollegiate Studies Institute, n.d.). The ten are: Ludwig von Mises, *Socialism: An Economic and Sociological Analysis* (New York: Macmillan, 1936); Albert Jay Nock, *Memoirs of a Superfluous Man* (New York: Harper and Brothers, 1943); Hayek, *Road to Serfdom* (1944); Richard M. Weaver, *Ideas Have Consequences* (Chicago: University of Chicago Press, 1948); Whittaker Chambers, *Witness* (New York: Random House, 1952); Eric Voegelin, *The New Science of Politics, An Introduction* (Chicago: University of Chicago Press, 1952); Russell Kirk, *The Conservative Mind: From Burke to Santayana* (Chicago: H. Regnery, 1953); Robert A. Nisbet, *The Quest for Community: A Study in the Ethics of Order and Freedom* (New York: Oxford University Press, 1953); Frank S. Meyer, *In Defense of Freedom: A Conservative Credo* (Chicago: H. Regnery, 1962); and Irving Kristol, *On the Democratic Idea in America* (New York: Harper and Row, 1972). The pamphlet concludes with a note that all of these "ten best" can be ordered from ISI at a discount, and provides a toll-free number to place orders.

28. Ben J. Wattenberg, *Fighting Words: A Tale of How Liberals Created Neo-Conservatism* (New York: Thomas Dunne Books, 2008), 3.

interior furnishings). He assumed the presidency of the Volker Fund (est. 1932) and, under the influence of Loren Miller, Volker's chief assistant in founding the fund, decided in 1944 that the fund would henceforth support the cultivation and dissemination of conservative ideas.<sup>32</sup> Hayek had written to Miller expressing his profound concern about the rapid advance of socialism and the swelling attacks upon values of Western civilization during the 1940s. Encouraged by his book's succès fou, Hayek expressed a fervent desire to marshal a phalanx of countervailing ideas. He proposed convening a conclave of the world's leading classical liberal scholars in Mont Pelerin, Switzerland. On May 7, 1945, the Volker Fund cut Hayek a \$2,000 check to pay the expenses of those making the trip.

Among those who attended the first meeting of what became the Mont Pelerin Society were the philosopher Karl Popper of The London School of Economics; University of Chicago economics professors Milton Friedman, Aaron Director, Frank Knight, and George Stigler (then at Brown) (the founders of "Chicago School" economics); V. Orval Watts of the Foundation for Economic Education (FEE) (publisher of *The Freeman*); John Davenport of *Fortune* magazine; Henry Hazlitt of *Newsweek*; Felix Morley of *Human Events*; and Ludwig von Mises. When they could not secure regular faculty positions in the United States, where their views would get wider exposure, the Volker Fund supplied the fellowships that permitted Hayek to assume a position at the University of Chicago and von Mises a post at NYU.<sup>33</sup>

The Mont Pelerin Society spun a peerless web of intellectual and policy influence in postwar public life. Its members published prolifically. Eight of them won the Nobel Prize in economics.<sup>34</sup> Many rose to leadership positions in conservative governments around the world, including Ronald Reagan's, who himself regularly cited Hayek, von Mises, Friedman, and Hazlitt as amongst the small group of thinkers who turned him toward conservatism. Mont Pelerin members were the driving intellectual force behind the revival of classical liberal

thought in the second half of the twentieth century.<sup>35</sup>

The Volker Fund also provided money for the Intercollegiate Studies Institute (ISI), the Foundation for Economic Education (FEE), and the Institute for Humane Studies (IHS). The fund additionally underwrote the publication of many landmark conservative books, including Frédéric Bastiat's *The Law*, Murray Rothbard's *Man, Economy, and State*, and Richard Weaver's *Visions of Order*. It also sponsored the lectures that Milton Friedman later turned into *Capitalism and Freedom*.<sup>36</sup>

English chicken magnate Antony Fisher founded the Institute for Economic Affairs (IEA) in London—the first modern free-market think tank—soon after reading *The Road to Serfdom* and summoning its author to discuss what could be done.<sup>37</sup> After the two met in 1947, Hayek said: "He [Fisher] thought you could sway mass opinion. What I insisted and what was strictly followed by the Institute was not to appeal to the large numbers, but to the intellectuals. My conviction is that, in the long run, political opinion is determined by the intellectuals, by which I mean ... the second-hand dealers in ideas—the journalists, school masters, and so on." Fisher wanted to "do for the non-Labour Parties what the Fabian Society did for Labour."<sup>38</sup>

The IEA sponsored the publication of many of Hayek's subsequent books, including *The Constitution of Liberty*, and later served as the intellectual fount of Thatcherism. In 1978, Fisher founded an American counterpart to the IEA in New York City: the Manhattan Institute, which midwived the publication of Charles Murray's *Losing Ground* (a major spur to welfare reform) and George Kelling and James Q. Wilson's landmark "Broken Windows" article in the *Atlantic Monthly* (which revolutionized urban policing and played a significant role in the subsequent reduction of urban crime rates, in New York City and elsewhere). The Manhattan Institute also publishes *City Journal*.<sup>39</sup>

In 1960, Pierre Goodrich, longtime president of the Indiana Telephone Company, gave his fortune to establish the Indianapolis-based Liberty Fund, a leading publisher of classic and modern texts that advance traditional understandings of free markets

32. Hoplin and Robinson, *Funding Fathers*, 25–26. Luhnrow was William Volker's nephew. See David Boutros, "The William Volker and Company" (Kansas City, MO: Western Historical Manuscript Collection, 2004).

33. Burgin's "The Return of Laissez-Faire" is the most complete account of the founding, development, and influence of the Mont Pelerin Society. See also <http://www.montpelerin.org>. See also Hoplin and Robinson, *Funding Fathers*, 26–30. Director's sister, Rose, later married Milton Friedman and co-authored his book making the case for free-market capitalism, *Free to Choose* (1980), and the subsequent PBS series (1980) based on it. Milton and Rose Friedman, *Free to Choose: A Personal Statement* (New York: Harcourt, Brace, Jovanovich, 1980). See Allitt, *Conservatives*, 183–187; Phillips-Fein, *Invisible Hands*, 45–52.

34. Hayek, Friedman, Stigler, James Buchanan, Maurice Allais, Ronald Coase, Gary Becker, and Vernon Smith.

35. Hoplin and Robinson, *Funding Fathers*, 28–29.

36. *Ibid.*, 30.

37. For a similar process amongst progressives, see Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Belknap Press of Harvard University Press, 1998). On the transatlantic dynamic within twentieth-century free-market conservatism, see Burgin, "The Return of Laissez-Faire."

38. Hayek, quoted in Hoplin and Robinson, *Funding Fathers*, 159–60.

39. See <http://www.iea.org.uk/>, <http://www.manhattan-institute.org>, and <http://www.city-journal.org/>. See also Tom Wolfe, "Revolutionaries," *New York Post* (January 30, 2003); Charles Murray, *Losing Ground: American Social Policy, 1950–1980* (New York: Basic Books, 1984); and George L. Kelling and James Q. Wilson, "Broken Windows," *Atlantic Monthly* (March 1982).

and constitutional liberty and a sponsor of a perpetual round-robin of academic conferences on related themes. In these conferences, which typically last two days and convene in high-end hotels and resorts (and, pointedly, *not* on (corrupted) college and university campuses), professors read from classic and modern works and discuss them in seminar format and over meals. The aim is to nourish enthusiasms and cultivate understandings that the professors might ultimately pass on to their students.<sup>40</sup>

No publisher has been more central to the modern conservative movement—then and now—than Regnery. William Regnery, whose parents had fled the Bismarkian statism of their native Germany for Wisconsin, got his start in business as a young man working for William Volker and Co.<sup>41</sup> William's son Henry, an M.I.T. math major, later returned to his ancestral Germany to study, where he made friends, many of whom were subsequently killed under Europe's Nazi and Communist regimes. In response, and in fulfillment of his patrimony, Henry became a passionate opponent of repressive statist ideologies. Drawn increasingly to the study of economics and public affairs, Henry entered graduate school in economics at Harvard. Turned off by the university's prevailing socialist milieu, however, he soon dropped out. Still unsettled in his politics, however, Regnery went to work in Washington for Franklin Roosevelt's Resettlement Administration. That experience set him firmly on the conservative path he would pursue for the rest of his life.<sup>42</sup> Regnery came to publishing through Felix Morley and *Human Events* (two of Regnery's first three books were essay collections culled from *Human Events*).<sup>43</sup> Regnery chose the

Porta Nigra Gate at the entrance to Trier, Germany—a symbol of emergence and strength of Western civilization—as the mark for his new imprint.<sup>44</sup>

Short on cash, Regnery entered into a partnership with the Great Books Foundation to publish classics like Aristotle's *Ethics*, Plato's *Republic*, and Adam Smith's *Wealth of Nations*.<sup>45</sup> Great Books had been created 1947 to provide books to the Western canon reading group movement that had sprung up in the United States immediately after the war, kindled by the efforts of Robert Maynard Hutchins, the young president of the University of Chicago and the former dean of the Yale Law School, and Mortimer Adler, also of the University of Chicago,<sup>46</sup> with money from the university and from Paul Mellon's Old Dominion Foundation. These founders believed that Great Books education would define the future of American education, which was then, in the view of traditionalists, dominated by Deweyan progressivism.<sup>47</sup>

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of the British Left. He was (with John Strachey and Harold Laski) a founder of Britain's Left Book Club—publishers of George Orwell's *The Road to Wigan Pier* (1937)—an opponent of capital punishment, and a humanitarian, antipoverty, and antinuclear activist. A staunch anti-Fascist and anti-Communist, Gollancz was frustrated in his efforts to get Britain (and the world) to recognize and act early against the Nazi efforts to exterminate the Jews, and worked to rescue Jews from Hitler's Germany. Picard, a Swiss physician, Jew, and Catholic convert, abandoned the practice of medicine to devote himself to philosophical reflection on the ills of the modern age. His *The Flight from God* (Chicago: H. Regnery and Co., 1951) is an attack on the decline of faith and on modern relativism. The book was re-issued by Regnery Gateway in 1989. See also Max Picard, *The World of Silence* (Chicago: H. Regnery, 1952).

44. It also, of course, reflected Regnery's German heritage. The fact that, in the Middle Ages, the gate had been transformed into a church was probably quite attractive to Regnery as well. Napoleon, however, had attempted to remove the church and restore the gate to its (secular) Roman glory, a move that was successfully resisted. Regnery's Porta Nigra mark thus symbolically commemorated to conservative cognoscenti a triumph of the progress of Christian-based Western civilization over modern secular despotism. Hoplin and Robinson, *Funding Fathers*, 42; Alex Beam, *A Great Idea at the Time: The Rise, Fall, and Curious Afterlife of the Great Books* (New York, Public Affairs, 2008), 64.

45. Beam, *A Great Idea at the Time*. This role has been assumed today by the Liberty Fund. Great Books courses and curricula are supported in the movement today by the Manhattan Institute's Veritas Fund. In its early years, 10 percent of the books sold by Regnery were Catholic school textbooks published for the Archdiocese of Chicago as a service to Catholic parents whose children were forced to attend (secular) public schools. Regnery then moved—in conjunction with Pierre Goodrich (who founded The Liberty Fund in 1960) and the Volker Fund's Harold Luhnow—to establish a line of college textbooks on secular subjects like American history, Latin, and economics. (Hoplin and Robinson, *Funding Fathers*, 44, 49.)

46. Beam, *A Great Idea at the Time*, 88, 133, 182. Mortimer Adler was one of William F. Buckley's favorite guests on *Firing Line*. Adler converted to Catholicism shortly before his death.

47. Mellon's Old Dominion Foundation also helped support St. John's College, a Great Books college in Annapolis, Maryland, and was a predecessor of the Andrew W. Mellon Foundation, named for Paul Mellon's father. The flame of the Great Books burns brightest today at St. John's College (Annapolis and Santa Fe), with outposts at Straussian centers like Kenyon College and

40. Hoplin and Robinson, *Funding Fathers*, 148–66. See Dane Starbuck, *The Goodriches: An American Family* (Indianapolis: Liberty Fund Press, 2001) and <http://www.libertyfund.org>.

41. See Allitt, *Conservatives*, 155–56. See also William H. Regnery II, "Preface," in Ruth Sarles and Bill Kaufman, eds., *A Story of America First: The Men and Women Who Opposed U.S. Intervention in World War II* (Westport, CT: Praeger, 2003). With General Robert E. Wood, the C.E.O. of Sears Roebuck, Co., Regnery helped establish the isolationist America First Committee (1940).

42. Hoplin and Robinson, *Funding Fathers*, 36–38, 43. See Boutros, "William Volker and Company."

43. Since the books Regnery was driven to publish cut against intellectual currents of the time, he had no expectation of ever turning a profit. When he founded the company in 1947, he first tried to organize it as a nonprofit, but the IRS rejected his application. The earliest Regnery book runs were a response to immediate post—World War II challenges to Western civilization. Conservatives understood themselves as Western civilization's most firmly grounded stay against Nazism and Nazi ideology. (Hoplin and Robinson, *Funding Fathers*, 42.) These early books included *Blueprint for World Conquest, As Outlined by the Communist International* (Chicago: Human Events, 1946); Victor Gollancz, *In Darkest Germany* (Hinsdale, IL: H. Regnery, 1947) (introduction by Robert Maynard Hutchins); Max Picard, *Hitler in Our Selves* (Hinsdale, IL: H. Regnery Co., 1947); and Victor Gollancz, *Our Threatened Values* (Hinsdale, IL: H. Regnery Co., 1948). Victor Gollancz, a Jewish publisher and author, was, in almost every respect, a man

The movement gained momentum in the late 1940s and was strong through the early 1960s. Initially, 2,500 Great Books discussion groups blossomed in private homes, public libraries, church basements, corporate conference rooms, army bases, chamber of commerce offices, and even prisons. This movement drew strength from the intellectual curiosity and ambition of the new postwar middle class, including returning GIs, and contributed to the rise of the era's so-called "middlebrow" culture.<sup>48</sup> In the immediate aftermath of the Nazi experiment and during the heyday of Stalinist tyranny (and the Communist takeovers in China and Eastern Europe), scientific materialism was on the defensive and the appeal of a morally (and religiously) grounded humanism was on the rise. Moral relativism and the siren song of "value free" social science became, for many, intellectual *bête noires*.<sup>49</sup> The problem was that, just when the need for foundations was greatest, the Great Books were hard to find. Many remained untranslated. It was Hutchins's idea, in conjunction with his Yale classmate William Benton, to meet this need by publishing them.<sup>50</sup>

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Claremont McKenna College and at (often Straussian) Catholic universities like Notre Dame, Boston College, and the University of Dallas.

48. See Macdonald, "Masscult and Midcult, I & II," *Partisan Review* 27 (Spring, Fall 1960), 203–33, 589–631; Joan Shelley Rubin, *The Making of Middlebrow Culture* (Chapel Hill: University of North Carolina Press, 1992). These same trends were behind the establishment of the Reader's Digest Condensed Books and Britannica's Great Books (1950).

49. Beam, *A Great Idea at the Time*, 65, 57, 70; Purcell, *Crisis of Democratic Theory*; Nasser Behnegar, *Leo Strauss, Max Weber, and the Scientific Study of Politics* (Chicago: University of Chicago Press, 2003).

50. Beam, *A Great Idea at the Time*, 70–71. Benton later founded the advertising firm Benton and Bowles (1929–2002), served as a U.S. Senator from Connecticut and U.S. Ambassador to UNESCO, and founded the Encyclopedia Britannica. See Sidney Hyman, *The Lives of William Benton* (Chicago: University of Chicago Press, 1969). See also Harry S. Ashmore, *Unseasonable Truths: The Life of Robert Maynard Hutchins* (Boston: Little Brown, 1989). While dean of Yale Law School, Hutchins championed legal realism. He moved to Chicago in 1930, where, turning away from realism, he began to question the ability of empirical social science to solve important social problems. As such, the origins of the Great Books can be considered in part an outgrowth of the reaction against legal realism by one of its prominent proponents. Eventually, Hutchins made his way all the way to Aritoteleanism and Thomism. ("[Hutchins's] opponents [at the University of Chicago] spread rumors that Hutchins and Adler, who simply couldn't shut up about St. Thomas Aquinas, were plotting to convert the student body to Catholicism. Historian Tim Lacy writes that the Chicago faculty thought Hutchins 'was calling for the restoration of the medieval university.'"). This situation gave rise to the oft-repeated quip that the University of Chicago was a former Baptist school where Jewish professors were now teaching Catholic theology to atheists. Upon retiring from Chicago in 1952, Hutchins took up the cause of global justice and world government. (Beam, *A Great Idea at the Time*, 59, 94, 120–121.) The official relationship between Regnery and The Great Books Foundation ended in 1951, when the heads of the foundation were incensed by Regnery's publication of Buckley's vitriolic *God*

At the same time it was reissuing the classics, Regnery shrewdly published zeitgeist-seizing best sellers. Freda Utley's *The China Story* (1951) on the "loss" of China to the Communists was one.<sup>51</sup> That same year, Regnery published *God and Man at Yale* (1951), introducing Buckley to a national audience. Next came Russell Kirk's *The Conservative Mind* (1954)—which was widely reviewed (including by Henry Luce's *Time*, whose book review editor, Whitaker Chambers, devoted the entire July 4, 1954, section to Kirk's opus). Kirk's book constructed a proud intellectual heritage for conservatives, who had previously shied away from the label "conservative," but, Henry Regnery noted, now had a banner it could fly under of which it was proud.<sup>52</sup>

Intoxicated by Kirk's *The Conservative Mind*, Colorado beer magnate Joseph Coors, a Cornell-educated engineer, founded The Heritage Foundation in Washington, D.C., in 1973 "to provide timely policy information to members of Congress from a principled perspective." Heritage soon became the

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*and Man at Yale* (1951). (Hoplin and Robinson, *Funding Fathers*, 47.) Today, Regnery's Gateway book series publishes new editions of (amongst others) Adam Smith's *Wealth of Nations*, Orestes Brownson's *The American Republic*, John Locke's *The Reasonableness of Christianity*, *The Political Writings of St. Augustine*, St. Augustine's *Enchiridion on Faith and Hope*, Romano Guardini's *The Lord* (with foreword by Cardinal Joseph Ratzinger), and St. Thomas Aquinas's *Treatise on Law*.

51. Favorably reviewed in the *New York Times*, it caught the attention of William Casey, who told Henry Regnery in private correspondence what a formative influence the book had had upon his thinking. As CIA Director in the 1980s, Casey played a major role in the support of the Contra insurgency against the Communist government in El Salvador and the resistance to the Marxist Sandanista government in Nicaragua. (Hoplin and Robinson, *Funding Fathers*, 44–45.)

52. Hoplin and Robinson, *Funding Fathers*, 45–48. Later, Regnery Books was aptly cited by many pivotal policymakers in the Reagan administration as a wellspring of many of the era's most influential ideas. Regnery remains a major player in contemporary conservatism, where it has published many notable books, including Ann Coulter, *High Crimes and Misdemeanors: The Case Against Bill Clinton* (Regnery, 2002); Bernard Goldberg, *Bias: A CBS Insider Exposes How the Media Distort the News* (Regnery, 2001); Laura Ingraham, *Power to the People* (Regnery 2008); Edwin Meese, Matthew Spalding, and David F. Forte, eds., *The Heritage Guide to the Constitution* (Regnery, 2005); and (most recently) Dinesh D'Souza's, *The Roots of Obama's Rage* (Regnery, 2010) and Newt Gingrich's *To Save America: Stopping Obama's Secular-Socialist Machine* (Regnery 2010). Regnery's Politically Incorrect Guides series offers a broad-ranging (one is tempted to say comprehensive), playful, and easily readable conservative counternarrative to American history, U.S. constitutionalism, and controversial policy issues. In addition to its guide to the U.S. Constitution, the series includes "politically incorrect" guides to American history, the Founding Fathers, the New Deal, the Bible, Western civilization, the Civil War, the South, Islam, Darwinism and intelligent design, capitalism, global warming, hunting, the Vietnam War, and women, sex, and feminism. Henry Regnery gave generously in helping to establish the Young Americans for Freedom (YAF) (<http://www.yaf.com>) and the Philadelphia Society (<http://www.phillysoc.org>). (Hoplin and Robinson, *Funding Fathers*, 52–53, 55.) See <http://www.regnery.com>.

Reagan administration's most influential policy shop and remains a major conservative think tank today.<sup>53</sup> Heritage publishes the influential originalist reference guide, *The Heritage Guide to the Constitution*, and hosts monthly meetings at its Capital Hill headquarters for Washington-based conservative "cause lawyers" to keep them abreast of important developments in the courts, the executive branch, and in Congress, and to promote and coordinate movement collaboration. Heritage also hosts the semi-annual Legal Strategy Forum, which, with the same goals, brings together lawyers from approximately thirty conservative legal organizations around the country.<sup>54</sup>

### TOWARD AN ECUMENICAL CONSERVATISM: THE FOUNDING OF *NATIONAL REVIEW*

"Before the Second World War," Donald Critchlow has observed, "the American Right manifested a particular crankiness and eccentricity that prevented it from developing a sustainable political movement." A journalistic remnant poured out anti-New Deal invective and isolationist propaganda of low intellectual caliber, with little political effect. The outbreak of the Cold War, however, energized conservative anticollectivism. A younger cohort—Hayek, Ayn Rand, Leo Strauss, Milton Friedman, Willmoore Kendall, Richard Weaver, Russell Kirk, William F. Buckley, Jr., and others—launched an intellectual renaissance on the Right. Nevertheless, conservatism in the 1950s remained (as Ronald Reagan observed) "diffuse and scattered, without a unifying voice."<sup>55</sup>

*National Review* was designed by the late William F. Buckley, Jr., as a venue where "men and women of disparate inclinations" who agreed on a few basic

principles could meet to forge a coalition that could ultimately win political power. As Buckley aptly noted late in life, the magazine "took its place, very soon after its nativity, at the center of conservative political analysis in America."<sup>56</sup> Its target audience was an interested readership who, motivated and informed by the magazine, would help to steer public opinion, over the long term, in a decidedly conservative direction.

In the early 1950s, Buckley, a brilliant and charismatic *enfant terrible*, had made a name for himself by publishing *God and Man at Yale* (1951), a scorching attack on his alma mater, where he had been a champion debater and editor-in-chief of the *Yale Daily News*. The book was an exposé on what Buckley held to be Yale's hostility to capitalism and the abandonment of its traditional religious roots.<sup>57</sup> Buckley followed up *God and Man at Yale* with a defense of the crusading anti-Communist Republican Senator from Wisconsin, Joseph McCarthy, in *McCarthy and His Enemies* (1954) (co-authored by Brent Bozell, his brother-in-law, Catholic convert, fellow Yale, and later the ghostwriter of Barry Goldwater's campaign manifesto, *The Conscience of a Conservative*).<sup>58</sup>

Although Buckley had gained a national audience with these books, he was increasingly frustrated that they had taken so long to produce, thwarting his desire to inject conservative ideas into the immediate political fray. He thus set his sights on starting a magazine, first trying unsuccessfully to buy both *Human Events* and then *The Freeman*. He then sought funding for a magazine of his own from both Henry Regnery and *Time* magazine founder and publisher Henry Luce—to no avail. As a last resort, he turned to his father, a wealthy oilman, for a \$100,000 commitment, which, with a little help from Regnery, he received.<sup>59</sup>

53. Hoplin and Robinson, *Funding Fathers*, 192, 196–97; Phillips-Fein, *Invisible Hands*, 169–73; Russell Kirk, *The Conservative Mind: From Burke to Santayana* (Chicago: Regnery, 1953). Heritage created Townhall.com (1995), an internet clearinghouse for conservative thought and opinion, and publishes *Policy Review*, a leading conservative policy journal. See <http://www.heritage.org>.

54. Hoplin and Robinson, *Funding Fathers*, 202. See <http://townhall.com/>; <http://www.hoover.org/publications/policyreview>. Intervening in politics directly, Coors helped Phyllis Schlafly defeat the ERA and gave \$250,000 to Ward Connerly's American Civil Rights Coalition to promote the anti-affirmative action California Proposition 54. (Hoplin and Robinson, *Funding Fathers*, 201–2, 209. Southworth, *Lawyers of the Right*, 127.) See generally, Stuart A. Scheingold and Austin Sarat, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998); Stuart A. Scheingold and Austin Sarat, *Something to Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford, CA: Stanford University Press, 2004).

55. Donald T. Critchlow, *The Conservative Ascendancy: How the GOP Right Made Political History* (Cambridge, MA: Harvard University Press, 2007), 7, 11. See also Nash, "Creation Story: Building the House of Conservatism," 154, in Nash, *Reappraising the Right*; Phillips-Fein, *Invisible Hands*, 3–25; Maxwell Bloomfield, *Peaceful Revolution: Constitutional Change in America from Progressivism to the New Deal* (Cambridge, MA: Harvard University Press, 2000).

56. William F. Buckley, Jr., *Flying High: Remembering Barry Goldwater* (New York: Basic Books, 2008), ix, x. See also Critchlow, *Conservative Ascendancy*, 23, 40; Allitt, *Conservatives*, 175–76.

57. See Nash, "God and Man at Yale Revisited," in Nash, *Reappraising the Right*, 133–47.

58. Hoplin and Robinson, *Funding Fathers*, 68–69. Goldwater was recruited to both run for president and write *Conscience of a Conservative* by Clarence Manion.

59. At William F. Buckley, Sr.'s request, Regnery agreed to buy back \$25,000 worth of shares in Buckley's company, which made it possible for Buckley père to underwrite his son's new magazine. (Hoplin and Robinson, *Funding Fathers*, 55.) See also Nash, "Forgotten Godfathers," in Nash, *Reappraising the Right*, 204–5; Hoplin and Robinson, *Funding Fathers*, 70–71; and Phillips-Fein, *Invisible Hands*, 77–81, 147, 224. William Casey, a New York lawyer, and, like Buckley, a devout Catholic, drew up NR's initial articles of incorporation and later ran Ronald Reagan's 1980 presidential campaign, subsequently becoming one of his closest advisors and a controversial CIA director. Casey was also a co-founder of The Manhattan Institute. Major investors in NR included Henry Salvatori, a California engineer and pioneer of off-shore oil drilling, who was active in the 1964 Goldwater campaign and part of the group of influential businessmen who encouraged Ronald Reagan to run for Governor of California in 1966. In 1969, Salvatori became the benefactor of

The magazine's birth coincided with a time of ascendant liberalism. The magazine was launched shortly after the premature death of the great presidential hope of post-New Deal movement conservatives, Ohio Republican Senator Robert A. Taft (d. 1953), and after Joe McCarthy's implosion in the Army-McCarthy hearings (1954) and the near-collapse of *The Freeman* (1954). In the early 1950s, there was only one conservative magazine with any significant readership or influence—*Human Events*.<sup>60</sup>

NR's features and opinion pieces proved crucial in cultivating conservative intellectual talent and in disseminating conservative political ideas. The magazine served as a major underwriter of the conservative publishing industry by regularly reviewing books published by Regnery, which received little, if any, publicity elsewhere.<sup>61</sup> Buckley commissioned and disseminated crucial ideological manifestos, including the magazine's inaugural Mission Statement<sup>62</sup> and "The Sharon Statement" issued by the Young Americans for Freedom (YAF) at their founding meeting on Buckley's Sharon, Connecticut, estate.<sup>63</sup> He helped found activist organizations committed to the battle of ideas (like YAF), trained their leaders, and encouraged them to train future leaders. These organizations in turn served as prototypes for the efflorescence of movement institutions that followed: the Young America's Foundation, The Fund for American Studies, The American Conservative

Union, and the Conservative Political Action Conference.<sup>64</sup> Buckley seized a national platform for movement ideas as well through brilliant publicity stunts aimed at major media markets—such as his spirited run for mayor of New York against liberal, silk-stocking Republican John Lindsay. Buckley then parlayed his run into a nationally syndicated PBS television show, the Emmy Award-winning *Firing Line* (1966–1999), which showcased the movement's élan and intellectual seriousness.<sup>65</sup>

When it came to national political power, however, both Buckley and the movement remained on the outside looking in. The election of Richard Nixon in 1968 was a major step, though Nixon—admired in particular for his role in the Hiss-Chambers affair and his staunch anti-communism (later betrayed by his opening to China and his pursuit of détente)—never really won the trust of movement conservatives. With the watershed election of Ronald Reagan in 1980, the magazine at long last moved from outsider to insider status.<sup>66</sup>

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the Henry Salvatori Center for the Study of Individual Freedom in the Modern World at Claremont McKenna College, the home of contemporary Straussianism. (<http://www.claremontmckenna.edu/salvatori/>). The center publishes the *Claremont Review of Books* (<http://www.claremont.org/publications/crb/>).

60. Hoplin and Robinson, *Funding Fathers*, 71.

61. *Ibid.*, 72. The Conservative Book Club was founded later, in 1964, to serve the community that NR helped to create. Today, it is a subsidiary of Eagle Publishing, a conglomerate that owns Regnery, *Human Events*, and other conservative outlets. "Conservative Book Club Membership Soars," *Human Events* (October 2, 2007).

62. In that statement, Buckley wrote: "We begin publishing . . . with a considerable stock of experience with the irresponsible Right, and a despair of the intransigence of the Liberals, who run this country; and all this in a world dominated by the jubilant single-mindedness of the practicing Communist . . . All this would not appear to augur well for *National Review*. Yet we start with a considerable—and considered—optimism." NR, he proudly proclaimed, "stands athwart history, yelling Stop, at a time when no one is inclined to do so, or to have much patience with those who so urge it." Buckley continued: "[NR] is out of place because . . . literate America rejected conservatism in favor of radical social experimentation. Instead of covetously consolidating its premises, the United States seems tormented by its tradition of fixed postulates having to do with the meaning of existence, with the relationship of the state to the individual, of the individual to his neighbor, so clearly enunciated in the enabling documents of our Republic." William F. Buckley, Jr., "Mission Statement," *National Review* (November 19, 1955). NR would make the case for those postulates, as articulated in the nation's founding texts.

63. In September 1960. See Isaac Kramnick and Theodore J. Lowi, *American Political Thought: A Norton Anthology* (New York: W.W. Norton, 2008), 1281–82.

64. Hoplin and Robinson, *Funding Fathers*, 80–81; Allitt, *Conservatives*, 177–80; Gregory L. Schneider, *Cadres for Conservatism: Young Americans for Freedom and the Rise of the Contemporary Right* (New York: NYU Press, 1998). Buckley also was named the first president of Intercollegiate Studies Institute (ISI), which nurtures young conservative talent on university and college campuses. ISI (initially known as the Intercollegiate Society of Individualists (<http://www.isi.org>)), the first national organization for conservative students, was founded in 1953 by Frank Chodorov, a staunch libertarian and founder of *The Freeman*, to undertake a "fifty-year project" to reform American universities and win them over to the cause of "freedom." This is an objective that other foundations—Olin (now defunct), Bradley, Scaife, Earhart, Veritas, and Jack Miller, amongst others, still pursue—in part by founding college and university centers devoted to the study of the Constitution, American political thought, and the values and foundations of Western liberal democracy. ISI's extensive publishing arm, ISI Books, publishes writing on constitutional topics, including that by Robert Bork, Gerard V. Bradley, Christopher Wolfe, Robert P. George, Walter Berns, and George W. Carey. It provides free books to campus reading groups.

65. Buckley's run led directly to the founding of the influential New York State Conservative Party. Hoplin and Robinson, *Funding Fathers*, 80–83; George J. Marlin, *Fighting the Good Fight: A History of the New York Conservative Party* (South Bend, IN: St. Augustine's Press, 2002). The *Firing Line* video archive is housed at Stanford University's Hoover Institution (<http://hoohila.stanford.edu/firingline/>).

66. William F. Buckley, Jr., "The Week," *National Review* (28 November 1980), 1434, quoted in Hoplin and Robinson, *Funding Fathers*, 74. Speaking as a sitting president at the magazine's thirtieth anniversary banquet, Reagan testified to NR's significance to his own political education, noting that he had been a Democrat when he had first read it, and hadn't stopped reading since. "*National Review* is to the offices of the West Wing of the White House what *People* is to your dentist's waiting room," President Reagan declared, adding "I want to assure you tonight: you didn't just part the Red Sea—you rolled it back, dried it up, and left exposed, for all the world to see, the naked desert that is statism." The magazine, he said, was the "principal intellectual influence in [the] formative years" for "young [conservative] leaders in the media, academia, or government" in the postwar United States. Quoted in Hoplin and Robinson, *Funding Fathers*, 73–75.

## CONSTITUTIONAL DISCOURSE IN *NATIONAL REVIEW*, 1955–1977

### Starting from Extra-Judicial Constitutionalism

Serious discussion of constitutional issues characterized NR from its inception.<sup>67</sup> From the 1950s through the 1970s, though, such discussion ranged well beyond considerations of the legitimacy of various interpretive theories applied by judges in deciding cases (though discontent over “liberal activist judges” was a constant). In 1955, many conservatives remembered the constitutional stand-off between FDR and the Court in which conservatives had aggressively defended judicial power. In the 1940s and 1950s, bastions of the judiciary like the American Bar Association (ABA) remained conservative organizations. Thus, critiques of the Court did not come naturally. The reality that the actual Supreme Court was now a liberal, Democratic institution, though, slowly dawned. The inclination at NR’s outset was to what scholars today call “the constitution outside the courts.”

There was considerable discussion early on, for example, of the investigatory powers of Congress. In the late nineteenth and early twentieth century, progressives had argued that Congress had broad powers to gather information for policy purposes via hearings and subpoenas. Conservatives had objected that, absent criminal charges, Congress’s powers in this regard were severely circumscribed by constitutional privacy rights.<sup>68</sup>

In the 1930s, just as liberals had won the battle over Congress’s powers to gather facts for (economic) regulatory purposes, a new battle concerning its powers to gather facts to ensure domestic security was beginning, a battle that heated up with the outbreak of the Cold War and reached a fever pitch in the 1950s. In a notable inversion, conservatives appropriated the old progressive argument and turned it on liberals, deploying it as the foundation for their contention that Congress had broad authority to investigate (and compel testimony) in matters concerning domestic security. Liberals insisted that, absent criminal charges being adjudicated in a court of law, the government had no right to this (private, personal) information.<sup>69</sup>

67. This analytic rigor of this discussion was mocked by Dwight Macdonald in his early assessment of NR. Dwight Macdonald, “Scrambled Eggheads on the Right,” 370 (“Their idea of a hot series is four articles on ‘Presidential Inability’ in which the Constitutional problems posed by Eisenhower’s recent illness are explored with a grim thoroughness that includes the facsimile reproduction of two Congressional bills and one resolution.”).

68. See Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge, UK: Cambridge University Press, 2004), ch. 2; Ken I. Kersch, “The Reconstruction of Constitutional Privacy Rights and the New American State,” *Studies in American Political Development* 16 (Spring 2002): 61–87.

69. See, e.g., C. Dickerman Williams, “Reflections on the Fifth Amendment,” *National Review* (December 21, 1955) 1: 15, 15. See

Conservatives also inveighed against executive power and stumped for the constitutional prerogatives of Congress.<sup>70</sup> The critique of executive power was set out at length by NR editor James Burnham in his book *Congress and the American Tradition* (1959), which criticized President Truman for launching the Korean War without Congress’s consent, condemned the growth of executive budgeting, warned that the presidents were using executive agreements to sidestep the constitutional requirement that treaties be made with the advice and consent of the Senate, and complained that the federal bureaucracy was becoming a politically unaccountable “fourth branch.” America was drifting towards a “democratist” plebiscitary presidency, in which the executive (on the model of a Napoleon or Hitler) had been handed an “unrestricted proxy.”<sup>71</sup>

### Axis One: The Structuralist–Moralist Debate

One major axis of movement constitutional debate between the 1950s and the mid-1970s was between structuralists like Willmoore Kendall and Martin Diamond and moralists like Harry Jaffa (and their various surrogates and partisans). Notably, none of these figures were legal academics (all were political scientists). All were primarily concerned not with giving normative advice to judges but with limning the nature of the American constitutional order writ large—that is, with American constitutionalism as a species of American political thought.

One of the most prominent debates was between partisans of “deliberate sense” constitutionalism and those of (as its critics dubbed it) moralist, “messianic” constitutionalism. Dartmouth College English Professor Jeffrey Hart, an NR editor, explained these

also C. Dickerman Williams, “Problems of the Fifth Amendment,” *Fordham Law Review* 24: 19 (1955): 26–30; Erwin N. Griswold, *The Fifth Amendment Today* (Cambridge, MA: Harvard University Press, 1955); C. Dickerman Williams, “The Watkins Case,” *National Review* (March 21, 1956): 1, 23. For the liberal view in the earlier period, see Felix Frankfurter, “Hands Off the Investigations,” *New Republic* 38 (1924): 329; and James M. Landis, “Constitutional Limitations on the Congressional Power of Investigation,” *Harvard Law Review* 40 (1926): 153.

70. See, e.g., Frank S. Meyer, “The Revolt Against Congress,” *National Review* (May 30, 1956): 9, 10; Samuel J. Kornhauser, “Lippmann’s ‘Prerogatives’” *National Review* (May 2, 1956): 16–17.

71. James Burnham, *Congress and the American Tradition* (Chicago: Regnery, 1959). Burnham’s book was recently re-issued by Regnery, with a forward by Newt Gingrich. Burnham, *Congress and the American Tradition* (Washington, D.C.: Regnery, 1996). On Burnham, see John P. Diggins, *Up From Communism: Conservative Odysseys in American Intellectual Development* (New York: Columbia University Press, 1994), 160–200, 303–338. On the conservative push for the Bricker Amendment to the Constitution, limiting the president’s treaty-making power, see Duane Tananbaum, *The Bricker Amendment: A Test of Eisenhower’s Political Leadership* (Ithaca, NY: Cornell University Press, 1988). See also Stephen Skowronek, “The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive,” *Harvard Law Review* 122 (2009): 2070.

longstanding disagreements amongst conservatives to NR readers in the 1970s. He distinguished two American constitutional traditions. “In the first . . . the American system is conceived of as one based ultimately on the ‘deliberate sense’ of the people. The Founders, consciously and with great ingenuity, designed a government in which ‘waves of popular enthusiasm’ would find it exceedingly difficult . . . to bring about rapid and fundamental change. . . . And the complex filter in the system of government they designed may be viewed as the functional equivalent of Burke’s ‘custom’ and of the unwritten restraints of the ‘British Constitution.’” Hart went on to explain that “the other and rival American political tradition does not appeal to the ‘deliberate sense’ of the people, but to a set of goals, posited as absolutes, which it claims to have discovered in certain key texts. The first is the ‘all men are created equal’ clause of the Declaration of Independence, not in its original context, but as reinterpreted by the Gettysburg Address. . . . Other key texts are Amendments I through X, especially the First and, of course, the ‘equal protection’ clause of the Fourteenth Amendment.”<sup>72</sup>

While contemporary readers might be inclined to identify Hart’s second tradition with contemporary liberalism, Hart was alluding to the constitutional philosophy of Straussian Harry Jaffa of Claremont McKenna College. Charles Kesler, today a government professor at Claremont McKenna, editor of the *Claremont Review of Books*, and a member of the board of governors of the Salvatori Center, but then a graduate student at Harvard, stumped for Jaffa in NR. “A political movement cannot philosophize, but a decent one has need of a philosophy,” Kesler insisted. He worried that “American conservatism sometimes resembles that false love of liberty, its self-examinations concluding in nothing more lasting or noble than ad hoc reactions to the New Deal, the Great Society, the New Frontier.” Kesler warned that “[T]his sort of poking around in the detritus of liberal social programs” was inadequate. Conservatism needed to define itself “less [by] a commitment to the past than [by] a commitment to certain *truths* applicable to past, present, and future.” He added, “[T]he scholar who, more than any other, has shown that the principles of that tradition, far from being ‘mere rubbish—old wadding left to rot on the battlefield after the victory is won’—are in fact the living truths of just government and wise conservatism, is Harry V. Jaffa.”<sup>73</sup>

72. Jeffrey Hart, “Peter Berger’s ‘Paradox,’” *National Review* (May 12, 1972): 511–16, 512. Hart has published a history and memoir of his years at the magazine: Jeffrey Hart, *The Making of the American Conservative Mind: The National Review and its Times* (Wilmington, DE: ISI Books, 2005). See also Jeffrey Hart, *The American Dissent: A Decade of Modern Conservatism* (Garden City, NY: Doubleday, 1966).

73. Charles Kesler, “A Special Meaning of the Declaration of Independence: A Tribute to Harry V. Jaffa,” *National Review* (July 6, 1979): 850–59, 850. Jaffa had been a speechwriter for Barry

The case for Jaffa was directed against the quite different constitutional visions propounded by other movement intellectuals. The neoconservative editor of *The Public Interest*, Irving Kristol, for instance—reacting in significant part against the New Left and the counterculture of the 1960s—had been busy mounting a sustained defense of bourgeois values (a notable reversal from his days as a City College Trotskyist in the 1930s). That defense led him toward an interpretation of the American Revolution as a bourgeois revolution.<sup>74</sup> Advocating Jaffa’s position, Kesler asserted that “it is hard to conceive that Americans would rise up to throw off British rule for reasons that could be embodied in a calm and legalistic document. . . . Of that abstract truth ‘that all men are created equal,’” he noted, chagrined, “Kristol says nothing.”<sup>75</sup>

Like Kristol, the Straussian Martin Diamond characterized the Revolution in terms that were too bourgeois and prosaic for Kesler. Diamond’s constitutional theory emphasized constitutional structure rather than the foundational truths of the Declaration.<sup>76</sup> Bowing respectfully to Diamond, Kesler conceded that “The Declaration and the Constitution each embody, in some sense, the principle of the Revolution, but the relationship between them is unclear, which is the higher expression of those principles. . . .” To be sure, Diamond was properly esteemed as “the foremost expositor of the Constitution and *The Federalist* in our time, through his lucid, finely crafted essays on the Framers’ views of democracy, liberty, and federalism.” Kesler admits that “[a]lmost single-handedly he revived the study of *The Federalist* as a serious work of political philosophy.”<sup>77</sup>

But Jaffa’s constitutional philosophy, propounded in *The Crisis of the House Divided* (1959), was of an entirely different order.<sup>78</sup> There, as Kesler reminded NR readers, Jaffa recounted how “Lincoln led America through ‘a new birth of freedom’—through a spiritual rebirth—because the first birth—the Founding—had been defective. Not

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Goldwater’s 1964 presidential campaign and he became famous for penning the line in Goldwater’s nomination acceptance speech asserting that “Extremism in the defense of liberty is no vice . . . And . . . moderation in the pursuit of justice is no virtue.”

74. See Irving Kristol, “The American Revolution as a Successful Revolution,” in *America’s Continuing Revolution: An Act of Conservatism* (Washington, DC: American Enterprise Institute, 1975), reprinted in Irving Kristol, *Reflections of a Neoconservative: Looking Back, Looking Ahead* (New York: Basic Books: 1983), 78–94.

75. Kesler, “A Special Meaning of the Declaration of Independence,” 851.

76. See Martin Diamond, “The Declaration and the Constitution: Liberty, Democracy, and the Founders,” *The Public Interest* 41 (Fall 1975): 39–55.

77. Kesler, “A Special Meaning of the Declaration of Independence,” 852.

78. Harry V. Jaffa, *The Crisis of the House Divided: An Interpretation of the Issues in the Lincoln–Douglas Debates* (Garden City, NY: Doubleday, 1959).

merely because of the Constitution's compromises with slavery, but because of what those compromises represented. . . ." Jaffa placed the "equality of natural rights" at the core of American constitutionalism. In Kesler's assessment, "Jaffa's view of the character of our politics unfolds easily into an interpretation of the whole of U.S. history: which becomes the moral drama of conflict between self-government, as *what the people will* and self-government as *what the people ought to will*." "This," he insisted, "is history on the grand scale, similar to Charles A. Beard's or Louis Hartz's comprehensive interpretations, but truer to the moral character—one should say, truer to the facts—of American political life."<sup>79</sup>

79. Kesler, "A Special Meaning of the Declaration of Independence," 854. Jaffa's understandings have served as the wellspring of the contemporary conservative constitutional vision some have called "Declarationism." With its intellectual core housed at Claremont McKenna College, in the *Claremont Review of Books*, and at Claremont's Salvatori Center, Declarationism rests on the conviction that the Declaration of Independence is not only an inherent component of the U.S. Constitution, but foundational. Declarationists understand the Declaration to be both philosophically and temporally prior to the Constitution. For, without a prior commitment to the (purportedly Christian) proposition that all men are created equal, there is no basis for considering consent to the Constitution binding. That shared philosophical commitment created the American nation, which then composed and ratified the Constitution. Significantly, this understanding amongst many conservative intellectuals serves as a bridge between the Founders and conservative Catholics, fundamentalist and evangelical Protestants, and Mormons. See, e.g., John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960); Francis A. Schaeffer, *A Christian Manifesto* (Wheaton, IL: Crossway Books, 2005); A. Scott Loveless, "The Forgotten Founding Document: The Overlooked Legal Contribution of the Declaration of Independence and California's Opportunity to Revive It Through Proposition 8," SSRN Working Paper (October 23, 2008). See also Kirkpatrick, "Right Hand of the Fathers." Declarationism has the special virtue to many conservatives of putting them on the "right side" of civil rights (Lincoln is a hero to Declarationists, which had initially made them anathema to the now largely vanished remnant of neo-confederates). And, because of its appeal to natural law as the root of human equality, Martin Luther King, Jr.'s "Letter From a Birmingham Jail"—which quotes Thomas Aquinas—has been adopted as a core Declarationist text. Today, even the *University of Mississippi* has a newly opened Declaration of Independence Center for the Study of American Freedom (founded by a Princeton Ph.D. student of conservative Catholic Natural Law philosopher Robert P. George)—with images of Lincoln, Jefferson, and King on its homepage banner (<http://www.olemiss.edu/depts/independence/>). In recent years, Princeton's James Madison Program in American Ideals and Institutions, founded and directed Robert George, and his relatively new, free-standing, Princeton, New Jersey think tank, The Witherspoon Institute, which is led by an Opus Dei cleric, is assuming increasing leadership in the propagation of the Declarationist vision. Operating under a "teach the controversy" rubric, Witherspoon (with the sponsorship of the Bush administration's National Endowment for the Humanities) has recently launched a "Natural Law, Natural Rights and American Constitutionalism" web resource, with banner graphics (quotes and photos) juxtaposing the opening lines of the Declaration, Abraham Lincoln on the Declaration, and Martin Luther King, Jr. (quoting Catholic natural law—here, St. Augustine) with the positivist counter-tradition, as represented by Oliver Wendell

Jaffa battled against Diamond's structuralism and institutionalism, which he traced to the malign errors made by Willmoore Kendall in *The Basic Symbols of the American Political Tradition* (1970). There, Kendall had claimed that "The Declaration itself gives no guidance on how or in what ways' American government should be structured, it anticipates merely that the people will shortly 'engage in some sort of deliberative process to establish that form of government.'" But perhaps Jaffa's greatest antagonists on the Right were agrarian or neo-confederate traditionalists like M.E. Bradford, who blamed Lincoln for wrecking the Constitution. Arguing on Jaffa's behalf, Kesler noted that "Like Kendall, Bradford sympathizes with the Confederacy, makes great sport of the freedom-loving-slave-holding Founding Fathers, and is scornfully critical of Lincoln, whom he anathematizes as a 'gnostic' force." Kesler disdainfully dismissed "the Taney-Kendall-Bradford interpretation."<sup>80</sup>

Kesler was convinced that the outcome of the debate over which constitutional vision should prevail within the movement would ultimately determine whether the nation, once restored to sound leadership, would flourish—or even, perhaps, survive. "The U.S. will become nothing if it suffers a great military defeat in the next war: but, more profoundly, the U.S. will become nothing if it becomes persuaded that it stands for nothing," Kesler warned.<sup>81</sup> "Conservatives who look to Jaffa's teaching, and to Lincoln's example," he wrote, "will see a kind of conservatism that lies between and above the extremes of libertarianism and traditionalism." He continues

The danger of traditionalism's reverence for the past is that it is unreasonable, unprincipled—and fundamentally no different from liberalism's unprincipled commitment to the future. . . . It does not acknowledge any objective standards by which we may distinguish just from unjust, good from bad, true from false, and so provides us no guidance in choosing what elements of the past should be conserved as a matter of expedience, and what elements must be conserved as a matter of justice. Nor . . . can it provide us with what the past does not furnish—living statesmanship and virtue. . . . Jaffa's interpretation of the

Holmes, Jr., and Hugo Black. See <http://www.nlrac.org/> (for the initiative's announcement notice, see [http://www.winst.org/announcements/11\\_01\\_17\\_natural\\_law.php](http://www.winst.org/announcements/11_01_17_natural_law.php)).

80. Kesler, "A Special Meaning of the Declaration of Independence," 855, 858. Willmoore Kendall and George W. Carey, *The Basic Symbols of the American Political Tradition* (Baton Rouge, LA: LSU Press, 1970). Bradford was the pick of Republican traditionalists to head the National Endowment for the Humanities in Ronald Reagan's first term; they were infuriated when he was spurned in favor of William Bennett. Taney wrote the majority opinion in *Dred Scott*.

81. Kesler, "A Special Meaning of the Declaration of Independence," 859.

American political tradition points toward a politics that prizes virtue more highly than does libertarianism, and reason more highly than does traditionalism.<sup>82</sup>

Jaffa himself lamented that the Declaration's insistence that "all men are created equal" was a "proposition that is anathema to American conservatives. It is hardly too much to say that they regard it with an aversion equal to that with which they regard 'all history is the history of class struggle.'" Moreover,

[E]very schoolboy knows—or at least once knew—that Jefferson departed from Locke in declaring that among man's unalienable rights were life, liberty, and the pursuit of happiness—happiness, mind you, and not "property" or "estate." If man, in the state of nature, or by nature, pursues happiness, then by nature he pursues a *summum bonum* and does not merely flee a *summum malum*. This theoretical defect in Hobbes's and Locke's teaching is then not a necessary defect of the Declaration.<sup>83</sup>

But do contemporary Americans have the faith to avail themselves of their rich heritage? Jaffa reminded readers that in *Natural Right and History* (1953), Leo Strauss asked one of the most momentous of questions: "Does this nation in its maturity still cherish the faith in which it was conceived and raised? Does it still hold those 'truths to be self-evident?'... Strauss believed those questions ought to have been answered in the affirmative. Until they could be so answered, he did not believe this nation, or the West, could recover its moral health or political vigor." It was the mission of conservative Americans to fight for the triumph of this faith.<sup>84</sup>

Countering Kesler, M. J. Sobran and Jeffrey Hart took on Jaffa on Kendall's behalf.<sup>85</sup> "Throughout his career," Sobran reported, "Kendall deplored the

messianic pretensions . . . of what we may . . . call the Declaration Tradition, with its universalism and stress on individual rights." "Against this," Sobran explained, "he placed the Constitutional Tradition of government by consensus, which tended to mute sharp moral issues and scale down grandiose causes to politically assimilable dimensions."<sup>86</sup>

Hart complained that "the interpretation of these key texts by the avatars of the rival [Declaration] tradition is . . . completely unhistorical. . . . Does the Declaration tell us that it is the task of government to bring about equality of condition, or even equality of opportunity? . . . The founders would have ridiculed either goal as preposterous." Plainly, the Declaration stood simply, if importantly, for the proposition that "Men are equal . . . in their right to found and organize a government as they see fit."<sup>87</sup>

Hart was particularly troubled that Jaffa's theoretical tradition had "developed its own mythology, and, when not appealing to key sacred texts, invokes a series of quasi-messianic Great Presidents—Washington, Jefferson, Lincoln, Wilson, Roosevelt, Kennedy—each of whom, to quote Kendall again, 'sees more deeply into the specifically American problem, which is posed by the 'all men are created equal' clause of the Declaration of Independence.'" By these lights, "America will build a New Jerusalem which will be a commonwealth of free and equal men. . . . Through Him, through the Great President, we are to be reborn." Hart understood this political (and executive) messianism to be an affront to the Constitution—and politically dangerous as well.<sup>88</sup>

For Hart, the debate about whether the "deliberate sense" or "abstract theory" would prevail within conservative constitutional thought framed the central constitutional issues of his time: "Busing, school prayer, pornography—the current litmus test issues," Hart insisted, "all seem to take their places within its parameters." If, as seemed to be the case, the Supreme Court and the federal bureaucracy were

82. Ibid.

83. Harry V. Jaffa, "Another Look at the Declaration," *National Review* (July 11, 1980): 836–40, 836, 840. In recent years, Jaffa has been arguing that Thomas Aquinas's thought was more important to the American Founding than John Locke's. See Harry Jaffa, "Natural Law and American Political Thought," Lecture in the America's Founding and Future Series, James Madison Program in American Ideals and Institutions, Princeton University (September 29, 2003).

84. Jaffa, "Another Look at the Declaration," 840. See Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

85. Kendall was once described by Dwight Macdonald as "a wild Yale don of extreme, eccentric, and very abstract views who can get a discussion into the shouting stage faster than anybody I have ever known." Dwight Macdonald, "Scrambled Eggheads on the Right," 368. A more endearing portrait was drawn by Saul Bellow in "Mosby's Memoirs," where the title character Willis Mosby is based on Kendall. Saul Bellow, *Collected Stories* (New York: Viking, 2001), 355–73 [originally published in *The New Yorker*]. See also Nash, "The Place of Willmoore Kendall in American Conservatism," in Nash, *Reappraising the Right*, 60–71.

86. M. J. Sobran, "Saving the Declaration," *National Review* (December 22, 1978): 1601–2, 1601. Hart's characterization of both Kendall and Strauss suggests that they are progenitors of originalism in that both sought to read texts as their authors intended them to be read. Kendall sought to "define a constitutional orthodoxy based on common sense, American experience, and the founding texts, closely read." His approach was to start with the "We the People" of the preamble filtered through the delaying and refining process of constitutional forms, democratic instincts and experience combined with high political theory." See Hart, *Making of the American Conservative Mind*, 30, 36.

87. Hart, "Peter Berger's 'Paradox,'" *National Review* (May 12, 1972), 512.

88. Ibid. To the consternation of many conservatives, Hart endorsed Barack Obama for president in 2008. We might in part attribute this turn as a reaction against the influence of messianic Straussianism in the contemporary Republican Party. See Jeffrey Hart, "Obama is the Real Conservative," *The Daily Beast* (October 31, 2008) (<http://www.thedailybeast.com/blogs-and-stories/2008-10-31/obama-is-the-true-conservative/>).

now careering out of control, it was because they had spurned Kendall's go-slow, consensus approach.<sup>89</sup>

The libertarian Frank S. Meyer also came out swinging against Jaffa. Noting that both deliberate sense and abstract views have long pedigrees in American political thought, Meyer found it odd that Jaffa clung so tenaciously to the conviction that his understanding was the only legitimate interpretation of the American constitutional tradition. Jaffa's relentless high-mindedness, moreover, was a menace to free government. His "airy and cavalier lack of concern with how power is distributed," Meyer charged, "leaves him with no defenses, except hope, against the tendency of government to concentrate power and to ride roughshod over the individual. It fully explains his admiration of Jackson, Lincoln, *et al.*"<sup>90</sup>

Meyer placed liberty, not equality, at the core of the country's constitutional tradition—and Jaffa's hero, Lincoln, was no friend of liberty. "Professor Jaffa, since he regards the division of power as irrelevant to the 'principle of a free constitution,' [in favor of the view that what is crucial is the recognition that all men have rights which no government should infringe] does not begin to grasp the incalculable damage for which Lincoln is responsible," Meyer protested. "Jaffa . . . chooses to base his critique of American slavery on the proposition that the American polity is in its essence dedicated to equality—and to center his vindication of Lincoln on Lincoln's role as the champion of equality. Nothing . . . could be further from the truth . . . The freedom of the individual person from government, not the equality of individual persons, is the central theme of our constitutional arrangements. . . . Freedom and equality are opposites." Jaffa's Lincoln is the champion of equality, but Meyer's is "the creator of concentrated national power, the President who shattered the constitutional tension." These two Lincolns, Meyer insisted, are "one and the same man."<sup>91</sup>

### Axis Two: Reactive Originalism and the Conflicted Critique of the Court

NR's first ten years largely coincided with the Warren Court's (1953–1969) first decade, and much of NR's constitutional discussion in those years expressed incredulity at the audacity and looseness of that Court's rulings. Major themes included the view (concerning civil rights cases) that good intentions do not justify radical departures from constitutional strictures and traditions and that (concerning national security cases) governments must have the powers

necessary to deal effectively with threats. The earliest articles strained to maintain a deferential respect for the Court as an institution, but these efforts gave way as what first looked like a smattering of erroneous rulings calcified into a set of firm and cohesive commitments. At this point NR writers began contrasting the Court's reasoning with what they insisted was the original understanding of the Constitution, transforming the magazine into an early forum for what Keith Whittington has called "old originalism"—although I prefer the more descriptive "reactive originalism"—an originalism (then) newly fashioned in direct response to the Warren Court's rulings.<sup>92</sup>

Reactive originalism at this point was not the fully theorized philosophy of interpretation it would later become, but, rather, a species of traditionalism.<sup>93</sup> No articles at this time argued that using originalist methods was the most, or the only, legitimate way for judges to interpret the constitutional text. When an originalist appeal was made, it was in response to a ruling in an immediate controversy that transformed an important area of public policy. When broader discussions led to results that coincided with results that would appeal to contemporary originalists (like Willmoore Kendall's article on the "open society" and free speech), they tended to argue on grounds of political philosophy—on the nature of the right and the good—rather than on the grounds that a judge, as a condition of his office, was restrained by a duty of fidelity.<sup>94</sup>

Articles dealing with constitutionalism in NR were penned by an array of authors, with diverse starting points and commitments. In the hands of some, including the magazine's editors, reactive originalism was less a theory of interpretation than a way of signaling one's commitment to constitutionalism itself, advanced in a Burkean guise. "For years now we've

92. See Keith E. Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 2 (2004): 599–613.

93. See, e.g., Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999).

94. See Willmoore Kendall, "The 'Open Society' and its Fallacies," *American Political Science Review* 54 (December 1960): 972–79 (arguing against John Stuart Mill). See also Willmoore Kendall, "The Bill of Rights and American Freedom," in Meyer, ed., *What is Conservatism?*, 41–64. The injunction that greater attention be paid to the constitutional framers was advanced most influentially by the Straussian Martin Diamond, who published several influential articles on the topic in *The Public Interest* (See, e.g., Martin Diamond, "Conservatives, Liberals, and the Constitution," *The Public Interest* 1: 96–109 (Fall 1965)). We might, however, also trace the modern originalist impulse as far back as the thought of early twentieth-century civil libertarians like Roger Baldwin or Hugo Black who, in part through this impulse, distinguished themselves from their progressive progenitors. See John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, MA: Belknap Press of Harvard University Press, 2007), Ch. 3. See also William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953) (3 vols.).

89. Hart, "Peter Berger's 'Paradox,'" 513.

90. Frank S. Meyer, "Again on Lincoln," *National Review* (January 25, 1966): 71–72, 71. On Meyer, see Meyer, *In Defense of Freedom*; Kevin J. Smant, *Principles and Heresies: Frank S. Meyer and the Shaping of the American Conservative Movement* (Wilmington DE: ISI Books, 2002).

91. Meyer, "Again on Lincoln," 71, 72.

had it drummed into us that the Constitution is what the Supreme Court says it is," wrote NR's editorial board in 1962:

If that is true . . . it begins to look as if it were only an indirect way of saying that we do not have a Constitution, that our government is a constitutional government no longer. To call a government "constitutional" must mean, as a minimum, that its particular laws and day-to-day operations are conceived within some sort of stable structure that represents a consensus or compact, changing only slowly, and by prescribed, deliberate methods. This structure may be in part written down, as ours was, or embodied in tradition, custom, and precedent, as is the English case; but the structure must be there and accepted, or the Constitution is a myth. . . . Let us grant that a constitution, any constitution, written or unwritten, must develop, must adapt itself in sufficient measure to changed time. But it cannot, without becoming a mockery, turn upside down overnight; cannot mean one thing today, and the exact opposite tomorrow: that is the dialectic not of constitutional development, but of social revolution.<sup>95</sup>

NR's reactive originalism was typically, and frankly, qualified. In assessing foreign affairs powers as late as 1970, for instance, NR's editors soberly concluded that "like most constitutional issues, it is a problem that cannot be settled by mere reference to the words of the Constitution. The Constitution is ambiguous about the locus of the 'war power.'"<sup>96</sup> James J. Kilpatrick—no moderate on the Warren Court or the Constitution—insisted that "[t]his séance theory, which treats Supreme Court Justices as table-knocking mediums, speaking in trance through the spirits of the founding fathers, is a theory of convenience. It is hokum." He concluded ruefully that "[c]onstitutionality is like beauty: it lies in the beholder's eye; and when the beholder sits in one of those nine great swivel chairs, the eye sees what it wants to see. The Constitution . . . is what the judges say it is."<sup>97</sup>

That said, Kilpatrick argued that the essence of a constitution is that it disciplines. Kilpatrick explained

95. "God Save This Honorable Court," *National Review* (July 17, 1962): 10–12, 10. See also C. Dickerman Williams, "Is It Constitutional?" *National Review* (July 14, 1970): 731–33, 732. ("Although, of course, practice cannot supply power when none exists, it is true, as once said by Justice Frankfurter, that 'deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of the text or supply them.' In the same opinion, he expressed the thought that when the government has 'consistently operated' in a given way over a long period of time, that fact 'fairly establishes' that it has operated according to its true nature.").

96. "Powers and Dominations," *National Review* (June 2, 1970): 550.

97. James J. Kilpatrick, "A Very Different Constitution," *National Review* (August 12, 1969): 794–800, 795.

that "[t]o Judge Cooley, most famous of the professors of constitutional law, this rule of strict construction—to go first to the intention of the framers and ratifiers—was the very 'pole star' of constitutional adjudication." He continued that

Such an adherence to fixed meanings does not exclude the proposition that ours is a "living Constitution." Of course, the Constitution lives, in the enduring structure of government it created, in the separation of powers, in the spirit of human liberty that gives life to the Bill of Rights. But especially in questions of power, and in the meaning to be attached to particular words and phrases, the intention of the framers is critical. If this is scorned, judges become not interpreters, but amenders.<sup>98</sup>

In the end, as William F. Buckley, Jr. himself wrote, the "division, in fact, is between those who desire to make social revolution by odd-ball interpretations of the Constitution, and those others who believe that whatever changes we make, if they are to be made by organic movement of the Republic, should be made by legislation or by constitutional amendment."<sup>99</sup>

Cornell University political scientist Walter Berns emphasized that interpreting the Constitution was not often easy, or amenable to slogans and formulas. "Not much is gained by saying that [the] standard can be found in the words of the Constitution," Berns explained. "If the process of constitutional interpretation were that simple, anyone with a dictionary could be a judge, and . . . there would be little criticism of the Court." Clearly not a faithful originalist in the contemporary sense, he continued, "Nor is the standard of a valid constitutional decision always to be found through an examination of historical records to learn . . . the intent of the men who wrote and accepted the words of the relevant clause. . . . [M]uch has happened to alter the constitutional relation of nation and states since those words were written. . . . [most importantly] the ratification of the Fourteenth Amendment after the Civil War."<sup>100</sup> That the

98. *Ibid.*, 796. See also Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little, Brown, 1868).

99. William F. Buckley, Jr., "Two Whats for the Supreme Court," *National Review* (November 5, 1971): 1258–59, 1259.

100. Walter Berns, "School Prayers and 'Religious Warfare,'" *National Review* (April 23, 1963): 315–18, 316. Berns subsequently decamped to the University of Toronto with fellow Straussian Allan Bloom in the aftermath of the radical student uprisings at Cornell in 1969 and the failure, in their eyes, of the Cornell administration to defend academic standards and integrity. See Donald Alexander Downs, *Cornell '69: Liberalism and the Crisis of the American University* (Ithaca, NY: Cornell University Press, 1999). Berns later moved to Georgetown, where he is currently professor emeritus, and a Resident Scholar at the American Enterprise Institute. See also L. Brent Bozell, *The Warren Revolution: Crisis in the Consensus Society* (New Rochelle, NY: Arlington House, 1966), 17 ("Everyone knows that constitutions may be written, as in the United States, or unwritten, as in Great Britain. What is less often noticed is that

Constitution had to be considered a constraining legal document all agreed. But NR writers were largely convinced that vexatious questions of judgment and interpretation could, in the end, never be removed from the process.

For all the excoriation it leveled at the Warren Court, there was, at various points, some surprising give in the magazine's criticisms. In a 1969 postmortem, for example, NR observed that:

For all the history-book prominence of major Supreme Court decisions... it is difficult to be sure to what extent the Court is leading the way, or merely formalizing wider political and social developments. The Warren Court did not create the welfare state, though its decisions upheld welfarism; *Brown* and its sequel civil rights decisions were spectacular, but it is doubtful how big an independent role they played in racial matters. The racial issues were pushing to the surface independently of anything the Court did or could have done. If the Warren Court frequently exercised, as it did, the legislative power, that was as much from Congress's abdication as from the Court's deliberate usurpation.<sup>101</sup>

James J. Kilpatrick noted that “[a]t every point in its history, the Court has drawn the same criticism from those it has offended. The indictment that is drawn against the Warren Court thus is not different in kind: it is different only in degree.” Kilpatrick even praised the substance of the Court's landmark right to privacy decision—later the *bête noire* of conservatives. “[I]f one is indifferent to the means employed to reach an end,” he wrote in the late 1960s, “it is possible to admire many of the new landmarks erected. In *Griswold v. Connecticut*, for one example, the Court reached a clearly desirable end: It dumped Connecticut's ridiculous law on the sale and use of contraceptives. But the Court, stomping through the penumbras of the law, attained this end by trampling upon the power of a state, if it chooses, to enact ridiculous laws.”<sup>102</sup> Similarly, Kilpatrick admitted in 1973 that “The Court, under Warren, accomplished ... a vast deal that was good.” As legal craft, Earl Warren's *Brown v. Board of Education* opinion was “clearly a monstrosity.” It nevertheless “served to smash a rotten barrier that cried out for removal.” In its reapportionment decision *Baker v. Carr*, Kilpatrick thought that the “cogent

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in a society like ours ... only *part* of the Constitution is written down.” [emphasis in original]. Bozell then undertakes an extended discussion of “our unwritten constitution,” where he distinguishes the Constitution's “fixed” from its “fluid” features. Bozell, *The Warren Revolution*, 20–21.

101. “Warren Goes,” *National Review* (July 8, 1969): B97. This article did assert, however, that criminal procedure was one area where Court was actually leading.

102. Kilpatrick, “A Very Different Constitution,” 795. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

dissents of Frankfurter and Harlan ... plainly had the better view of the law and of the Court's scheme of government.” The decision, nevertheless, “righted a flagrant wrong,” and Kilpatrick also admitted that “[s]o, too, with many of the Warren opinions going to the protection of the rights of the accused in criminal prosecution: the Court tossed precedents to the four winds, but it halted some palpable evils.”<sup>103</sup> However, Kilpatrick also felt that the Warren Court's “record of judicial activism is without parallel in the Court's long history.”<sup>104</sup>

## BROWN V. BOARD OF EDUCATION AND CIVIL RIGHTS

Discussion of civil rights in NR in the aftermath of *Brown* helped forge a unified postwar conservatism. What didn't appear in the magazine's pages was as significant as what did. Buckley's ground rules forbade overt racism, proud neo-confederatism, and anti-Semitic or John Birch Society rants alleging Jewish or Communist plots. But he encouraged spirited discussion of the ruling grounded in the abstractions of constitutional and political theory.

Accordingly, from the outset NR regarded the civil rights movement through the prism of highly formalized, traditionalist understandings of governmental powers. Like the New Dealers before them, the civil rights movement demanded, and won, government action that spurned both the wonted strictures of federalism and the separation of powers and incrementalism. NR writers inclined toward opposing civil rights in much the same idiom with which their progenitors had fought FDR's innovations.

The magazine downplayed the human dimensions of the civil rights struggle.<sup>105</sup> In a heartfelt editorial, Buckley appealed to “the best elements of the South [to] bear in mind that no hardship visited on it by Northern egalitarians or judicial ideologues warrants retaliation against Negro school children.” He predicted that “[t]he specter of New Orleans ... where the tricoteuses expressed themselves against the Supreme Court by spitting on Negro school girls will haunt the American memory for generations after the sins of Earl Warren are ... bleached by time.”<sup>106</sup> But mostly there was little passion for, or even interest in, civil rights, save as it challenged traditional constitutional formalisms. Early on, Dwight Macdonald had limned the magazine's unsatisfying reaction to *Brown*, observing that “[t]hey don't quite meet the central issue, they don't quite dare to state that segregation is not in itself discrimination,

103. James J. Kilpatrick, “This Much, at Least: The Court,” *National Review* (September 28, 1973): 1047–52, 1048. *Baker v. Carr*, 369 U.S. 186 (1962).

104. James J. Kilpatrick, “A Very Different Constitution,” *National Review* (August 12, 1969): 794–800, 794–95.

105. See Allitt, *Conservatives*, 182.

106. William F. Buckley, Jr., “They Are Going to Do It,” *National Review* (December 2, 1969), 1234.

because they generally don't meet awkward issues head-on (or perhaps just don't recognize them—one must allow for a general obtuseness), but they sneak in the back way with a pious declaration that segregation 'is a problem that should be solved not by the central government, but locally—in the states—and in the hearts of men.'"<sup>107</sup>

The Goodman, Schwerner, and Cheney murders occasioned less outrage than the fact that, under the 1964 Civil Rights Act, their perpetrators were being pursued by the federal government. To NR's writers, this suggested that allegations of civil rights violations could "become a catch-all charge by which the Federal Government can get its hands on nearly any citizen." The magazine jokingly warned, "A man will have to watch his step . . . if he told his wife he'd kill her if she voted for Bobby Kennedy, he may find himself hauled up for a civil rights violation."<sup>108</sup>

NR writers argued that while civil rights were a noble cause, the means the Court was deploying to advance them were destroying the Constitution. Indeed, according to NR, the Court's civil rights imperative had rendered their claim to be interpreting the Constitution ridiculous. NR's arguments sometimes gave way to satire. One 1966 article announced with mock solemnity that "The United States Supreme Court yesterday declared the federal Constitution unconstitutional on the ground that it is in direct and complete conflict with the Voting Rights Act of 1965 . . . . It declared that in the light of Gunnar Myrdahl's [sic] discovery of 'The American Dream,' the intent of the Constitution's framers could only be construed to denote that they had no real intent of framing a constitution, and did so merely to pass the time as pleasantly as possible. . . ." The satire referenced an opinion by a Supreme Court Justice in the fictional decision "holding that the unconstitutionality of the Constitution should be made retroactive and ex post facto in order to establish instant integration everywhere. . . . All those criminals who had been caught and imprisoned would be automatically released *sine die*, having been convicted under laws enacted under an unconstitutional Constitution." For good measure, it cited an apocryphal concurring opinion announcing that the Constitution "was additionally unconstitutional by reason of being at total variance with the Atlantic Charter, the By-laws of Americans for Democratic Action, and the Medulla Oblongata. That opinion quoted as authority . . . three chapters from *Catcher in the Rye*, and 26 pages from the *Reader's Digest* condensation of *The Eleanor Roosevelt Story*."<sup>109</sup>

107. Macdonald, "Scrambled Eggheads on the Right," *Commentary*, 369. He added, "[a] true conservative appeals to the laws or, if desperate, to tradition, but certainly not to the 'hearts of men.'"

108. [untitled], *National Review* (July 7, 1964): 1.

109. David Warren Ryder, "The Day They Killed the Constitution," *National Review* (August 23, 1966): 838.

James J. Kilpatrick opined that the desegregation decision "was a portent of things to come. It was short on law, but long on compassion. [Earl Warren's] first premise appeared to be that segregation is morally wrong; therefore, he concluded, it must be unconstitutional."<sup>110</sup>

Some conservatives were also put off by the civil rights movement's penchant for encouraging lawlessness and disorder. More sympathetic to the underlying cause than most conservatives, Harry Jaffa claimed that "[T]he principal cause of lawlessness in the United States had always been the tension generated by the demands of equality in the presence of racial difference."<sup>111</sup> But the Lovestone-ite Communist-turned-conservative (Jewish) intellectual and theologian Will Herberg (NR's religion editor in the 1960s), warned that "Internal order is the first necessity of every society. Even justice is secondary to order, because without order there can be no society and no justice. . . ." He continued:

For years now, the Rev. Dr. Martin Luther King and his associates have been deliberately undermining the foundations of internal order in this country. With their rabble-rousing demagoguery, they have been cracking the "cake of custom" that holds us together. With their doctrine of "civil disobedience," they have been teaching hundreds of thousands of Negroes—particularly the adolescents and the children—that it is perfectly alright to break the law and defy constituted authority if you are a Negro-with-a-grievance; in protest against injustice. . . . They have on occasion after occasion . . . called out their mobs on the streets, promoted "school strikes," sit-ins, lie-ins, in explicit violation of the law and in explicit defiance of the public authority. They have taught anarchy and chaos by word and deed . . . and they have found apt pupils everywhere. . . . Sow the wind, and reap the whirlwind.<sup>112</sup>

110. Kilpatrick, "A Very Different Constitution," 795. See also Garrett Epps, "The Littlest Rebel: James J. Kilpatrick and the Second Civil War," *Constitutional Commentary* 10 (1993): 19.

111. Harry V. Jaffa, "The Limits of Dissent," *National Review* (September 10, 1968): 911–12, 911.

112. Will Herberg, "Who Are the Guilty Ones?" *National Review* (September 7, 1965): 769–70, 769. Herberg's most influential book was *Protestant, Catholic, Jew: An Essay in American Religious Sociology* (Garden City, NY: Doubleday, 1955). For a similar position on King and the civil rights movement from a Straussian favorably inclined toward the movement's substantive goals (rightly understood), see Herbert Storing, "The Case Against Civil Disobedience," in Joseph Bessette, ed., *Toward a More Perfect Union: Writings of Herbert J. Storing* (Washington, DC: American Enterprise Institute, 1995), 236. This essay was originally published in Robert A. Goldwin, ed., *Civil Disobedience: Five Essays by Martin Luther King, Jr. and Others* (Gambier, OH: Public Affairs Conference Center, 1968) [essays by King, James Farmer, Paul Goodman, Herbert Storing, and Harry Jaffa]. Storing taught courses on the Civil War and the Constitution and edited an anthology of African-American

In 1962, NR's editors saw *Brown* as "the prime symbol of the drive toward a centralized, despotic mass state that has been proceeding under the direction of a united front of the federal executive and judiciary."<sup>113</sup> NR's editors pronounced the decision "one of the most brazen acts of judicial usurpation in our history, patently counter to the intent of the Constitution, shoddy and illegal in analysis, and invalid as sociology."<sup>114</sup> It contradicted long-established precedent, and was a blatant usurpation of legislative power.<sup>115</sup>

Forrest Davis insisted *Brown's* reasoning "derived more from the leveling doctrines of the Jacobins of the French Revolution than from the philosophy of the Founding Fathers." He claimed "the Fathers never conceived of the federal government as an agency empowered to make all Americans equal, uniform, or total abstainers. . . . True egalitarianism . . . is a concept translated from the religious teaching that all men are brothers under God. Few, if any, political systems have practiced egalitarianism. . . ."<sup>116</sup>

Brent Bozell emphasized that *Brown* "was not a faithful interpretation of the Constitution as the document was conceived by its framers, but rested entirely on the justices' views of correct social policy. . . . The authors of the Fourteenth Amendment did not intend to withdraw public education from the realm of state power." He argued that, given the explosive nature of the subject, progress on desegregation should be slower, more flexible, and incremental, and led by the elected branches. "A wiser course for the Court . . . would have been to defer indefinitely any decrees in the cases before it while simultaneously calling attention to Section V of the Fourteenth Amendment . . . . It might also have expressly reminded the states of their obligation to enforce the Constitution. . . . [I]t would have given prime responsibility for the integration

program, and thus leadership of it, to the political departments."<sup>117</sup>

The problem was compounded by the extension of *Brown* to not only forbid segregation but to require desegregation, an extension that laid waste to the Tenth Amendment, creating, in effect, a national police force to enforce national injunctions. NR saw it as ironic that the ideological progeny of progressives would support this new departure: "The desegregationists have now got the federal courts back into the business of government by injunction [as the conservative judges had been involved in enjoining the activities of labor unions in the late nineteenth and early twentieth centuries]. . . . In a government by injunction, the courts become the detailed administrators of the law; they invade the sphere of executive power."<sup>118</sup>

NR explained that "Since the Constitution does not explicitly deny to the states the right to supervise education, and since it does not explicitly assign that right to the federal government, education [is] a matter for the individual states to regulate." Moreover, the Congress that drafted the Fourteenth Amendment had established racially segregated schools in the District of Columbia. The issue was not whether conservatives approved of racial discrimination; it was whether central or local authority should make the decision. "It is particularly strange that the same people . . . who attach profound significance to an almost ritualistic maintenance of traditional freedoms, even when those freedoms are used in behalf of men or causes we disapprove of, should be so slow to understand the nature of the resistance to the Supreme Court's rulings," NR's editors observed. "The question is not . . . whether children of African and . . . European stock shall study in the same classrooms . . . [but] whether they shall be compelled to do so by an arm of the federal government."<sup>119</sup>

Fortunately, *Brown* "may . . . shak[e] inchoate states-righters out of their . . . stupor. Perhaps it is too late; but political resistance in the South seems to be centering on the broad and—potentially—dynamic concept of decentralized political authority," the magazine cheered. "There has been more talk, these past few months, about the meaning of federation and about the significance of the Tenth Amendment . . . than there has been for a generation. . . . We welcome . . . the return of serious discussion of states rights. This resistance might dovetail with the related fights over the federal treaty making power, and matters of

political thought: Herbert J. Storing, ed., *What Country Have I? Political Writings by Black Americans* (New York: St. Martin's Press, 1970).

113. "Toward a Total State," *National Review* (April 10, 1962): 234–35.

114. "Segregation and Democracy," *National Review* (January 25, 1956): 5. A journalist and editor of *The Freeman*, Hazlitt wrote for mainstream publications including *The Wall Street Journal*, *The Nation*, and *Newsweek*. He influentially reviewed Hayek's *The Road to Serfdom* for the *New York Times*, and arranged for Von Mises to teach at NYU. His libertarian classic *Economics in One Lesson* (New York: Harper and Brothers, 1946) was one of Ronald Reagan's favorite books. See Thomas W. Evans, *The Education of Ronald Reagan: The General Electric Years and the Untold Story of His Conversion to Conservatism* (New York: Columbia University Press, 2008), 53, 77–78, 109, 176, 203.

115. Henry Hazlitt, "Court or Constitution?" *National Review* (September 1, 1956), 14; "The Brown Decade," *National Review* (June 2, 1964): 433–34. The precedent was *Plessy v. Ferguson*, 163 U.S. 537 (1896).

116. Forrest Davis, "The Right to Nullify," *National Review* (April 25, 1956): 9–11, 11.

117. Brent Bozell, "A Way Out for the Supreme Court?" *National Review* (September 13, 1958), 176. See also Bozell, *Warren Revolution*, 41–58.

118. "By What It Feeds On," *National Review* (December 22, 1956): 5. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Constitution, Amendment 10.

119. "The South Girds Its Loins," *National Review* (February 29, 1956): 5; "The Court's Pleasure," *National Review* (April 25, 1956): 5; Davis, "Right to Nullify," 11.

internal security, to form an actively united front opposing the aggrandizement of national power at the expense of the states".<sup>120</sup>

In response to the Little Rock schools crisis, NR compared *Brown* to *Dred Scott*, contending that both cases demonstrated that controversial constitutional disputes should not be resolved by judicial fiat, but rather incrementally and politically. Otherwise, people are forced to choose sides and fight. Before *Brown*, race relations in the South had been improving, NR insisted. Lynching and racial violence had nearly disappeared, excellent Negro schools were being built, and, in the border states, integration was proceeding apace. The Warren Court, however, had obstructed this progress, making the situation not better, but worse.<sup>121</sup>

Reacting to Little Rock, James J. Kilpatrick defended Arkansas Governor Orville Faubus's view that the Court had simply invented the right to attend a nonsegregated school. This was not interpretation, but amendment. As such, the community outcry against the Court was understandable, and Faubus had both a right and a responsibility to preserve public peace and order in its face.<sup>122</sup>

Kilpatrick was an outspoken critic of the 1964 Civil Rights Act.<sup>123</sup> "The logic ... go[es] something like this ... All decent Americans should support good things. All decent Americans should oppose bad things. Racial discrimination is a bad thing. Bills to prohibit racial discrimination are good things. The ... Civil Rights Bill is intended to prohibit racial discrimination. Therefore, his bill is a good thing and all decent Americans should support it." He insisted upon the constitutional imperative of distinguishing ends from means. The CRA violated the Constitution in a half dozen ways, he argued. It destroyed states' control over their own voting requirements.<sup>124</sup> It stretched the commerce clause beyond recognition. In its voting provisions, it mistakenly invoked the Fourteenth rather than the Fifteenth Amendment. It disregarded property rights, undermined the right to a jury trial,<sup>125</sup> and opened new doors to government regimentation.<sup>126</sup> The act swept too broadly.

120. "Return to States Rights," *National Review* (April 18, 1956): 4.

121. "The Court Views Its Handiwork," *National Review* (September 21, 1957): 244–45.

122. James J. Kilpatrick, "Right and Power in Arkansas," *National Review* (September 28, 1957): 273–75.

123. James J. Kilpatrick, "Civil Rights and Legal Wrongs," *National Review* (September 24, 1963): 231–36.

124. *Ibid.*, 231 ("It should never be forgotten that whenever we vote, we vote as citizens of our states. ... The Constitution makes it so.")

125. *Ibid.*, 236 (referring to Title VI's expansion of federal power to deny federal funds to individuals, without judicial process).

126. See also Frank S. Meyer, "The Attack on Congress," *National Review* (February 11, 1964): 109–10, 110, apropos of the 1964 Civil Rights Act that he was concerned: "... not to deny the right of Negroes to equal treatment and dignity before the law. But no clause in that bill is concerned with such old-fashioned

It outlawed all literacy tests—not just those aimed at racial exclusion. To get rid of poll taxes, a constitutional amendment, not simply ordinary legislation, was necessary.<sup>127</sup> Kilpatrick concluded "I do not propose to defend racial discrimination. I do defend, with all the power at my command, the citizen's right to discriminate ... If this be destroyed, the whole basis of individual liberty is destroyed. The American system ... rests solidly upon the individual's right to be wrong—upon his right in his personal life to be capricious, arbitrary, prejudiced, biased, opinionated, unreasonable—upon his right to act as a free man in a free society."<sup>128</sup>

Looking back at *Brown* a decade later, NR's editors observed that "The rate of school integration ... has been no more rapid in this decade since 1954 than in the decade before 1954, when, without benefit of the Court, it was progressing slowly but continuously under the influence of economic change, social pressures, shifts in community sentiment, and state or local law." By contrast, court orders had provoked white flight from cities to the suburbs, worsening the plight of African Americans, devastating their schools, and exacerbating their social alienation. *Brown* was not only "bad law and bad sociology," but it had yielded bad results.<sup>129</sup>

### Into the 1970s: Against the New Civil Rights

By the mid-1960s, NR writers switched from opposing *Brown* to defending it—properly interpreted—as a new baseline. *Brown* had prohibited *de jure* segregation, they concluded—no less, and no more. Fortunately, the noxious racism of yore was fast receding into history. George Gilder reported in 1980 that "The last thirty years in America ... have seen a relentless and thoroughly successful advance against the old prejudices, to the point that it is now virtually impossible to find in a position of power a serious racist."<sup>130</sup>

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American rights. They are concerned rather with federal enforcement of special group privileges."

127. On the provisions aimed at voting intimidation, he wrote: "I have no patience with conspiracies or chicanery or acts of intimidation intended to deny qualified Negroes the right to vote... [But] [t]here is abundant law on the books ... to prohibit and to punish such willful acts by local registrars." Kilpatrick cited the 1957 Civil Rights Act as a case in point. But, see the earlier contemporaneous editorial in NR opposing the 1957 Civil Rights Act, which had argued against "put[ting] the South under the domination of federal prosecutors, federal civil rights commissioners, federal judges, and the federal Department of Justice." In its provisions for the federal control of state election procedures, the editors wrote, "the bill remains a force bill which invades the rights of the states as guaranteed by the original constitutive compact of 1787." "Still a Force Bill," *National Review* (September 7, 1957): 198.

128. Kilpatrick, "Civil Rights and Legal Wrongs," 234.

129. "The Brown Decade," *National Review* (June 2, 1964), 434.

130. George Gilder, "The Myths of Racial and Sexual Discrimination," *National Review* (November 14, 1980): 1381–90, 1381.

These “old prejudices” were, of course, distinguishable from the legitimate preference of members of racial (and other) groups for associating with their own kind, making colorblindness “a fiction, partly noble, partly hypocritical.”<sup>131</sup>

This defense of voluntary separatism led some NR writers to a perhaps surprising defense of Black Power, arguing that “a permissive separatism—i.e. one which is uncoerced; where whites are genuinely free to mix with blacks and vice versa—is not intrinsically evil and surely not unconstitutional.”<sup>132</sup> NR writers supported “the idea of the development of black pride by reliance on black resources,” explaining and predicting that “[t]hat is the way other minorities made it up the ladder, and that will be the way the Negro community will make it . . . .”<sup>133</sup> One NR writer argued that “The Court . . . must stop viewing American citizens as racial or ethnic groups, must cease encouraging quota systems of any kind, and . . . must permit those groups that want to preserve a separate identity to do so.”<sup>134</sup>

These views informed the magazine’s fervent opposition to court-ordered busing, which sought to remedy what conservatives understood as the effects of naturally occurring residential patterns.<sup>135</sup> When a federal judge ordered a merger of Greater Richmond, Virginia’s urban and suburban school districts to facilitate the busing of students to break down the area’s de facto residential segregation patterns, NR pointed out that the rule of this case would apply in principle to virtually every major city in the country, North or South. Hadn’t civil rights legislation from 1964 onward specifically stated that the law didn’t require numerical racial balance? The distortion of the concept of civil rights, NR’s editors warned, would provoke white flight and lead to a massive expansion of the coercive powers of government in a desperate attempt to compel an impossible result—sowing the seeds of a constitutional crisis.<sup>136</sup> “[T]here is presently but one remedy for putting an end to forced busing,” NR editorialized in 1976, “And that is a constitutional amendment.”<sup>137</sup>

131. “Bakke: Enduring Question,” *National Review* (July 21, 1978): 880–81.

132. “Mr. Wilkins on the Extremists,” *National Review* (January 28, 1969): 62.

133. *Ibid.*

134. Bruce Odom, “Some Are More Equal Than Others,” *National Review* (September 30, 1977): 1114–15, 1115.

135. See also Lino A. Graglia, *Disaster by Decree: The Supreme Court Decisions on Race and the Schools* (Ithaca, NY: Cornell University Press, 1976).

136. “Richmond Decision,” *National Review* (February 4, 1972): 82; Robert G. Holland, “Judge Merhige’s Little Plan,” *National Review* (February 4, 1972): 101; “Who’s Racist Now?” *National Review* (June 6, 1975): 594–95, 595.

137. “They’ve Blown It,” *National Review* (July 9, 1976): 719–20. Perhaps this article’s title alludes to Wyatt’s famously cryptic utterance near the end of the film *Easy Rider* (“We blew it. . . .”), shortly before his dramatic quest for radical freedom ends in his murder

The magazine also opposed the racial preferences endemic to affirmative action. NR writer William Harvey attacked such preferences by echoing William Graham Sumner’s argument against the nascent redistributionist social welfare state. He argued that just as that state amounted to a conspiracy against the interests of the “Forgotten Man,” so too was affirmative action. In this scenario, A and B—social reformers—get together to decide what C should do for X. Reformers A and B, it so happens, “love X, and detest C.” So what is C, and what are C’s interests, to them? He is of no account. Harvey contended that when it came to racial preferences, the bureaucracy and Supreme Court stood in the place of A and B.<sup>138</sup> To make matters worse, M. Stanton Evans added, here the bureaucracies, with the help of the Court, were acting in express contradiction to the commands of the people’s elected representatives in Congress, who had not forsaken the legitimate interests of C.<sup>139</sup>

To be sure, without such preferences, blacks might remain “underrepresented” in the country’s major universities and businesses. In time, however, that would—and should—change of its own momentum, Jeffrey Hart argued. After all:

the lag [is] to be expected when a group with a predominantly agricultural background attempts to adjust to urban conditions and new goals. . . . [P]revious groups took at least three generations to make the advance from manual labor to proportional representation in the white collar jobs and in the professions. . . . The weakness of the program aimed at total Negro integration is that it attempts to impose on the whole area of Negro-white relations a novel and abstract pattern which has not been followed by the other historic American groups. . . . integration . . . should be redefined to mean “integration into the pattern of American group experience.”<sup>140</sup>

Hart emphasized that “Virtually all legal barriers to Negro advancement have been eliminated. . . . Negro energies. . . should be turned inward to the problems of the Negro community, rather than

by rednecks on the backroads of the South. *Easy Rider* (1969) (d. Dennis Hopper).

138. William F. Harvey, “Some Different Thoughts About Bakke,” *National Review* (February 3, 1978): 151–71, 151, 152. William Graham Sumner, *What the Social Classes Owe Each Other* (New York: Harper and Brothers, 1883), Ch. IX (“On the Case of a Certain Man Who is Never Thought Of”), 123–33 (“A and B put their heads together to decide what C shall be made to do for D . . . . I call C the Forgotten Man.”).

139. M. Stanton Evans, “Freedom from Quotas,” *National Review* (December 23, 1977): 1497.

140. Jeffrey Hart, “The Negro in the City,” *National Review* (June 18, 1968): 603–23, 604. See also Thomas Sowell, *Civil Rights: Rhetoric or Reality?* (New York: W. Morrow, 1984).

directed outward toward confrontations with the rest of society.”<sup>141</sup>

The magazine dubbed the Supreme Court’s controversial *Weber v. United Steelworkers* (1979) decision, holding that racial preferences in decisions about which employees would receive special training leading to promotion did not violate the 1964 Civil Rights Act’s prohibition on race discrimination, “Bakke in a Blue Collar.” Characterizing *Bakke* as a moderate decision, NR’s writers also distinguished it: “Though agreeing that Bakke had been passed over in favor of applicants with lower test scores, the Court still held that race could be a relevant—though not a determining factor in college admissions,” they explained. “This recognizes that admissions committees have always taken a variety of qualifications into account.” The magazine insisted that “The world of unions, however, is by common consent controlled by seniority—and so long as those are the rules and do not violate the law . . . the government should not get into the act.”<sup>142</sup>

On the threshold of Reagan’s election, conservatives were advancing loftier arguments against racial preferences. Terry Eastland and William Bennett—the latter soon to be appointed by Reagan as head of the National Endowment for the Humanities and, later, U.S. Secretary of Education—appealed to the principles of the Declaration of Independence and to Abraham Lincoln, arguing that those principles were committed to moral, not numerical, equality. Eastland and Bennett insisted that the Equal Employment Opportunity Commission’s (EEOC) objective of numerical equality (approved by the Court in *Weber*) “upsets traditional and deeply rooted American understandings, going back to the Founding Fathers, as to the kind of equality we wanted to institute in this country.” In the process, the goal of numerical equality undermined the principle of moral equality on which the nation had been founded.<sup>143</sup>

## MORALS AND ABORTION

Conservatives perceived the Warren Court’s landmark Establishment Clause decisions striking down official prayer and Bible reading in the schools as an assault

on one of the major means the country had of instilling a commitment to the moral order in its youth. Because most conservatives understood that order as a sine qua non of political freedom, they saw the Court as having struck like a viper at the heart of the nation’s constitutional order as well, injecting poison into its civic bloodstream.<sup>144</sup>

Conservatives soon known as the “Religious” or “New” Right did not see their reaction against these rulings as an *attack* on the separation of church and state, but rather as a *defense* of a public philosophy ordained by the Founders, and long predominant. These decisions helped catalyze a new political identity committed to the defense of the nation’s traditional public philosophy, anchored, professedly, in a public commitment to God (for many, a Christian God).<sup>145</sup> It took the Court’s abortion decisions, however, to transform the Religious Right from an incipient community into a powerful, politically potent social movement.<sup>146</sup>

As seen from NR’s pages, the integration of the New Right into the broader conservative movement was more vexed than one might expect. The construction of a cohesive political community comprised of orthodox Catholics and evangelical and fundamentalist Protestants was hardly foreordained. James J. Kilpatrick, for instance, was concerned that, by injecting abortion into electoral politics, the Religious Right was seeking to impose its religious views on the polity.<sup>147</sup> William F. Buckley, Jr., responded by conceding that while “abortion, as a single issue, can be taken to ludicrous ends,” the question of whether a fetus is human is a momentous one. And “a great moral insight is a great moral insight regardless of its provenance. Those who believe that the fetus is human, like those who believed the Negro was human, cannot do

144. E.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington v. Schempp*, 374 U.S. 203 (1963).

145. See also Russell Kirk, “Praying in Public,” *National Review* (October 15, 1976): 1125 (“the United States remains a Christian nation.”).

146. Daniel K. Williams argues that, far from being quiescent between the 1920s and these provocative Supreme Court decisions, evangelical Christian conservatives were more involved in politics than the conventional wisdom holds. The practical effect of that involvement, however, was largely vitiated by the fact that such conservatives were broadly spread on both sides of the Democrat-Republican partisan divide. Only when they became a major part of the base for a single party, the Republicans—in the process fundamentally transforming the nature and agenda of that Party, which came, in significant part, to serve as their vehicle—did their political involvement reap real policy dividends. Daniel K. Williams, *God’s Own Party: The Making of the Christian Right* (New York: Oxford University Press, 2010). That said, the decisions are still a crucial part of the story of the trajectory of the political involvement of postwar evangelical Christian conservatives—in particular of their increasing, and highly influential, association with the Republican Party.

147. See William F. Buckley, Jr., “Abortion as a Campaign Issue,” *National Review* (October 29, 1976): 1199.

141. Hart, “The Negro in the City,” 606.

142. “Bakke in a Blue Collar,” *National Review* (January 1, 1979): 16–17, 16, 17. *United Steelworkers v. Weber*, 443 U.S. 193 (1979). *University of California v. Bakke*, 438 U.S. 265 (1978) (voiding by a 5-4 vote the University of California’s racial preference scheme for university medical school admissions on Fourteenth Amendment equal protection grounds).

143. See Nathan Glazer, “One, Two, Many Equalities,” *National Review* (May 2, 1980): 539, 540 [Reviewing Terry Eastland and William J. Bennett, *Counting by Race: Equality from the Founding Fathers to Bakke and Weber* (New York: Basic Books, 1980)]. Eastland became an assistant to the Attorney General in the Reagan Justice Department, and is publisher of the *Weekly Standard*.

less than seek to share their insight with others.”<sup>148</sup> Harold O. J. Brown acknowledged that “Some conservatives are more than a little apprehensive about their new allies. . . . Those who would welcome the new Christian support on particular issues—such as opposition to abortion or support for the free market—will be reluctant to accept it if they fear that they will thereby be subjecting themselves to some kind of theocratic supervision by a regiment of fundamentalist television evangelists.”<sup>149</sup> But these religious voters, Brown pleaded, were striving to advance basic principles that all conservatives could support: “[E]vangelicals and fundamentalists are trying to get government to acknowledge . . . the principle that the United States Constitution is not the highest authority. Over the Constitution there is a God, and attention needs to be paid to His laws and to His will if the nation is to survive.” Brown reassured NR readers that “these evangelicals and fundamentalists by no means want to create a theocracy. . . . They are concerned with theonomy. . . . the concept that the law of God should have a normative value in society.” Brown asked, “Is this such an atrocious idea? It is implicit in the U.S. Constitution, and quite explicit in the Declaration of Independence, as well as in most if not all of our legislative and judicial history until very recent years.”<sup>150</sup>

148. Buckley, “Abortion as a Campaign Issue,” 1199. The phrase “regardless of its provenance” refers to its provenance in Catholic doctrine.

149. Harold O. J. Brown, “The Road to Theocracy?” *National Review* (October 31, 1980), 1328–1329. 1328. Brown was a theologian who played a critical role in the political mobilization of anti-abortion evangelical Christians and in forging a moral and political alliance between Evangelical Protestants and Catholics. See Charles Colson et al. (participants) and William Abraham et al. (endorsers), “Evangelicals and Catholics Together: The Christian Mission in the Third Millennium,” *First Things* 43 (May 1994): 15–22 (This statement is familiarly known by insiders as “ECT”); Gerald L. Bray et al. (Evangelical Protestants) and James J. Buckley, et al. (Roman Catholics) “The Gift of Salvation,” *First Things* 79 (January 1998): 20–23. Brown co-founded the pro-life legal and political advocacy group Christian Action Network (now known as Care Net: <http://www.care-net.org/>) with future Reagan administration Surgeon General C. Everett Koop, and was a longtime religion editor of the magazine *Chronicles: A Magazine of American Culture* (<http://www.chroniclesmagazine.org>) (a publication of The Rockford Institute—<http://www.rockfordinstitute.org>). The trioka of Koop, Brown, and Francis Schaeffer was the driving intellectual force behind the pro-life movement, emphasizing its grounding in a deep moral and philosophical commitment to the significance of human life. See Susan Wunderlink, “Theologian Harold O.J. Brown Dies at 74,” *Christianity Today* (July 9, 2007); John D. Woodbridge, “Harold O.J. Brown (1933-2007),” *First Things* (July 10, 2007). See also Harold O. J. Brown, *The Reconstruction of the Republic* (New Rochelle, NY: Arlington House, 1977); Harold O. J. Brown, *Death Before Birth* (Nashville, TN: Thomas Nelson, 1977); Dr. Francis Schaeffer, *How Should We Then Live?* (DVD: Muskegon, Michigan; Gospel Communications International, 2009 [1977]); Dr. Francis Schaeffer and Dr. C. Everett Koop *What Ever Happened to the Human Race?* (DVD: Muskegon, Michigan: Gospel Films Distribution, 2007 [1979]).

150. Brown, *National Review*, 1329.

Nevertheless, when it came to public morality, NR was conflicted. To be sure, NR writers often mounted staunch defenses of traditional morality. But conservatives disagreed over how far government should go in enforcing it. Libertarianism was represented in NR. Buckley himself advocated the decriminalization of marijuana. NR senior editor William Rickenbacker stumped for the repeal of vice laws, laws against irregular private sexual practices amongst consenting adults, drug laws, usury laws, rent control laws, and, more generally, argued for the repeal of all laws involving victimless crimes.<sup>151</sup> The magazine presented both sides of the gay rights controversy—though it commonly employed mocking illustrations and titles to ridicule the articles (by gay conservatives) advancing a pro-gay rights position.<sup>152</sup>

NR began taking up the abortion question a full two years before *Roe* (1973), when Buckley enlisted his friend Clare Boothe Luce to review two recently published books on the issue. Luce read the books as “really . . . about the problem men are having with other men who refuse to see the ‘women’s problem’ as they do.” She complained that the books paid little attention to women’s experiences with unwanted pregnancies. Predicting that the abortion controversy “will be settled—and is being settled, in the political arena of a pluralistic society that is now 50 per cent female,” Luce insisted that the real task of anti-abortion forces is “to convince *women* that abortion is a crime so horrible that a woman should prefer to suffer any agony of heart, mind or body—even to prefer her own death—rather than to commit it. It is to persuade one-half of the population . . . that every woman should be Christ-like and suffer not only for her own sins, but for the sins of man and society against her. The task is not easy.”<sup>153</sup>

Will Herberg responded that the question was not a matter of persuasion and opinion, but rather of objective right and wrong. “There are certain views and

151. William F. Rickenbacker, “The Law Forbidding Sins,” *National Review* (January 21, 1972): 46.

152. See, e.g., David Brudnoy, “Reflections on the Issue of Gay Rights,” *National Review* (July 19, 1974): 802–3; Jere Real, “Gay Rights and Conservative Politics: Minority Report: Mad About the Boys,” *National Review* (March 17, 1978): 342–45.

153. Clare Boothe Luce, “Two Books on Abortion and the Questions They Raise,” *National Review* (January 12, 1971): 27–33, 28 [reviewing John T. Noonan, Jr., editor, *The Morality of Abortion: Legal and Historical Perspectives* (Cambridge, MA: Harvard University Press, 1970); Daniel Callahan, *Abortion: Law, Choice, and Morality* (New York: Macmillan, 1970)]. Luce, a charismatic socialite, playwright (*The Women* (1936)), editor (at *Vogue* and *Vanity Fair*), Republican congresswoman from Connecticut, Ambassador to Italy, staunch anti-Communist, fiscal conservative, and Catholic convert—was married to Henry Luce, the publisher of *Time*, *Fortune*, and *Life* magazines. On Luce, see Patrick Allitt, *Catholic Intellectuals and Conservative Politics in America, 1950–1985* (Ithaca, NY: Cornell University Press, 1993). Today, the Clare Boothe Luce Policy Institute is devoted to “preparing and promoting conservative women leaders.” See <http://www.cblpi.org/>.

positions . . . that are not simply the reflection of . . . 'secularian' beliefs, but are held in obedience to norms and standards that far transcend any conceivable pluralistic diversities. . . . Right and wrong are *not* determined by popular opinion or even by democratic majorities."<sup>154</sup>

A few months later, Buckley warned NR readers that trends were ominous. "We read now in the national press that so-called abortion referral services are becoming so widespread as to make it possible to say that . . . the day has arrived when abortion is for all intents and purposes universally available. . . . Indeed the feticiders' most prominent lobby nowadays directs its efforts not at universalizing abortion clinics, but in making them free."<sup>155</sup> Charles Magistro chimed in, reporting in subsequent articles that "Laws proscribing abortion are being challenged in every part of the country," to only "half-hearted protest from the Roman Catholic Church."<sup>156</sup>

It was time for conservatives to mobilize. Buckley called upon Catholic bishops to convene an interfaith council that should "immediately . . . organize 'round-the-clock' picketing of . . . abortion centers. There is . . . no more reason to disguise the proceedings of abortion centers, than there is to pretend that one does not know the whereabouts of Auschwitz. . . . The Council should demand of every public figure seeking state office an answer to the question: how he stands on the matter of abortion. . . . The Council should publicize the moral reasoning behind its manifesto."<sup>157</sup>

When *Roe* was announced two years later, NR's initial reaction was muted. "The Court took a course that, while supporting in large measure the pro-abortion arguments," the magazine observed, "fell short of going all the way with the women's lib extremists who have pressed the doctrine that a woman's body is hers to do with as she chooses and that therefore she has the absolute right to abort for any reason any time." Echoing Luce's argument of two years earlier, the magazine editorialized that "In practical terms what it comes down to is how effective the Right to Life people will be in persuading women that it is . . . a major wrong to abort an unborn child, whether such action is condoned by the state or not; that is a decision to be taken not so much by a woman and a physician as by a woman and her conscience. That is where the battle ultimately will be won or lost."<sup>158</sup>

154. Will Herberg, "The Limits of Pluralism," *National Review* (February 23, 1971): 198–99.

155. William F. Buckley, Jr., "Abortion: The Crunch," *National Review* (April 20, 1971): 444–45, 444.

156. Charles F. Magistro, "Abortion and the Pluralist Society," *National Review* (May 4, 1971): 476–92, 476; "The Abortion Front: End of the 'Phony War,'" *National Review* (March 2, 1973): 249–50, 250.

157. William F. Buckley, Jr., "How to Protest Abortion," *National Review* (April 20, 1971): 445. See also Allitt, *Conservatives*, 216–18.

158. "The Continuing Battle Over Abortion," *National Review* (February 9, 1973): B12.

*Roe*, however, was soon added to the long litany of post-1954 judicial outrages. The campaign against the decision began with the introduction of the so-called Buckley Amendment by New York Senator James Buckley (William's brother).<sup>159</sup> This was followed by a lengthy article by conservative Catholic law professor John Noonan entitled "Raw Judicial Power," printed beneath a large banner sketch of the opinion's author, Justice Harry Blackmun. "That these opinions come from a Court substantially dominated by appointees of a President dedicated to strict construction of the Constitution, that they should be drafted by a Justice whose antecedents are Republican," Noonan observed, "are ironies which do not abate the revolutionary character of what the Court has done in the exercise of what Justice White, in dissent, calls 'raw judicial power.'"<sup>160</sup> He explained that "Abortion-on-demand after the first six or seven months of fetal existence has been effected by the Court through its denial of personhood to the viable fetus, on the one hand, and through its broad definition of health, on the other," and he added that the decision had nothing to do with original meaning of the Fourteenth Amendment.<sup>161</sup> "As a matter of ethics and morals, the majority opinion on abortion may have some value," James J. Kilpatrick added. But, he insisted, in much the spirit with which he had reacted to *Brown*, that "As a matter of constitutional law, it has none. This was judicial legislation, judicial activism, judicial usurpation."<sup>162</sup>

NR stumped in the 1970s for making abortion "a visible and 'voting' issue." NR's editors insisted, "It makes no difference if Catholics oppose abortion for religious reasons any more than if Jews support Israel for religious reasons . . . . Once we exclude

159. See "The Abortion Front: End of the 'Phony War,'" *National Review* (March 2, 1973): 249–50, 249. The Buckley Amendment (1974) would have prohibited all abortions except to save the life of the mother.

160. John T. Noonan, Jr., "Raw Judicial Power," *National Review* (March 2, 1973): 260–64, 261. Noonan, who, besides having a law (and undergraduate) degree from Harvard, received a Ph.D. from the Catholic University of America, was a law professor, first at Notre Dame, and, subsequently, at UC-Berkeley. He is one of the nation's preeminent (conservative) scholars of the relationship between morality and law. In 1985, President Reagan appointed Noonan to the Ninth Circuit Court of Appeals in San Francisco, where he remained an influential voice for constitutional conservatism (he currently has senior status). A past recipient of Notre Dame's Laetare Medal, Noonan substituted at the University's 2009 graduation ceremony when Mary Ann Glendon of Harvard Law School declined the Medal, and the opportunity to address the graduates, in protest against Notre Dame's selection of (pro-choice) President Barack Obama as its commencement speaker. On Noonan, see Allitt, *Catholic Intellectuals and Conservative Politics*. Byron White's "raw judicial power" language was picked up extensively on the Right, serving, for example, as a key refrain in Francis Schaeffer's documentaries. See Kersch, "Roe and the Supreme Court in Thick Ideological Context."

161. Noonan, "Raw Judicial Power," 261–62.

162. Kilpatrick, "This Much, at Least: The Court," *National Review*, 1051.

religious motives from public life, we in effect favor nonbelievers over believers, virtually establishing irreligion.” This would amount to “requiring . . . a kind of loyalty oath to secularism.”<sup>163</sup>

The development of conservative thought concerning abortion should not be considered a wholly separable “case” from that concerning race and civil rights. Only when conservatives began to unite around a new interpretation of *Brown* as a command that the state abide by a (colorblind) commitment to the moral equality of all human beings in the 1970s did the movement begin to shed its identification with southern segregationist racism. By opposing abortion on the same grounds—in opposition to an activist, elitist, federal judiciary—conservatives could now re-imagine themselves as the polity’s last remaining defenders of the dignity of the individual, with *Roe* being re-cast as their movement’s *Dred Scott*, and the focal point of their fight against an amoral, anti-human statism (akin to eugenicist Nazism). As the polity’s last hold-out against the legal positivism and moral relativism that had justified both slavery and killing the unborn (and The Third Reich), they were able, in their own eyes, to step forward and newly assume the mantle of Martin Luther King, Jr. They were now all that stood between the country and the amoral conviction that anything is possible, and all is permitted.

### INTO THE 1980S: RAOUL BERGER’S PROACTIVE ORIGINALIST MANIFESTO

With the publication of Harvard Law Professor Raoul Berger’s manifesto *Government by Judiciary* in 1977, the center of gravity of conservative constitutional thought moved decidedly away both from the long-standing debates between structuralists and moralists on the nature of the American constitutional order (what I have termed “axis one”) and from a reactive originalism accompanied by a conflicted critique of the Court (what I have termed “axis two”) and rooted itself in a commitment to the interpretive theory of “originalism.” Originalism holds that it is the duty of a judge to interpret the Constitution according to its original meaning at the time of its adoption.<sup>164</sup>

163. “Abortion as a Voting Issue,” *National Review* (September 27, 1974): 1090; “The ACLU’s Holy War,” *National Review* (January 19, 1979): 74–75, 75.

164. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977). See O’Neill, *Originalism in American Law and Politics*, Ch. 5. See also Teles, *Rise of the Conservative Legal Movement*. Berger’s opus was later re-issued by the Liberty Fund: *Government by Judiciary*, 2<sup>nd</sup> ed. (Indianapolis, IN: Liberty Fund, 1997) (foreword by Forrest McDonald). For influential statements of the originalist approach to constitutional interpretation, see Robert Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47 (1971): 1; Robert Bork, *The Tempting of*

Berger’s book became so influential in part because it mimicked familiar progressive arguments concerning an elitist and illegitimate (federal) judiciary that were first advanced at the turn of the twentieth century and then turned the tables of those arguments back against liberals. Berger even went so far as to borrow his book’s title from a well-known New Deal–era leftist antijudicial jeremiad.<sup>165</sup> A disputatious cast of conservatives were able to unite around this new constitutional conservatism and engaged the polity by asking the classic populist/progressive question: Who will rule here, the elite or the people?

The reaction to Berger’s book was immediate, and game changing. Buckley welcomed it as a bombshell. “[C]oming in at us, and due to explode in a couple of weeks,” he announced, “is the most devastating book on the abuse of power by the Supreme Court written in our time. Moreover, it is the work of a liberal, Jewish professor of law at Harvard University whose two preceding books . . . unquestionably cleared the legal air for the fateful decision of the Supreme Court in ruling that certain of Mr. Nixon’s tapes could legally be subpoenaed.” Berger had painstakingly detailed the usurpations of activist courts committed in the name of the Fourteenth Amendment. Buckley quotes Berger as stating that “When Chief Justice Warren asserted that ‘we cannot turn back the clock to 1868,’ he in fact rejected the Framers’ intentions as irrelevant.”<sup>166</sup>

Writing in *Human Events*, James J. Kilpatrick effused “Now and then a book comes along so stunning in its impact upon society that it finds its own place in the political and social history of a period. Such a book has just come to hand. It is Raoul Berger’s *Government by Judiciary*.” He continued:

In one sense, there is nothing much here that is new. Twenty years ago, at the peak of controversy over *Brown v. Board of Education*, hundreds of Southern lawyers, scores of Southern editors, and even one Southern justice, James Byrnes of South Carolina, said much the same things. Dozens of pamphlets appeared, expounding the intention of the framers of the 14<sup>th</sup> Amendment. In 1957, I myself wrote a book, *The Sovereign States*, arguing the very case that Berger argues now. Our Dixie fulminations fell upon deaf ears. In those days it was automatically assumed that any Southerner who attacked the Court was not truly opposed to usurpation of power; he was opposed only

*America: The Political Seduction of the Law* (New York: Free Press, 1990); and Antonin Scalia, “Originalism: The Lesser Evil,” *University of Cincinnati Law Review* 57 (1989): 849.

165. Louis B. Boudin, *Government By Judiciary* (New York: William Godwin, 1932).

166. William F. Buckley, Jr., “Berger’s Big Book,” *National Review* (November 11, 1977): 1320.

to integration of schools. No such taint attaches to Berger.<sup>167</sup>

A review in *Human Events* made similar points, praising *Government by Judiciary* for making “a clarion call for respect for the limits of power as the essence of a democratic society,” and demonstrating “how and where the Supreme Court has exceeded the constitutional limits of its power.” Richard Williamson wrote “Prof. Raoul Berger rejects the Supreme Court as social engineer. He believes that the sole sources of constitutional law are the historical record and the words of the Constitution itself.” Moreover, he “rejects the view that constitutional law is the succession of value choices of Justices, dressed up in lawyers’ language. The Constitution is an anchor. It is a check on excesses of power by the legislature and others. The Constitution is not a cloud under which the judiciary substitutes its own value choices for those of the people.”<sup>168</sup>

Berger himself took the case directly to NR readers, writing there that “the Court has exercised a revisory power that the Constitution withheld from it.”<sup>169</sup> The Court, he thundered, “is acting as a continuing constitutional convention, usurping a function reserved to the people. Were the people to become aware that the Court is *imposing its own values* on them, as activists unabashedly acknowledge, they would insist on deciding their own destiny.”<sup>170</sup> He declaimed that “For a generation academicians have been cheering on the Court to ever more heroic feats.” And, in response to an attack by his Harvard Law School colleague, Arthur Miller, “In [whose] eyes my glaring sin is ‘reliance on the Framers’ intention as the only proper standard of interpretation,” he answered “[m]ore accurately, I hold that if the intention is clear, it governs. . . . Miller’s euphemisms disguise a claim of judicial power to rewrite the Constitution.” Berger continued: “Like Miller, [Stanford Law Professor Paul] Brest considers that my cardinal sin is insisting that ‘the constitutional interpretation should depend chiefly on the intent of those who framed and adopted a provision.’” But Berger insisted “Judges are appointed to ‘defend the Constitution,’ not to revise it. . . . Unlike its apologists, the Court has never openly laid claim to a power to amend the Constitution. Instead, as former Solicitor General Robert Bork wrote, ‘Value choices are attributed to the Founding Fathers, not the Court.’” He

concluded, “it is a disservice to the American people to delude them into thinking they have surrendered self-government to the Court.”<sup>171</sup>

This argument was soon taken up by others. “If the Supreme Court can render a decision whose result would have appalled the Framers of the constitutional provision it purports to ‘interpret,’” law professor and NR contributor Grover Rees III asked, “then what limits are there on the judicial power?”<sup>172</sup>

On eve of the Reagan presidency, proactive originalism was advanced as the new touchstone for judges. Rees, for instance, argued in NR that:

Not the least of the virtues of the Reagan Court is that it will cause many law professors to insist on the application of the Framers’ values. But is it possible to discern those values? Even after a judge has buried himself in history books, will he not ultimately arrive at a dead end, and perhaps a dozen dead ends? What about conflicts among the Framers themselves, not clearly resolved by the text of the Constitution or the records of debates? What about those modern phenomena that have no eighteenth century parallels? Will not the judge eventually choose among the competing historical evidence on the basis of his own beliefs about what is right and wrong? Does it really make any difference whether he does this before or after examining the historical evidence? It does make a difference. There is no such thing as a perfect record; nobody can hope to be certain of precisely what the Framers thought, or would have thought, about a certain controversy; nor, indeed, can anyone ever know every single relevant fact about an automobile accident or a contract dispute that happened six months ago; but one can try, and it makes a difference whether one tries. A judge will make interstitial decisions about what the Framers “must have” thought, just as he will fill in gaps in his information about the automobile accident or the contract dispute by assuming that the parties “must have” acted as he himself would. Thus, the judge inevitably “legislates” to fill in the gaps in his “judgment”. He cannot close all these gaps, but he can strive to make them fewer and smaller. I do not contend that our judicial Emperors will ever be fully clothed; but I wish never again to see them as naked as on the day they decided *Roe v. Wade* . . . .<sup>173</sup>

167. James J. Kilpatrick, “Supreme Court: Government’s Most Dangerous Branch,” *Human Events* (December 24, 1977): 13. See also James J. Kilpatrick, *The Sovereign States* (Chicago, IL: Regnery, 1957).

168. Richard S. Williamson, “Court Decisions Have Transformed the 14<sup>th</sup> Amendment,” *Human Events* (April 1, 1978): 14.

169. Raoul Berger, “Academe vs. the Founding Fathers,” *National Review* (April 14, 1978): 468–71, 468.

170. Raoul Berger, “Judicial Government vs. Self-Government,” *National Review* (April 4, 1980): 402.

171. Berger, “Academe vs. the Founding Fathers,” 468–71.

172. Grover Rees III, “The Constitution, the Court, and the President-Elect,” *National Review* (December 31, 1980): 1595–1602, 1601. Rees taught law at the University of Texas at Austin, served as Special Counsel to Edwin Meese III (1986), where he weighed in on appointments to the federal bench. He subsequently held a variety of judicial, executive branch, and ambassadorial appointments in the Reagan and two Bush administrations.

173. Rees, “The Constitution, the Court, and the President-Elect,” 1601.

“If the Supreme Court changes its approach,” Rees predicted, “the considerable resources of the adversary system of criminal and civil justice will be devoted to discerning the original understanding. Soon even law professors will find it necessary to take a sabbatical from teaching Reason and Moral Science, in order to study history.”<sup>174</sup> Originalism was now the conservative movement’s fighting faith.

One of the more mysterious ideological accomplishments of Berger’s *Government by Judiciary* is the way in which its call to battle—formulated, plainly, as an attack on *Brown v. Board of Education*—was embraced by the movement at about the same time that it had stopped criticizing *Brown*’s result. Conservatives were able to deploy originalism, freshly interpreted, as a bludgeon with which to attack liberals. It was as if this book—issuing, perhaps crucially, from the urban, Jewish North—allowed the movement to at last decouple and decontextualize their critique of “raw judicial power” from the concrete historical conditions of its production and to at last unite plausibly behind the banners of method and of principle.<sup>175</sup> Whatever the precise nature of Berger’s alchemy, it catalyzed the commitment to originalism that became a polestar for the Reagan Justice Department under Edwin Meese—and of the constitutional conservatism of today.

## CONCLUSION

When William F. Buckley, Jr., founded *National Review* in 1955, his goal was to move conservatism beyond its quirky and reactionary reputation and to forge a modern, vibrant, and viable political movement. One challenge was the movement’s sometimes rather gaping philosophical fault lines. Buckley’s big tent on the printed page sought to bridge these fault lines discursively, by welcoming the movement’s diverse strands into a single venue. Constitutionalism—a form of “popular constitutionalism”—was a major subject of that developmental discourse and, over time, the movement succeeded in achieving ecumenicalism in significant part through constitutionalism.<sup>176</sup>

174. *Ibid.*, 1601–2.

175. This opposition to *Brown* was a political albatross for originalism, until originalist scholars later gave conservatives permission to support *Brown* on originalist grounds. See Michael W. McConnell, “Originalism and the Desegregation Decisions,” *Virginia Law Review* 81 (1995): 947; Michael W. McConnell, “An Originalist Justification for *Brown*: A Reply to Professor Klarman,” *Virginia Law Review* 81 (1995): 1937. See also Robert Bork, *The Tempting of America*. For originalist Justice Antonin Scalia’s recent evasiveness on the relationship between originalism and *Brown*, see Adam Liptak, “From 19<sup>th</sup>-Century View, Desegregation is a Test,” *New York Times* (November 10, 2009), A14.

176. In Thomas Medvetz’s terms, the magazine served as “a venue [for conservatives] to specify, debate, and reaffirm the core principles that animate their movement . . . to marshal cultural authority by providing each other with intellectual ammunition

Postwar constitutional conservatism began as much with a commitment to political philosophy as to judicial fidelity. The debates between Kendall, Jaffa, Kristol, and Diamond recounted above elided the contemporary distinction between constitutional theory and American political thought. For these men, arriving at constitutional meaning involved—explicitly—the interpretation of not just a text, but of events like the American Revolution, the Civil War, and the New Deal, and of the lives of political leaders such as John Marshall, James Madison, and Abraham Lincoln. For these constitutional theorists—none of whom were law professors—questions concerning the respective places of structure and morals were complicated and deep, and clear answers elusive.

From the 1950s through the 1970s, conservatives considered originalism as one form of constitutional argument amongst many. NR contributors constructed the “the political spectacle”—interpreted the meaning of political events—in ways that they hoped might ultimately prove broadly compelling to the American public.<sup>177</sup> As constitutional liberalism reached its height under the Warren Court, and as a “New Politics” was forged by one progressive movement after another, NR forged “another world to live in” for those who felt alienated and aggrieved by these developments, feeding and forming their hopes and apprehensions, defining “threats and reassurances,” friends and enemies, stimulating feelings of belonging and alienation, fidelity and betrayal, fashioning symbols and signifiers, and evoking both rational logics and intense emotions—in significant part through the medium of constitutional discussion.<sup>178</sup>

Through their interpretation of *Brown* and *Roe* and other constitutional events (and, later, in supporting a colorblind reading of *Brown* on moral dignity and equality grounds that harmonized with their opposition to *Roe*), conservative constitutionalists alighted upon a way of unifying their movement and

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for use in public debates, such as . . . data and rhetorical ‘talking points.’” It played a major role in allowing conservatives “to construct the political world as a set of meaningful objects,” working gradually towards, first, an internal, and, then, a public, politically actionable constitutional unity. Medvetz, “The Strength of Weekly Ties,” 346, 357–58, 363. See Kramer, *The People Themselves*. See also Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Belknap Press of Harvard University Press, 1991); Bruce Ackerman, *We the People 2: Transformations* (Cambridge, MA: Belknap Press of Harvard University Press, 1998); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998); Akhil Reed Amar, *America’s Constitution: A Biography* (New York: Random House, 2005); Jack M. Balkin, “Original Meaning and Constitutional Redemption,” *Constitutional Commentary* 24 (2007): 427; Jack M. Balkin, “Framework Originalism and the Living Constitution,” *Northwestern University Law Review* 103 (2009): 549. See also the work generally of Yale’s Robert Post and Reva Siegel.

177. See Murray J. Edelman, *Constructing the Political Spectacle* (Chicago, IL: University of Chicago Press), 1–2, 90, 104.

178. See Edelman, *Constructing the Political Spectacle*, 1, 119–20.

distinguishing themselves politically that had eluded them in their movement's more fractious and heterodox earlier stages. Whatever their ideological and intellectual starting points, all could agree that alien currents of thought had been imposed upon them by a renegade judiciary that had served as a conduit for the constitutionalization of the views of an antidemocratic intellectual elite. A regrouping in the Founding was the answer.

The movement's shift to proactive originalism, catalyzed by the alchemy of Berger's *Government by Judiciary* (1977), provided a uniform and unifying message. At this point, conservatives turned effectively toward institutions by founding the Federalist Society (1982) and ideologically consolidating the Reagan Justice Department under Attorney General Edwin Meese (1985–1988), and entered a period of ruthless and relentless ideological simplifying and discipline that transformed originalism into the movement's fighting faith. Through ritualized reaffirmation and repetition, conservative "originalism" and liberal "living constitutionalism" established themselves as oppositional rallying cries and rhetorics, each serving to institutionalize and buttress the other.<sup>179</sup>

After 1980, originalism became for conservatives "a term that excites the imagination of large numbers of people and also helps to organize and discipline them as a potent political instrument . . ." <sup>180</sup> It "[lent the

political spectacle] emotional depth as well as the intellectual satisfaction that springs from the transformation of uncertainty, ambivalence, and complexity into an understandable phenomenon."<sup>181</sup> The weeping and gnashing of teeth unleashed by the martyrdom of failed Supreme Court nominee (and originalist saint) Robert Bork in 1987 only strengthened the movement's faith, uniting conservatives of diverse intellectual origins in a paroxysm of grief and indignation, followed by angry and embittered calls to battle.<sup>182</sup>

This article has, in its broadest sense, been a case study in the ways in which political processes "are wider and deeper than the formal institutions designed to regulate them." As Clifford Geertz has observed, "Some of the most critical decisions concerning the direction of public life are not made in parliaments and presidiums . . . [but] in the unformalized realms of what Durkheim called 'the collective conscience.'" He continues, "The more accessible events of public life, political facts in the narrower sense do about as much to obscure this course as to reveal it. Insofar as they reflect it . . . they do so obliquely and indirectly, as dreams reflect desires or ideologies interests." Geertz insisted that "discerning it is more like interpreting a constellation of symptoms than tracing a chain of causes."<sup>183</sup>

By the time institutional advances were made by conservatives—winning the presidency, staffing the Justice Department, selecting the judges—most of the serious intellectual and emotional work, and the formation of movement identities, had been done. Given the character of our politics today, that earlier stage too is worthy of our attention.

181. *Ibid.*, 40.

182. See Bork, *Tempting of America*.

183. Clifford Geertz, "The Politics of Meaning," in Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 316.

179. See Jack N. Rakove, ed., *Interpreting the Constitution: The Debate Over Original Intent* (Boston: Northeastern University Press, 1990); Edelman, *Constructing the Political Spectacle*, 18–19; Steven Teles, "Transformative Bureaucracy: Reagan's Lawyers and the Dynamic of Political Investment," *Studies in American Political Development* 23 (2009): 61–83. Ultimately, originalism triumphed more broadly: Commitment to "living constitutionalism" is rarely trumpeted these days anywhere on the liberal/left—or in the confirmation hearings of Democratic nominees to the Supreme Court. Today, many of the most prominent liberal/left constitutional theorists—e.g., Bruce Ackerman, Akhil Reed Amar, Jack Balkin—adhere to diverse forms of "liberal original".

180. Edelman, *Constructing the Political Spectacle*, 37.