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**BEYOND ORIGINALISM: CONSERVATIVE DECLARATIONISM  
AND CONSTITUTIONAL REDEMPTION**

KEN I. KERSCH\*

*“Our republican robe is soiled, and trailed in the dust. Let us repurify it. Let us turn and wash it white, in the spirit . . . of the Revolution. . . . Let us re-adopt the Declaration of Independence, and . . . the practices, and policy, which harmonize with it.”<sup>1</sup>*

Abraham Lincoln

I. INTRODUCTION

Almost 150 years after the ratification of the Thirteenth Amendment, the redemption of the nation from chattel slavery has become important—and for many conservatives, central—to the understanding of American politics. Slavery itself may be a thing of the past, but the purported political and constitutional lessons of its initial acceptance and subsequent eradication—once a preoccupation primarily of the liberal/left—are very much on the mind of the modern American right. In a marked departure from the old, more familiar conservative narrative,<sup>2</sup> many of the modern movement’s most influential constitutional theorists recount the nation’s experience with slavery through a constitutional vision I will call (as have others) “Declarationism.” As that term is used in this Article, Declarationism is the view that the Constitution can only be understood and interpreted in light of the principles enunciated in the opening words of the Decla-

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1. Abraham Lincoln, Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), in *LINCOLN: SELECTED SPEECHES AND WRITINGS* 93, 98–99 (1992).

2. By “old conservative narrative,” I refer to the story of post-emancipation depredations of states’ rights, and the property and associational rights of segregationist business owners, and the constitutionally impermissible expansion of national government powers. See, e.g., Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of Heart of Atlanta Motel, Inc. v. United States*, 71 MD. L. REV. 83 (2011).

ration of Independence, which are held to be the Constitution's beating heart and unshakable foundation.

In this Article, I argue that contemporary conservative Declarationism offers a dramatic and morally compelling story about the long trajectory of American constitutional development, and serves: (1) as an ideological means of morally rehabilitating and redeeming southern conservatism in the wake of its longtime, but now morally discredited, defense of legal segregation; and (2) as an ideological means of unifying the diverse strands of the contemporary Religious Right. Both, of course, are crucial to the mission of the modern Republican Party.

It is important as a preliminary matter to emphasize that the contemporary phenomenon I call Declarationism, though served in a new bottle by the contemporary right, is, in important respects, very old wine. It is inherently neither liberal nor conservative, though, whatever its political valence, it is always intended to be dynamic and inspirational. Over the course of American history, the Declaration of Independence has been prominently invoked by feminists,<sup>3</sup> "free love" enthusiasts,<sup>4</sup> Populists,<sup>5</sup> anti-imperialists,<sup>6</sup> and by a soon-to-be liberal president calling for the redefinition of people's rights to meet

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3. See, e.g., Catharine E. Beecher, *A Treatise on Domestic Economy* (1841) (referring to "[t]he great maxim, which is the basis of all our civil and political institutions . . . that 'all men are created equal,' and that they are equally entitled to 'life, liberty, and the pursuit of happiness.'"), reprinted in *AMERICAN POLITICAL THOUGHT: A NORTON ANTHOLOGY* 522 (Isaac Kramnick & Theodore J. Lowi eds., 2009) [hereinafter *AMERICAN POLITICAL THOUGHT*]; Elizabeth Cady Stanton, *The Seneca Falls Declaration of Sentiments and Resolutions* (1848) (The Seneca Falls Declaration begins: "When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course. We hold these truths to be self-evident: that all men and women are created equal . . ."), reprinted in *AMERICAN POLITICAL THOUGHT*, *supra*, at 529; Victoria Woodhull, *On Constitutional Equality* (1871) ("I come before you, to declare that my sex are entitled to the inalienable right to life, liberty and the pursuit of happiness."), reprinted in *AMERICAN POLITICAL THOUGHT*, *supra*, at 861.

4. Victoria Woodhull, *The Principles of Social Freedom* (1871) ("Yes, I am a Free Lover. I have an *inalienable, constitutional and natural* right to love whom I may, to love as *long* or as *short* a period as I can; to *change* that love *every day* if I please, and with that right neither *you* nor any *law* you can frame have *any* right to interfere."), reprinted in *AMERICAN POLITICAL THOUGHT*, *supra* note 3, at 866 (emphases in original).

5. National People's Party Platform (1892) (referencing the Declaration of Independence in its preamble), reprinted in *AMERICAN POLITICAL THOUGHT*, *supra* note 3, at 801.

6. Platform of the American Anti-Imperialist League (1899), reprinted in *AMERICAN POLITICAL THOUGHT*, *supra* note 3, at 921.

the conditions of “a changing and growing social order.”<sup>7</sup> The reading of the Declaration of Independence into the core of the Constitution was also a crucial, if not the central, component of the political thought of both President Abraham Lincoln and the abolitionist orator Frederick Douglass.<sup>8</sup> Indeed, for many on the contemporary right, Lincoln, Thomas Jefferson, and Martin Luther King, Jr., have been joined in a Declarationist Triptych that serves—particularly in moments of moral and political crisis—to evoke awe and reverence for the eternal return of the American republic to its grounding in the principles of the Declaration.

In his debates with Abraham Lincoln during their 1858 campaign for the U.S. Senate, U.S. Senator Stephen A. Douglas’s position on the vexing question of slavery’s status in the newly admitted states and territories was that each state should resolve the issue itself through the democratic (and constitutional) principle of popular sovereignty.<sup>9</sup> In response to invocations by those committed to banning slavery in the territories of the Declaration’s provision that “all men are created equal” and “endowed by their creator with certain inalienable rights,” Douglas replied that these provisions could only be understood in light of the practices of the 1770s, when the Declaration was adopted.<sup>10</sup> Douglas observed that the enslavement of Africans in America was generally accepted at the time.<sup>11</sup> This meant that those principles were meant to, and continued to, apply to whites only.<sup>12</sup>

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7. Franklin Delano Roosevelt, Commonwealth Club Speech (1932), *reprinted in* AMERICAN POLITICAL THOUGHT, *supra* note 3, at 1170, 1177.

8. See GARY JEFFREY JACOBSON, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 3–4 (1993) (“Thus for Lincoln constitutional meaning was scarcely imaginable without the Declaration as [the] ultimate source of interpretive guidance.”); STEVEN KAUTZ, LIBERALISM AND COMMUNITY 105 (1997) (“Abraham Lincoln, Frederick Douglass, and Martin Luther King often referred to the Declaration of Independence . . . . But they referred to the Declaration not only as our founding document, but also because it embodies an honorable claim about humanity, and implies a moral aspiration . . .”).

9. THE LINCOLN-DOUGLAS DEBATES OF 1858, 326–27 (Robert W. Johannsen ed., 1978) [hereinafter LINCOLN-DOUGLAS DEBATES].

10. See *id.* at 215–16 (explaining that the practice of Founding Fathers, such as Thomas Jefferson, of owning slaves proves that “the equality of all men” referred only to white men); J. DAVID GREENSTONE, THE LINCOLN PERSUASION: REMAKING AMERICAN LIBERALISM 29 (1993) (explaining that Douglas “interpreted [the Declaration’s] assertion of human equality in terms of the practices of the 1770s”).

11. See LINCOLN-DOUGLAS DEBATES, *supra* note 9, at 215–16 (“It must be borne in mind that when that Declaration was put forth, every one of the thirteen Colonies were slaveholding Colonies . . .”).

12. See *id.* at 216 (Douglas believed that the American government “was made by white men for the benefit of white men and their posterity forever, and was intended to be administered by white men in all time to come.”).

As he made clear in his debates with Senator Douglas, Lincoln came to the question from a very different place. Crucial to Lincoln's position was his grounding in the Declaration.<sup>13</sup> In Lincoln's view, "the universal moral principles" referenced in the Declaration's famous opening lines served as no less than the foundation of the American Union.<sup>14</sup> "I have never had a feeling politically," he once pronounced categorically, "that did not spring from the sentiments embodied in the Declaration of Independence."<sup>15</sup> Lincoln's animating purpose as a political leader was "to secure the moral character of the Union."<sup>16</sup> Indeed, the nation's special status and mission in the world—its "solemn responsibilities"—were to vindicate these principles.<sup>17</sup>

Lincoln repeatedly invoked the Declaration in his attacks on the institution of chattel slavery.<sup>18</sup> In the Lincoln-Douglas debates, Lincoln opposed Douglas's popular sovereignty understandings with the position that the nation had accepted slavery in the southern states as part of its original constitutional bargain.<sup>19</sup> Accordingly, he insisted he had no intention of interfering with that institution in the states where it already existed.<sup>20</sup> An adherence to the nation's founding principles, however, required that slavery not be newly instituted where it did not originally exist—in the nation's great western expanses.<sup>21</sup>

The other political figure who systematically recurred to the Declaration as his touchstone was the abolitionist orator Frederick Douglass.<sup>22</sup> After Lincoln's assassination and the Union victory in the war, Douglass became the nation's most prominent purveyor of the "emancipationist vision" of the Civil War maintaining that the war was fought to vindicate the nation's founding, moral principles.<sup>23</sup> This

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13. See GREENSTONE, *supra* note 10, at 282 ("For [Lincoln], the declaration was not simply a rational statement of universal truths about the natural rights of particular individuals—it also proclaimed his nation's covenantal status as a special people . . .").

14. *Id.* at 17 (citation and internal quotation marks omitted).

15. Abraham Lincoln, Speech at Independence Hall, Philadelphia, Pennsylvania (Feb. 22, 1861), in LINCOLN: SELECTED SPEECHES AND WRITINGS 282, 282 (1992).

16. GREENSTONE, *supra* note 10, at 256.

17. *Id.* at 282.

18. *Id.*

19. LINCOLN-DOUGLAS DEBATES, *supra* note 9, at 303.

20. *Id.*

21. *Id.* at 308.

22. See KAUTZ, *supra* note 8, at 105.

23. See DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 106 (2001) ("With the resurgence of the Democratic Party in the South, and the waning of radicalism in the Republican Party, Douglass described the American people as 'destitute

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emancipationist vision, so passionately advanced by Douglass and others, was besieged almost immediately following the end of the war, and was largely crushed by the gradual eclipse of Radical Republican power, the end of Reconstruction, and the subsequent late nineteenth and early twentieth century sectional reconciliation between the white North and the white South.<sup>24</sup>

After a long hiatus, the emancipationist vision of Douglass was revived during the mid-twentieth century civil rights movement, most prominently by the Rev. Martin Luther King, Jr. In his famed 1963 “I Have a Dream” speech at the Lincoln Memorial, King insisted—as had Lincoln and Frederick Douglass before him—that the Constitution and the Declaration of Independence should be understood as two sides of the Founding’s single coin. “When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence,” King declared at the outset of his oration, “they were signing a promissory note to which every American was to fall heir. This note was a promise that all men . . . would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness.”<sup>25</sup> King’s first articulation of the outlines of his “dream” was taken directly from the Declaration itself. He dreamed that “one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal.”<sup>26</sup>

Through the mid-1960s Lincoln and Martin Luther King, Jr., were still largely reviled by the southern right. Prior to the mid-1960s, many conservatives understood Lincoln as a staunch centralizer.<sup>27</sup>

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of political memory.’ If Republicans would stand as the party of memory, Douglass was happy to carry their banner.”). Others expressing similar views included Radical Republican leader Thaddeus Stevens, who illustratively insisted in congressional debates over the proposed Fourteenth Amendment that “in rebuilding, it is necessary to clear away the rotten and defective portions of the old foundations, and to sink deep and found the repaired edifice upon the firm foundation of eternal justice,” and Republican Congressman (and future President) James A. Garfield who insisted that to rebuild the constitutional order in the Civil War’s aftermath “[w]e must remove the rubbish and rebuild from the bottom.” *Id.* at 55–57.

24. *See id.* at 92, 106. *See also* WOLFGANG SCHIVELBUSCH, *THE CULTURE OF DEFEAT: ON NATIONAL TRAUMA, MOURNING, AND RECOVERY* 32 (Jefferson Chase trans., 2001) (noting that “Woodrow Wilson was the first Southerner elected to the Presidency since the Civil War”).

25. Martin Luther King, Jr., *I Have a Dream* (1963), in *AMERICAN POLITICAL THOUGHT*, *supra* note 3, at 1317, 1318.

26. *Id.* at 1320.

27. *See* THOMAS J. DILORENZO, *LINCOLN UNMASKED: WHAT YOU’RE NOT SUPPOSED TO KNOW ABOUT DISHONEST ABE* 150 (2006) (describing Lincoln as a consolidator of political power).

King was seen as a suspected communist, moral reprobate, fomenter of disorder, and conduit for outside meddling by officious northern activists and politicians.<sup>28</sup> Within the conservative movement itself, states' rights southern traditionalists found their case against Lincoln and the federal government championed aggressively by (northern) libertarians like Frank Meyer, who tirelessly lambasted Lincoln as a crypto-fascist, quasi-totalitarian centralizer, and crusher of civil liberties.<sup>29</sup> In this earlier stage in the development of post-War conservatism, the chief antagonist of the Lincoln-reviling neo-confederates and libertarians within the movement itself was the Straussian political philosopher Harry V. Jaffa.<sup>30</sup> Jaffa—like Lincoln, Douglass, and King—placed the opening lines of the Declaration at the core of his understanding of American constitutionalism, and lionized (to the point of virtually deifying) Lincoln as the redeemer of these principles.<sup>31</sup>

A telling illustration of Declarationism's nature and new status with today's right is the symbolism employed by what was once the flagship institution of the Old (and Deep) South, the University of Mississippi,<sup>32</sup> which has launched a new academic center called The Declaration of Independence Center for the Study of American Free-

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28. See JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS 1945–1975*, 84–85 (2006) (“The allegations against King only reinforced that circle: here was a civil rights leader who had contacts in the nation’s capital, ran an influential ‘outside’ organization, and attended communist training schools.”).

29. See DILORENZO, *supra* note 27, at 150–52 (explaining that Frank Meyer criticized Lincoln’s presidency as a “repressive dictatorship” that consolidated political power under the President).

30. See RICHARD BROOKHISER, *RIGHT TIME, RIGHT PLACE: COMING OF AGE WITH WILLIAM F. BUCKLEY JR. AND THE CONSERVATIVE MOVEMENT 93–94* (2009) (explaining that Buckley disagreed with other conservatives like Frank Meyer on their view of Lincoln and the Declaration of Independence). For a definition of Straussianism, see *infra* note 118.

31. See HERMAN BELZ, *ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS IN THE CIVIL WAR ERA 87–88 n.52* (1998) (discussing Jaffa’s numerous essays in which he relies on the Declaration of Independence and celebrates Lincoln for the same). At the time, Jaffa was a staunch, and aggressively outspoken, defender of the powers of the national government, and, indeed, called for it to be involved to a much greater degree in a whole range of public policies. See Harry V. Jaffa, *The Case for a Stronger National Government*, in *A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM* 106, 106 (Robert A. Goldwin ed., 1968) (“The only agency which can marshal all the resources of the nation, and order all its efforts to the overriding purposes which all share, is the government of the United States.”).

32. See FRANK LAMBERT, *THE BATTLE OF OLE MISS: CIVIL RIGHTS V. STATES’ RIGHTS* (2010); Nadine Cohodas, *James Meredith and the Integration of Ole Miss*, 16 J. BLACKS IN HIGHER EDUC. 112, 112 (1997) (“Meredith had chosen Ole Miss because it was a symbol of white prestige and power, a haven for the privileged and the finishing school for the sons of the elite.”).

dom.<sup>33</sup> This center is devoted to propagating the principles of American freedom such as the teachings of Abraham Lincoln and Martin Luther King, Jr.<sup>34</sup> Mississippi's Declaration of Independence Center is one of a growing number of university centers founded and run by staunch conservatives committed to (amongst other things) the reinforcement of Declarationism as a constitutional creed.

The iconography of Ole Miss's Declaration of Independence Center<sup>35</sup> is, not coincidentally, the same as that used by the Princeton, New Jersey-based Witherspoon Institute, an off-campus, Christian Right research center created by conservative Catholic natural law philosopher and Princeton politics professor Robert P. George.<sup>36</sup> With the sponsorship of the Bush administration's National Endowment for the Humanities, Witherspoon recently launched a "Natural Law, Natural Rights, and American Constitutionalism" web resource.<sup>37</sup> The resource contains banner graphics juxtaposing the opening lines of the Declaration. It depicts Abraham Lincoln speaking about the centrality of the Declaration to his political and constitutional thought, shows Martin Luther King, Jr.'s touchstones in Catholic natural law philosophy, and testifies to the centrality of natural law to the civil rights movement.<sup>38</sup>

In the following pages, I pursue a number of objectives. First, I provide historical context for an important current of contemporary political thought that informs current constitutional understandings and ideologies. Second, I enlist this historical work to underline several claims about the nature of U.S. constitutional politics more generally. As many scholars have observed, constitutions do many things, including creating and limiting governmental structures and political

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33. *Declaration of Independence Center for the Study of American Freedom*, THE UNIVERSITY OF MISSISSIPPI, <http://www.olemiss.edu/depts/independence/index.html> (last visited July 23, 2011).

34. *See id.* (posting the pictures of Abraham Lincoln and Martin Luther King, Jr., on the center's homepage).

35. The center's homepage is bannered with images of Washington, Lincoln, and King, and features a photo of a parchment version of the Declaration, with a quill pen lying across it. *See Declaration of Independence Center for the Study of American Freedom*, *supra* note 33.

36. The apparent anomaly of the Ole Miss's conservative-run center makes sense when you learn that it was founded by law professor Jack Wade Nowlin, who received his Ph.D. in politics at Princeton under the direction of Robert P. George.

37. *Natural Law, Natural Rights, and American Constitutionalism*, THE WITHERSPOON INSTITUTE, [http://www.winst.org/announcements/11\\_01\\_17\\_natural\\_law.php](http://www.winst.org/announcements/11_01_17_natural_law.php) (last visited July 23, 2011).

38. *See Natural Law, Natural Rights and American Constitutionalism*, THE WITHERSPOON INSTITUTE, <http://www.nlhrc.org/> (last visited July 23, 2011).

institutions.<sup>39</sup> As such, constitutions live legally and practically in law and in the standard operating procedures and rules of government (and even private) institutions. Additionally, scholars have observed that constitutions also live politically outside formal institutions, where they are appealed to as parts of campaigns to form political identities, underwrite social and political movements, forge political parties, and motivate an electorate. Part of my purpose here is to underline the relevance of this political—as opposed to purely legal—understanding of constitutions to our understanding of major currents of contemporary politics.<sup>40</sup>

In describing the uses of Declarationism within the modern conservative movement, I also seek to refute the overly simplistic historical accounts of contemporary conservatism, such as those advanced by the historian Nancy MacLean, that insist that neo-Confederatism is the “true” animating engine of that movement. Such accounts, which essentially treat the modern movement as an effort to turn back the clock to a long-gone, and morally discredited, *status quo*—presumably to put their liberal/left political compatriots on the *qui vive*—elide the complicated dynamics of constitutional development as understood by Declarationism’s most sophisticated students, who work at the intersection of law and political science. One of the most prominent of these, Bruce Ackerman, has emphasized that those employing constitutional arguments in politics are always simultaneously looking backwards while moving forwards.<sup>41</sup> As such, constitutional ideologies in the American context exist in the form of layered memory. This layered memory is a form of nationalism, in which political interpreters advance claims of fidelity, betrayal, and legacy, and rally others with calls to restoration and redemption. In this political struggle over memory, opponents—and even enemies—are defined, and alliances are forged. Appeals to constitutional symbols like the Declarationist Triptych are important parts of this process.<sup>42</sup>

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39. See generally BEAU BRESLIN, FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY (2009); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853 (1962).

40. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); JACK M. BALKIN, LIVING ORIGINALISM (2011).

41. BRUCE ACKERMAN, WE THE PEOPLE I: FOUNDATIONS 1–33 (1991).

42. See generally BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 40, at 247; see MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1964).



## II. UNRECONSTRUCTED: THE LAST DAYS OF MAINSTREAM NEO-CONFEDERATISM

### A. *The Modern Right Remembers the Civil War*

“[W]hat Constitution? *The Constitution as it was or the Constitution as it is?*” New York Herald (1868)

“*Let us have the Constitution as it was. Let us stand square up to the old Constitution and we can conquer.*” Milledgeville, Georgia, Federal Union (1868)<sup>43</sup>

Contention over the true “meaning” of the Civil War, constitutionally and politically, began from the moment of General Lee’s surrender at Appomattox Court House.<sup>44</sup> The ideological valence of the meanings attributed to the war, as they formed over the long term, do not track the categories that contemporary political scientists use to distinguish “liberals” from “conservatives.” We can at least distinguish those who read the war narrowly from those who read it broadly and aspirationally. The former believed the war, and the three amendments it occasioned, ended slavery and perhaps guaranteed national enforcement of some basic rights. The latter believed the war effectuated a revolution in the constitutional order which transformed the relations between the national government and the states and provided national guarantees for the broad definition and aggressive enforcement of rights.<sup>45</sup>

“Conservatives,” in the contemporary sense, were on both sides of this divide. Conservative (and often southern) defenders of states’ rights, and opponents of black social, civil, and political equality, nar-

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43. N.Y. HERALD, Aug. 25, 1868; FED. UNION, June 23, 1868 (quoted in BLIGHT, *supra* note 23, at 101, 416 n.6).

44. See, e.g., BLIGHT, *supra* note 23, at 1 (opining that determining the lessons of the Civil War “has been the most contested question in American historical memory since 1863, when Robert E. Lee retreated back into Virginia, Abraham Lincoln went to Gettysburg to explain the meaning of the war, and Frederick Douglass announced ‘nation regeneration’ as the ‘sacred significance’ of the war.”).

45. See Michael Vorenberg, *Bringing the Constitution Back In: Amendment, Innovation, and Popular Democracy During the Civil War Era*, in THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY 120 (Meg Jacobs et al. eds., 2003); see also Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1806 (2010) (“When we strip away these doctrinal glosses and focus on the original meaning and structural purpose underlying the Reconstruction Amendments, we discover that the Reconstruction Power gives Congress all the authority it needs to pass modern civil rights laws, including the Civil Rights Act of 1964. That was the original point of these amendments, and that should be their proper construction today.”).

rowly interpreted the implications of the war and the resulting constitutional changes.<sup>46</sup> However, those we would later recognize as libertarian conservatives—pro-market, pro-business, pro-property rights economic conservatives, like Supreme Court Justice Stephen J. Field, read the Civil War as having worked a revolution in the constitutional order.<sup>47</sup>

*B. Mel Bradford's Lincoln*

As we move forward to the time in which modern ideological categories became political realities in the post-New Deal era—our main focus here—we can clearly discern a strain of the modern conservative movement that prominently adhered to the narrow understanding of the war's meaning, with all the attendant constitutional and political implications of that position. Melvin E. (“M. E.” or “Mel”) Bradford was a leading theorist and thinker of this current of thought—sometimes dubbed “neo-Confederate”—in post-War America.

Most accounts of the reintegration of the South into the constitutional nation focus on the post-bellum late nineteenth and early twentieth centuries.<sup>48</sup> Some, however, also treat the successes of the mid-twentieth century's civil rights movement as occasioning, if not a second defeat with an attendant northern conquest, then at least as a

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46. See, e.g., M. E. BRADFORD, ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION 104 (1993) (“Despite the alteration that they made in the balance of American federalism, the Reconstruction amendments and early civil rights laws did not change the Constitution of the United States into a teleocratic instrument: a law with endlessly unfolding implications in the area of personal rights.”).

47. See, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 94–95 (1873) (Field, J., dissenting) (“The [Fourteenth] amendment was adopted ... to place the common rights of American citizens under the protection of the National government.... A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.”). If the narrower reading of the Court's majority were to hold, the Fourteenth Amendment “was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.... [I]f the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.... The privileges and immunities designated are those which of right belong to the citizens of all free governments.” *Id.* at 96–97. See also *Munn v. Illinois*, 94 U.S. 113, 140–44 (1877) (Field, J., dissenting) (arguing for a liberal construction of the Fourteenth Amendment to prohibit Illinois from regulating the amount a business could charge for use of a grain elevator).

48. See generally BLIGHT, *supra* note 23, at 31–63 (discussing reconstruction and the post-bellum era in the American South); WOLFGANG SCHIVELBUSCH, THE CULTURE OF DEFEAT: ON NATIONAL TRAUMA, MOURNING, AND RECOVERY 53–86 (2001) (same).

“Second Reconstruction,” to which some southerners reacted as badly as their predecessors had to the first.<sup>49</sup> Through as late as the early 1980s (repudiating a longstanding strain of southern thought that had made its peace with the Civil War’s outcome, and even with Lincoln),<sup>50</sup> the conservative movement continued to harbor a strong un-reconstructed element of neo-Confederatism, on the one hand,<sup>51</sup> and formalist, southern-based states’ rights conservatism on the other.<sup>52</sup> M. E. Bradford, a proud native Texan and literature professor at the University of Dallas, was perhaps the most sophisticated and influential neo-confederate intellectual in the second half of the twentieth century.<sup>53</sup> In constitutional matters, he was a strict constructionist, a

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49. See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 391 (2004) (“*Brown [v. Board of Education]* represented federal interference in southern race relations—something that white southerners, who harbor[ed] in historical memory, with deep resentment, the program of reconstruction and the deep humiliation of carpetbag government imposed by conquest, could not tolerate.”) (internal quotation marks omitted) (insertion in original). See generally FRANCES LISA BAER, RESISTANCE TO PUBLIC SCHOOL DESEGREGATION: LITTLE ROCK, ARKANSAS, AND BEYOND 33–42 (2008) (describing the fierce opposition to the integration of schools in Hoxie, Arkansas, and the advent of Citizens’ Councils in the mid-1950s).

50. See MERRILL D. PETERSON, LINCOLN IN AMERICAN MEMORY 49, 252 (1994) (noting as evidence of the South’s peace with Lincoln both a gentler view of Lincoln in the American South after Reconstruction faded into memory and the Virginia legislature’s adoption of a resolution in honor of Lincoln’s birthday in 1928).

51. See, e.g., M. E. BRADFORD, *Where We Were Born and Raised: The Southern Conservative Tradition*, in THE REACTIONARY IMPERATIVE: ESSAYS LITERARY AND POLITICAL 115, 115–34 (1990); Nancy MacLean, *Neo-Confederacy versus the New Deal: The Regional Utopia of the Modern American Right*, in THE MYTH OF SOUTHERN EXCEPTIONALISM 308, 308–12 (Joseph Crespiño & Matthew D. Lassiter eds., 2010). It is important to note that, for much of the twentieth century, these conservatives could be found in both political parties; of course, in the first part of that century, most southern conservatives were Democrats.

52. See JAMES JACKSON KILPATRICK, THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA 255–58 (1957) (discussing the effect of school desegregation on the southern states from a states’ rights perspective).

53. James McClellan, *Walking the Levee with Mel Bradford*, in A DEFENDER OF SOUTHERN CONSERVATISM: M. E. BRADFORD AND HIS ACHIEVEMENTS 35, 39 (Clyde N. Wilson ed., 1999) [hereinafter McClellan, A DEFENDER OF SOUTHERN CONSERVATISM]. Trained by the poet Donald Davidson in the Fugitive and Agrarian literary circle in the Vanderbilt University English Department, Bradford was a William Faulkner specialist by trade. Thomas H. Landess, *The Education of Mel Bradford: The Vanderbilt Years*, in A DEFENDER OF SOUTHERN CONSERVATISM, *supra*, at 7, 8–9; see also McClellan, A DEFENDER OF SOUTHERN CONSERVATISM, *supra*, at 35, 39 (Bradford was “equally at home in philosophy, religion, classical studies, politics, and history,” and took a special interest in literature of the South and American political rhetoric and thought). Davidson, Bradford’s mentor at Vanderbilt, had once pronounced the Lincoln Memorial in Washington a brazen affront to southerners. PETERSON, *supra* note 50, at 251.

position he advanced and defended from an explicitly southern point of view.<sup>54</sup>

In the mid-twentieth century, many conservatives, such as Russell Kirk, left Lincoln off the maps they were drawing of the history of conservative thought.<sup>55</sup> By contrast, Lincoln was very much on Bradford's map as his frequent and perhaps predominant target.<sup>56</sup> Indeed, when President Ronald Reagan nominated Bradford to head the National Endowment for the Humanities, it was Bradford's long paper trail of attacks on Lincoln, and Lincoln's constitutionalism, which ultimately doomed the appointment.<sup>57</sup> Under a barrage of objections from within the conservative coalition by New York neoconservatives such as Irving Kristol, Norman Podhoretz, and others, Reagan was forced to withdraw the nomination, naming the Brooklyn-born, neoconservative Catholic moralist William J. Bennett in Bradford's place.<sup>58</sup>

Bradford proudly described himself as "an impenitent conservative Southerner."<sup>59</sup> In his many essays on the subject, Bradford described Lincoln as a moral zealot who, in the spirit of Oliver Cromwell, the French Revolutionary Jacobins, and the continental Revolutionaries of 1848, sought to impose his moral vision on the United States through the power of an unconstitutionally unrestrained central state.<sup>60</sup> In an article taking its title from Thomas Jefferson's declared alarm at the Compromise of 1820, Bradford traced the history of the North's centralizing efforts, inflamed by "chiliastic

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54. Marshall L. DeRosa, *M. E. Bradford's Constitutional Theory: A Southern Reactionary's Affirmation of the Rule of Law*, in *A DEFENDER OF SOUTHERN CONSERVATISM*, *supra* note 53, at 92–93 ("The Southernness of Bradford's scholarship was professionally problematical, as is evidenced by the academic ostracism imposed on him due to his Southern, states'-rights brand of conservatism.").

55. RUSSELL KIRK, *THE CONSERVATIVE MIND* (1953).

56. McClellan, *A DEFENDER OF SOUTHERN CONSERVATISM*, *supra* note 53, at 35, 46–47.

57. See David Gordon, *Southern Cross: The Meaning of the Mel Bradford Moment*, *AM. CONSERVATIVE*, Apr. 2010, at 34, 34.

58. See *id.* at 34 (noting that Bradford's support for George Wallace's 1972 Democratic presidential campaign was another problem for the nomination); Benjamin B. Alexander, *The Man of Letters and the Faithful Heart*, in *A DEFENDER OF SOUTHERN CONSERVATISM*, *supra* note 53, at 17, 31.

59. M. E. Bradford, *A Fire Bell in the Night: The Southern Conservative View*, 17 *MODERN AGE* 9, 9 (1973) [hereinafter Bradford, *Fire Bell*].

60. See, e.g., M. E. Bradford, *Dividing the House: The Gnosticism of Lincoln's Political Rhetoric*, 23 *MODERN AGE* 10, 11 (1979) [hereinafter Bradford, *Dividing the House*] (interpreting Lincoln's 1838 Springfield Lyceum speech to reveal his true aim—"radical alterations in the basis and organization of American society").

moral imperatives,” to lay waste to the terms of the original constitutional compact.<sup>61</sup>

Bradford characterized Lincoln’s touchstone, the Declaration of Independence, as the nation’s “one serious flirtation with the millennial thing.”<sup>62</sup> Its legacy was made all the more damaging, he explained, through the influence of those who would read it by the light of “Jacobin ‘translations.’”<sup>63</sup> Abraham Lincoln was Exhibit A in this regard, by dint of his “misunderstanding of the Declaration as [conferring] a ‘deferred promise’ of equality,” and the Civil War struggle as having culminated in what amounts to a “second founding.”<sup>64</sup> This understanding, Bradford explained, was “fraught with peril and carries with it the prospect of an endless series of turmoils and revolutions, all dedicated to the freshly discovered meanings of equality as a ‘proposition’—a juggernaut . . . powerful enough to arm and enthrone any self-made Caesar we might imagine.”<sup>65</sup> Bradford asserted that Lincoln, who was “very early, touched by a Bonapartist sense of destiny,” imagined himself in precisely such a role.<sup>66</sup>

The danger of Lincoln’s outsized sense of destiny was heightened by his religiosity, Bradford warned, since men who see themselves as “authorized from on High to reform the world into an imitation of themselves—and to lecture and dragoon all who might object” are frighteningly zealous.<sup>67</sup> “[They] receive regular intimations of the Divine Will through prophets who arise from time to time to recall them to their holy mission.”<sup>68</sup> The biblical element in Lincoln’s rhetoric grew stronger as his political career progressed, Bradford observed.<sup>69</sup>

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61. Bradford, *Fire Bell*, *supra* note 59, at 9–10. For an earlier articulation of the view of Lincoln as a centralizing despot who had flagrantly violated the terms of the constitutional compact, see ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES: ITS CAUSES, CHARACTER, CONDUCT AND RESULTS; PRESENTED IN A SERIES OF COLLOQUIES AT LIBERTY HALL, VOLUME 2, 34 (1868), available at <http://www.archive.org/details/constitutionalview02steprich> (“Mr. Lincoln came into power on the 4th of March, 1861. He held that the Federal Government did possess the Constitutional Power to maintain the Union of States by force, and it was in the maintenance of these views, the war was inaugurated by him.”).

62. Bradford, *Fire Bell*, *supra* note 59, at 15 n.12.

63. *Id.*

64. M. E. Bradford, *The Heresy of Equality: Bradford Replies to Jaffa*, 20 MODERN AGE 62, 69 (1976) [hereinafter Bradford, *Heresy of Equality*].

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See, e.g., *id.* at 71 (interpreting Lincoln’s 1858 “House Divided” speech to have drawn its inspiration from Mark 3:25). Mark 3:25 reads: If a house is divided against itself, that house cannot stand. *Mark* 3:25.

Lincoln's characteristic and, in Bradford's view, disingenuous method as a moralizer was to demonize his enemies while only grudgingly deigning to recognize their constitutional rights.<sup>70</sup> The political implications of this method over the long-term were dire because "should slavery be gone, some new infamy was bound to be discovered by the stern examiners whose power depends upon a regularity in such 'crusades.'" <sup>71</sup>

Bradford contended that there was, in truth, "no worship of the law whatsoever" in Lincoln's political thought, "but instead devotion to perpetually exciting goals, always just beyond our reach."<sup>72</sup> As such, Lincoln was "an enemy of the 'founding'" who became "a scripture in himself," committed to "the attribution of his own opinions to an antinomian revelation of divine will."<sup>73</sup> He regarded himself as a great man, the oracle of a political religion (most famously articulated in his Peoria Speech),<sup>74</sup> and the wellspring of a political theology that would eventually "replace Church with State."<sup>75</sup>

In Lincoln's "House Divided" speech, Bradford explained, the self-dramatizing Lincoln went so far as to cast himself in the role of Old Testament Prophet.<sup>76</sup> It was in this high-prophetic mode that he alluded to "the eternal struggle between these two principles—right and wrong—throughout the world." "All that remained of his evolution" at this point, Bradford observed, "was a claim to direct communication with the god of history, of which we hear a great deal once Lincoln got the crisis which he wanted."<sup>77</sup>

In his study of Lincoln's political rhetoric, commenced under the tutelage of Eric Voegelin's *The New Science of Politics*, Bradford limned Lincoln as a "backcountry *philosophe*, as 'secularist intellectual' and 'rational, progressivist superman,'" a politician combining a "gnostic formula [with] a special neo-Puritan twist."<sup>78</sup> "For the stage to come,

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70. Bradford, *Heresy of Equality*, *supra* note 64, at 71.

71. *Id.*

72. *Id.*

73. *Id.* at 72.

74. Bradford, *Dividing the House*, *supra* note 60, at 17 (arguing that Lincoln, in his Peoria address, abandons the foundational political principle of compromise, offers apocalypse as an alternative to his political ideology, and implies a new political religion).

75. *Id.* at 13.

76. *Id.* at 19.

77. *Id.* at 19–20.

78. *Id.* at 11 (internal citations omitted). Amongst those conversant in conservative political thought, this critique of rationalism in politics would resonate with students of Michael Oakeshott, see MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS* (1962), and of the critique of the philosophies and the French Revolution as articulated, amongst others, by Gertrude Himmelfarb. GERTRUDE HIMMELFARB, *THE ROADS TO MODERNITY: THE*

according to [Lincoln's] political eschatology [as set out in his address to the Springfield Young Men's Lyceum in January of 1838,] may augur *either* a final perfection *or* an apocalypse, a complete inversion of the fortunate American unfolding already accomplished. That which comes soon may be either the kingdom or the beast."<sup>79</sup> This Lincoln, Bradford argued, seeks "not preservation but change: radical alterations in the basis and organization of American society."<sup>80</sup>

Many, Bradford claimed, have misidentified Lincoln with the freedom of the southern Negro, and have been misled by Lincoln's populist, Jacksonian posturing.<sup>81</sup> By temperament, however, the real Lincoln was a maniacal, tax-and-spend Whig, and an ideologist, "a promising young centralist" who saw government as the roaring engine for the advancement of his vision.<sup>82</sup> Whigs like Lincoln, Bradford explained, "were uniformitarians to the core. . . . Local feeling and variety were [their] enemies. . . . They connected both with the passions; and passion forestalled the evolution of the Union which, in standard progressive fashion, they defined more by what it could be than by what it was or had been."<sup>83</sup> "[T]he final Lincoln . . . [was] the worst. . . . For by him the real is defined in terms of what is yet to come, and the meaning of the present lies only in its pointing thither. This posture, when linked to one of the regnant abstractions of modern politics," Bradford warned, "can have no other result than a totalitarian order."<sup>84</sup>

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BRITISH, FRENCH, AND AMERICAN ENLIGHTENMENTS 181–87 (2005); HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* 228–29 (Phoenix ed., 1982) (1959) [hereinafter JAFFA, *CRISIS*].

79. Bradford, *Dividing the House*, *supra* note 60, at 11 (emphasis in original).

80. *Id.*

81. *See id.* at 16 (noting that the trouble with Lincoln devotees "is that they identify his politics with freedom of the Southern Negro . . . [a]nd that belief leads them to misconstrue what was his larger purpose, from the first.").

82. *Id.* at 13.

83. *Id.* at 16.

84. *Id.* at 21. Furthering his point, Bradford borrows directly from Eric Voegelin's *New Science of Politics*: "Totalitarianism, defined as the existential rule of Gnostic activists, is the end and form of progressive civilization." *Id.* at 24 n.84 (citing ERIC VOEGELIN, *NEW SCIENCE OF POLITICS* 132 (1952)). Bradford notes, additionally, "This entire essay is in obvious debt to Professor Voegelin's discussion of Richard Hooker's critique of the Puritan mind, *The New Science of Politics*, pp. 133–152." *Id.* at 24 n.85. For a similar understanding of Lincoln as a proto-authoritarian/totalitarian, on the model of Bismarck or Lenin, see also EDMUND WILSON, *PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR* xviii–xix (1962) ("Each of these men [referring to Bismarck, Lenin, and Lincoln], through the pressure of the power he found himself exercising, became an uncompromising dictator . . ."). Lest one think Voegelin's ideas to be of mere antiquarian interest, the Eric Voegelin Society ("EVS") regularly sponsors a large number of panels—wildly disproportionate, one might think, to their numbers—at the annual meeting of the

Bradford lamented that, in the Civil War's aftermath, the nation might have committed itself to a "second founding" that was "digestible—suited under certain circumstances to accommodation with the first."<sup>85</sup> "Emancipation appeared to have changed nothing substantial in the basic confederal framework," he concluded. "Neither did it attempt any multiracial miracles . . ."<sup>86</sup> Unfortunately however, for some, "the connection between blacks and American millennialism [only] intensified," in the post-bellum United States, and "Equality (capital 'E')" was placed at the center of their political understandings.<sup>87</sup> With the arrival of the rights revolution in the mid-twentieth century, the Civil War moment at last became "the Trojan Horse of our homegrown Jacobinism."<sup>88</sup>

Rights Revolution egalitarianism was founded upon an uncompromising denial of localism, "a hatred of plenitude . . . a denial of the variety of Creation, 'abolishing the constitution of being, with its origin in divine, transcendent being, and replacing it with a world-immanent order of being, the perfection of which lies in the realm of human action [and proceeds from a human dream]."<sup>89</sup> "Pure millennialism of the gnostic sort," Bradford warned, "is . . . ever restless, never satisfied. . . . [It] entails the fracturing of hard won communal bonds in the implementation of someone's private version of the su-

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American Political Science Association ("APSA") to this day. The EVS is a discursive community that is highly critical of the menace of the sort of "progressivism" that Voegelin had limned in *The New Science of Politics*. They are, that is, conservatives in the age of Obama. The EVS, in other words, has become the institutional sponsor of conservative panels (fifteen at the 2010 meeting) at the preeminent meeting for contemporary political scientists. ERIC VOEGELIN INSTITUTE, <http://www.lsu.edu/artsci/groups/voegelin/society/2010%20Papers/> (last visited July 10, 2011). The large number of panels is likely due to the fact that the group attends these panels in large numbers, packing the rooms. The allotment of panels at APSA meetings is derived from the attendance of a sponsor's panels at the previous annual meeting. See American Political Science Association, *Memorandum: 2006 Panel Allocations for Program Committee Divisions and Related Groups*, available at <http://www.apsanet.org/imgtest/2006%20M%20E%20M%20O%20R%20A%20N%20D%20U%20M.pdf> (describing the APSA annual meeting panel allocation process).

85. Bradford, *Fire Bell*, *supra* note 59, at 10.

86. *Id.* See also RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 14 (1977) (explaining that after a Civil War that ultimately resulted in the emancipation of the slaves, the war-weary North, generally, and the framers of the Fourteenth Amendment, specifically, were extremely reluctant to pursue other abolitionist goals, such as black suffrage).

87. Bradford, *Fire Bell*, *supra* note 59, at 10.

88. *Id.*

89. *Id.* at 11 (quoting ERIC VOEGELIN, SCIENCE, POLITICS, AND GNOSTICISM 99–100 (1968) (insertion in original)).



pernal good; and in a pluralistic society, implementation of such visions is usually perceived as moralistic aggression . . . .”<sup>90</sup>

“As the South has always recognized,” Bradford explained, “patronizing, ‘for-the-Negro’ millennialism has had its primary meaning and ultimate promise exposed in those other species of utopian hope for which it broke trail. . . . [I]t has been a stalking horse for objectives never able to command national assent—never *except* as they hid behind or within the . . . one ‘sacred’ cause.”<sup>91</sup> When these are achieved, diversity, culture, and, ultimately, freedom are lost.

### C. Mel Bradford’s Jaffa

Bradford’s most immediate targets in setting out these understandings were not left-liberals (who almost certainly would not be listening to him), but fellow movement conservatives. His chief conservative antagonist was the Straussian political philosopher Harry Jaffa, a passionate admirer of Lincoln and a tireless proponent of the view (shared with his hero) that the Declaration of Independence serves as the lodestar of the American constitutional tradition.<sup>92</sup>

Jaffa’s insistence on the centrality to the American constitutional tradition of “Equality, with the capital ‘E,’” Bradford thundered, “is the antonym of every legitimate conservative principle.”<sup>93</sup> “[T]here is no man equal to any other,” he insisted, “except perhaps in the special, and politically untranslatable, understanding of the Deity. *Not intellectually or physically or economically or even morally.* . . . Such is, of course, the genuinely self-evident proposition.”<sup>94</sup> The mistaken

90. *Id.* Although Bradford did not deny that a millennialist thread had run through all of American history, he insisted that history taught nevertheless that “the total nation has, characteristically, despised and rejected who or whatever aspired to dragoon its way to such beatitudes through the instruments of federal policy.” *Id.* at 11–12. (Bradford goes on to point out that the only full exception to this rule is the “civil rights revolution,” citing “reverse discrimination, racial quotas, assignment of teachers and workers by color, grading by court order, federal involvement with zoning practices or intervention in the relocation of business firms” as “positive millennialist injunctions.” *Id.*).

91. *Id.* at 13.

92. See Harry V. Jaffa, *Equality as a Conservative Principle*, 8 LOY. L.A. L. REV., 471, 476 (1975) [hereinafter Jaffa, *Equality*] (reviewing WILLMOORE KENDALL & GEORGE W. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* (1970)) (“We believe that the Declaration of Independence is the central document of our political tradition . . .”).

93. Bradford, *Heresy of Equality*, *supra* note 64, at 62.

94. *Id.* (emphasis in original). Jaffa was himself responding to Willmoore Kendall and George W. Carey’s *The Basic Symbols of the American Political Tradition*. Jaffa, *Equality*, *supra* note 92, at 476. Jaffa seems to reject the charge that he has anything to do with modern utopian egalitarian understandings of equality, which go “far beyond the scope of law, and sometimes were in flat contradiction to the principles of the earlier demands for full

commitment to equality, Bradford warned, will lead ineluctably to a demand for the equality of condition, as advanced by an increasingly all-powerful Leviathan, a docile, manipulated populace under the control of an army of elites.<sup>95</sup> Far from being conservative, this is nothing more than “the Old Liberalism hidden under a Union battle flag.”<sup>96</sup>

Lincoln’s distorted understandings of the Declaration of Independence were bad enough. But, Bradford believed, Harry Jaffa had only compounded Lincoln’s error through “his treatment of the second sentence of that document in abstraction from its whole: indeed, of the first part of that sentence in abstraction from its remainder, to say nothing of the larger text.”<sup>97</sup> Jaffa, Bradford observed, “filters the rest of the Declaration (and later expressions of the American political faith) back and forth through the measure of that sentence until he has (or so he imagines) achieved its baptism in the pure waters of higher law.”<sup>98</sup> In doing so, he “sets up a false dilemma: we must be . . . ‘committed’ to Equality or we are ‘open to the relativism and historicism that is the theoretical ground of modern totalitarian regimes.”<sup>99</sup> Only a firm commitment to that single phrase of the Declaration, Jaffa has oddly concluded, will save us from Hitler and Stalin.<sup>100</sup> “I agree with Professor Jaffa concerning the dangers of relativism,” Bradford wrote.<sup>101</sup> “A Christian must.”<sup>102</sup> But, all the same, “we must resist the tendency to thrust familiar contemporary pseudo-religious notions back into texts where they are unlikely to appear.”<sup>103</sup>

As a Straussian, Jaffa had insisted upon treating the “all men are created equal” clause “as one of Lincoln’s beloved Euclidian propositions . . . .”<sup>104</sup> Jaffa and his ilk “have approached the task of explication as if the Declaration existed, *sui generis*, in a Platonic empy-

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equality under law.” JAFFA, *CRISIS*, *supra* note 78, at 11. Jaffa notes that Lincoln also disapproved of the “temper and . . . methods” of radical reformism. *Id.* at 245.

95. Bradford, *Heresy of Equality*, *supra* note 64, at 63.

96. *Id.*

97. *Id.* at 64.

98. *Id.*

99. *Id.*

100. *Id.* The ludicrousness of this all-too-characteristic Straussian move, Bradford observed, demonstrated the problems arising “from the habit of reading legal, poetic, and rhetorical documents as if they were bits of revealed truth or statements of systematic thought.” *Id.*

101. *Id.* at 65.

102. *Id.*

103. *Id.*

104. *Id.*

rean.”<sup>105</sup> They treat the Founding and the Constitution the same way.<sup>106</sup> But “the Declaration is not implicit in the Constitution except as it made possible free ratification by the independent states. In truth, many rights are secured under the Constitution that are not present in the Declaration, however it be construed.”<sup>107</sup>

The sort of unreconstructed neo-confederatism that Nancy MacLean has argued serves as the grounding for post-War American conservatism is certainly evident—albeit in a distinctive guise—in the thought of M. E. Bradford. Bradford’s rejection of the opening lines of the Declaration of Independence as constitutional touchstones, and of Lincoln as a constitutional vindicator and savior, along with his insistence on narrowly interpreting the meaning of the Civil War as having effectuated no sharp break with the “confederal” antebellum constitutional order, place him squarely within this old conservative tradition. Even so, his insistence on characterizing Lincoln as a slave to the utopian, “uniformitarian,” and, ultimately, totalitarian millennial abstractions allegedly characteristic of twentieth century progressives, demonstrates his decidedly modern concerns. The neoconfederate Bradford, however, was locked in a raging intellectual battle for the soul of the post-War conservative movement with Harry Jaffa—who stands about as far from neoconfederatism as imaginable—as a fervent proponent of both Lincoln and the centrality of the Declaration to the American constitutional tradition. Unlike Bradford, Jaffa was a man of ascending prominence on the post-War American right.

### III. THE BIRTH OF CONTEMPORARY DECLARATIONIST CONSTITUTIONAL THEORY

#### A. *Harry Jaffa’s (Straussian) Lincoln*

M. E. Bradford’s truculently localist, pro-southern, neo-confederate conservatism, whatever its virtues as a species of political thought, was not likely to have much of a political future in the immediate post-civil rights era, when the states’-rights position was tied so closely to the lost causes of racism and segregation. President Reagan’s withdrawal of Bradford’s nomination to head the National Endowment for the Humanities was a clear indication that, whatever the

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105. *Id.*

106. *Id.*

107. *Id.* at 68. See also WILLMOORE KENDALL & GEORGE W. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 89–90 (1970) (arguing that it was the Constitution and not the Declaration of Independence that started our nation, and that the Declaration instead “establish[ed] a baker’s dozen of new sovereignties”).

standing of such views within the precincts of the out-of-power Old Guard, this vision would not serve within a right that now controlled the national government, and had realistic, long-term hopes of retaining that power. By contrast, Harry Jaffa's star was clearly rising.<sup>108</sup>

By the 1980s, Jaffa was hardly a new figure on the intellectual right. Credited with penning the most famous line of Barry Goldwater's speech accepting the Republican nomination for president in 1964,<sup>109</sup> Jaffa first propounded his constitutional theory through his magisterial interpretation of the Lincoln-Douglas debates in *Crisis of the House Divided*, a theory he subsequently reiterated, even evangelized for in countless articles, lectures, and reviews. As law school constitutional theorists became more influential, and conservative academics found their foothold in this new world by hawking their own trademarked theory of textual interpretation—"originalism"—the political scientist Jaffa later recast his views in the prevailing "originalist" idiom.<sup>110</sup>

The pre-originalist Jaffa was no uncritical worshipper of the American Founding. His writings emphasized its incompleteness, the sad failing arising out of the compromises the Founders had made with chattel slavery.<sup>111</sup> These compromises, Jaffa argued, represented a more fundamental "inability" or unwillingness on the part of the Founders to commit themselves in the Constitution to the eternal, unchanging, God-given principles that had served as the grounding of the nation's Declaration of Independence.<sup>112</sup> Jaffa contended that

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108. The most famous case of the public ascent of the Straussians, of course, is that of the University of Chicago political philosopher Allan Bloom, whose *The Closing of the American Mind* (1987) became a conservative cause célèbre.

109. "Extremism in the defense of liberty is no vice . . . . And . . . moderation in the pursuit of justice is no virtue." Barry Goldwater, Speech Accepting the Republican Nomination for President (July 16, 1964) available at <http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm>. See KARL HESS, MOSTLY ON THE EDGE 168–70 (1999) (attributing the line to Jaffa but stating he later learned it was a paraphrase of Cicero).

110. See HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994) (discussing the debate surrounding originalism); Jaffa, *Equality*, *supra* note 92, at 504 ("The principles of the Declaration . . . are present in the very first words of the Constitution as those words were understood by those who drafted and adopted it."); JAFFA, CRISIS, *supra* note 78 (repudiating the revisionist approach to the Civil War). On the shift to originalism in conservative constitutional thought, see generally Ken I. Kersch, *Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in National Review*, 25 STUDIES IN AM. POL. DEV. 1 (2011).

111. See, e.g., JAFFA, CRISIS, *supra* note 78, at 14 (discussing the Founders' acknowledgment that slavery was in conflict with the doctrine of the American Revolution, and their failure to end it despite this).

112. See *id.* at 315.

the capacity of the people to govern themselves, democracy, is “demonstrated” when the nation commits itself to living under submission to the natural law (the laws of nature and Nature’s God referenced in the Declaration), which is the embodiment of timeless and objective standards of right and wrong.<sup>113</sup> It was Abraham Lincoln who, belatedly, had completed the Constitution by placing the Declaration’s commitment to natural rights at its core, redeeming America’s (nearly) fatally flawed Founding with “a new birth of freedom.”<sup>114</sup>

Like all Straussians, Jaffa read the American constitutional tradition through the lens of classical political philosophy. Tracing the term for “constitution” used in the ancient Greek texts—*politeia*—Jaffa noted that, for Aristotle, a *polis* was a partnership in *politeia*, where *politeia* “is not the laws, but rather the animating principle of the laws, by virtue of which the laws are laws of a certain kind.”<sup>115</sup> In finding the “life principle of the nation” in the Declaration, Jaffa explained, Lincoln understood American constitutionalism in precisely the same way.<sup>116</sup> For Lincoln, Jaffa observed, “the relation of the famous proposition to the Constitution and Union corresponded to the relation of soul to body.”<sup>117</sup>

This story of national redemption, pivoting on Lincoln, informed not only Jaffa’s account of emancipation, but also his reading of the entire arc and spirit of American history, as instantiated in its constitutional politics, from the Founding to the present. That politics is imagined as involving a perpetual, epic, and millennial conflict between the partisans of (unredeemed) legal positivism, and a (saved) polity anchored in an uncompromising faith in natural law; a conflict between self-government understood as embodying what the people *will*, and self-government as embodying a struggle for the polity’s adoption of what it *ought to will*. Jaffa believes the nation’s very survival depends upon a perpetually renewed national commitment to a redeemed Constitution—a Constitution that embodies (through the

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113. *Id.* at 314–15.

114. Lincoln spoke of the nation’s “new birth of freedom” in his Gettysburg Address. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) *available at* [http://avalon.law.yale.edu/19th\\_century/gettyb.asp](http://avalon.law.yale.edu/19th_century/gettyb.asp).

115. JAFFA, CRISIS, *supra* note 78, at 331. Jaffa, like many Straussians, was trained in ancient classical languages and believed that the wisest and deepest political philosophy was articulated by the ancient Greeks.

116. *Id.* at 330.

117. *Id.* at 332.

principles of the Declaration, as vindicated by Lincoln) fixed, eternal standards of equality, justice, and truth.<sup>118</sup>

This epic conflict and choice was publicly argued in its most dramatic and sophisticated form in the Lincoln-Douglas debates, which Jaffa pronounced the world's greatest political and philosophic text. There, Lincoln and Douglas did no less than debate "the universal meaning of the Declaration."<sup>119</sup> "No political contest in history was more exclusively or passionately concerned with the character of the beliefs in which the souls of men were to abide," Jaffa dramatically claimed.<sup>120</sup> He added:

Neither the differences which divided the Moslem and Christian at the time of the Crusades, nor the differences which divided Protestant and Catholic in sixteenth-century Europe, nor those which arrayed the crowned heads of Europe against the regicides of Revolutionary France were believed by the warring advocates to be more important to their salvation, individually and collectively.<sup>121</sup>

Jaffa found a direct parallel between the position Lincoln took in those debates and the conception of classical natural right propounded by Jaffa's teacher Leo Strauss in *Natural Right and History*.<sup>122</sup> Considered by Jaffa to be "the greatest political philosopher of the

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118. See Charles Kesler, *A Special Meaning of the Declaration of Independence*, 31 NAT'L REV. 850, 850 (1979) (noting Jaffa's commitment to fixed standards of truth and liberty). The mission of the students of the incomparable Leo Strauss is to commit their lives to the discovery and propagation of these truths, and to the idea of the centrality of truth to politics, and to the American nation. Kersch, *supra* note 110, at 7. See generally LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1953) (expounding his philosophy of natural rights and standards of truth). Jaffa's Declarationism was, at one time, the subject of intense controversy within conservative intellectual life. Kesler, *supra*, at 850. Jaffa wrote in significant part in opposition to the constitutional theory being advanced by other conservatives emphasizing the bourgeois, commercial, middle-class nature of the American Revolution (Martin Diamond and Irving Kristol), and the structural nature of the constitutional order, as well as the Burkean, consensus account of U.S. constitutional development propounded by Willmoore Kendall. *Id.* at 851-52, 855 (discussing Jaffa's disagreement with Diamond, Kristol, and Kendall). At the time he was writing, there remained a strong neo-Confederate strain on the right, advanced most prominently in the work of M. E. Bradford, which Jaffa also took on aggressively. *Id.* at 857-58 (discussing Jaffa's disagreement with Bradford). See generally Kersch, *supra* note 110 (discussing conservative scholars' approaches to constitutional issues in *National Review*, including Jaffa and his contemporaries).

119. JAFFA, *CRISIS*, *supra* note 78, at 308. Jaffa titled the fourteenth chapter of *The Crisis of the House Divided* "The Universal Meaning of the Declaration of Independence." *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1.

20th century,”<sup>123</sup> Strauss “proved” that by attempting to replace faith with reason, modern (as opposed to classical) philosophy “laid the foundation of modern atheistic totalitarianism, the most terrible form of tyranny in human experience.”<sup>124</sup> While studying Plato’s *Republic* under the tutelage of the master at the University of Chicago, Jaffa “discovered . . . that the issue between Lincoln and Douglas was in substance, and very nearly in form, identical with the issue between Socrates and Thrasymachus.”<sup>125</sup> Douglas’s defense of “the golden calf of popular sovereignty” was in essence the position that might makes right—that the majority not only *does* rule, but *should*, without any objective standard of wrong and right to serve as its compass.<sup>126</sup> “Lincoln, however, insisted that the case for popular government depended upon a standard of right and wrong independent of mere opinion and one which was not justified merely by the counting of heads.”<sup>127</sup> “Hence,” Jaffa concluded, “the Lincolnian case for government of the people and by the people always implied that being for the people meant being for a moral purpose that informs the people’s being.”<sup>128</sup>

Lincoln, for Jaffa, is the world-historical figure who stood fast when the great nation he led was most “tempted to abandon its ‘ancient faith.’”<sup>129</sup> Through close readings of a number of Lincoln’s speeches presented in the form of “Teachings” concerning foundational principles of politics, Jaffa gives Stephen Douglas his due. Jaffa insists that Douglas recognized and acknowledged that chattel slavery was morally wrong, notwithstanding his support for popular sovereignty.<sup>130</sup> As a matter of politics, however, Douglas committed himself to value neutrality.<sup>131</sup> He believed that the substantive issues involving slavery were constitutionally consigned to the state and territorial governments, and as such slavery was best apprehended constitutionally as “a jurisdictional question.”<sup>132</sup>

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123. Harry V. Jaffa, *Faith and Reason*, N.Y. TIMES, July 3, 2011, at BR 16 (reviewing ROBERT C. BARTLETT, *ARISTOTLE’S NICOMACHEAN ETHICS* (2011)).

124. JAFFA, *CRISIS*, *supra* note 78, at 2.

125. *Id.* at 3.

126. *Id.* at 4.

127. *Id.* at 3.

128. *Id.*

129. *Id.* at 2.

130. *Id.* at 44.

131. *Id.*

132. *Id.*

In his study of Lincoln's *Address before a Young Men's Lyceum*,<sup>133</sup> Jaffa explained Lincoln's very different approach. For Lincoln, the question of the capability of the people to govern themselves "was always twofold: it referred both to the viability of popular political institutions and to their moral basis in the individual men who must make those institutions work."<sup>134</sup> Moral institutions could only be made and sustained by individually moral men.

Here, Jefferson's decision in the Declaration of Independence to substitute "the pursuit of happiness" for John Locke's protection for "property" in his similarly worded *Second Treatise on Civil Government* loomed large for Jaffa.<sup>135</sup> This substitution in phrasing proved to Jaffa that the United States was founded on the principle of the pursuit of moral virtue. While his contemporaneous fellow conservatives Irving Kristol and Martin Diamond were insisting that the American Revolution was essentially a bourgeois enterprise aimed at mitigating worldly evils and the pursuit of worldly pleasures, Jaffa interpreted the philosophical import of the opening words of the Declaration to have launched a polity committed to the aspirational pursuit of the supreme Good—to "a transcendental affirmation of what it *ought* to be."<sup>136</sup> "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*," he explained.<sup>137</sup> By advisedly substituting the phrase "pursuit of happiness" for the word "property," in other words, Jefferson had remedied a core theoretical defect in the political philosophy of Hobbes and Locke, and committed the new nation to the pursuit of moral perfection, understood by the lights of objective truth. For Jaffa, this was what the Lincoln-Douglas debates, occasioned by the question of the constitutional status of chattel slavery, were all about.<sup>138</sup>

Jaffa made clear that the issues at stake in those debates are "still the fundamental issues in American politics."<sup>139</sup> He expressed (and

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133. Abraham Lincoln, *Address before a Young Men's Lyceum* (Jan. 27, 1838) available at <http://www.constitution.org/lincoln/lyceum.htm>.

134. JAFFA, *CRISIS*, *supra* note 78, at 185–86.

135. Harry V. Jaffa, *Another Look at the Declaration*, 32 NAT'L REV. 836, 840 (1980) [hereinafter Jaffa, *Another Look at the Declaration*].

136. See Kesler, *supra* note 118, at 851–52 (discussing Jaffa's disagreements with Kristol and Diamond's views about the American Revolution). JAFFA, *CRISIS*, *supra* note 78, at 321 (emphasis in original).

137. Jaffa, *Another Look at the Declaration*, *supra* note 135, at 840.

138. *Id.*

139. JAFFA, *CRISIS*, *supra* note 78, at 7.



continues to express)<sup>140</sup> profound concern about whether contemporary Americans have the faith to avail themselves of their rich constitutional heritage. The great Leo Strauss asked what Jaffa described as perhaps the most momentous questions facing the country: “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?’”<sup>141</sup> “Strauss believed those questions ought to have been answered in the affirmative,” Jaffa tells us.<sup>142</sup> “Until they could be so answered, [Strauss] did not believe this nation, or the West, could recover its moral health or political vigor.”<sup>143</sup> It was the mission of conservative Americans—and, especially, the students of Strauss—to fight for the triumph of this ancient faith.<sup>144</sup>

*B. John Courtney Murray’s (Thomist) Declaration*

Jaffa’s reading of the Declaration of Independence as positing a unified supreme Good, with the nature of rights—as with all else—to be understood in light of this Good, harmonized well with Thomist Roman Catholic theology.<sup>145</sup> On this, M. E. Bradford critically observed that Jaffa was attempting to understand America through the lenses of systematic philosophy—treating the country as standing for a philosophical “proposition” from which all else followed logically, philosophically, and theologically.<sup>146</sup> Jaffa, however, made the connection himself. Drawing a parallel between the American Founders and seminal Catholic thinkers, Jaffa noted early on that “whatever their differences,” Thomas Aquinas<sup>147</sup> and Thomas Jefferson “shared a belief concerning the relationship of political philosophy to political authority that neither shared with the last ten presidents of the American Political Science Association. It seemed to me that both believed it was the task of political philosophy to articulate the principles of po-

140. See, e.g., Harry V. Jaffa, *Faith and Reason*, N.Y. TIMES, July 3, 2011, at BR 16 (reviewing ROBERT C. BARTLETT, *ARISTOTLE’S NICOMACHEAN ETHICS* (2011))

141. STRAUSS, *supra* note 118, at 1.

142. Jaffa, *Another Look at the Declaration*, *supra* note 135, at 840.

143. *Id.*

144. See *id.* (defending Strauss).

145. Jaffa’s first book, which immediately preceded *Crisis of the House Divided*, was a study of Thomas. HARRY V. JAFFA, *THOMAS AND ARISTOTELIANISM: A STUDY OF THE COMMENTARY BY THOMAS AQUINAS ON THE NICOMACHEAN ETHICS* (1952).

146. See text accompanying *supra* notes 92–107 (describing Bradford’s critiques of Jaffa).

147. Thomas Aquinas was a Dominican priest who lived in the eleventh century. His most renowned work, *Summa Theologica*, has been heavily influential in Western philosophy and helped Aquinas earn the title Doctor of the Church. Aquinas was canonized in 1323.

litical right, and therefore to teach the teachers of legislators, of citizens, and of statesmen the principles in virtue of which political power becomes political authority.”<sup>148</sup>

Unlike modern social scientists and contemporary relativist, positivist progressive/liberals, both Jefferson and Aquinas were committed to the position that there are objective standards of right and wrong.<sup>149</sup> Both believed, moreover, that democratic politics, properly understood, involved the advancement of the right and the Good: “the laws of nature mentioned in the Declaration.”<sup>150</sup>

A similar argument was advanced by John Courtney Murray, S.J., in his landmark statement of Catholic Declarationism, *We Hold These Truths: Catholic Reflections on the American Proposition*.<sup>151</sup> Murray, a Jesuit theologian at the now defunct Woodstock College,<sup>152</sup> and frequent contributor to the Jesuit magazine *America*, was not easily classified politically in the early 1960s (just as he is not easily classified politically today). While Murray’s thought has many attractions for contemporary conservatives,<sup>153</sup> in his own time Murray was far from conservative. He challenged not only the Church hierarchy (which silenced him for a period), but also the core convictions of the nation’s most conservative lay Catholics, who were convinced that American democratic liberalism was hopelessly incompatible with Catholic teaching. As the first major Catholic theologian to argue aggressively for the virtues of religious liberty, pluralism, the “distinction” between church and state, and the secular state,<sup>154</sup> Murray was celebrated in his day by liberals, and remains an important touchstone for Catholic liberals today. In time, despite earlier run-ins with the Church’s reac-

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148. JAFFA, CRISIS, *supra* note 78, at 9. The influential “postmodern” Catholic conservative thinker Peter Lawler recently described the American Founding as a case of “accidental Thomism.” Peter Lawler, *What Was Said by ME at Georgetown*, FIRST THINGS (Feb. 7, 2011, 2:39 PM), <http://www.firstthings.com/blogs/postmodernconservative/2011/02/07/what-was-said-by-me-at-georgetown>. Thomistic methodology is also, of course, Aristotelean, and this fits naturally into Straussianism as insisting upon a return of political thinkers—in a fallen, modern world with low (liberal) aims—to the wisdom of the ancients.

149. *See supra* note 148.

150. JAFFA, CRISIS, *supra* note 78, at 11.

151. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (1960).

152. Today, a successor institution to Woodstock College, the Woodstock Theological Center, is part of Georgetown University. WOODSTOCK THEOLOGICAL CENTER, <http://woodstock.georgetown.edu/> (last visited July 21, 2011).

153. *See, e.g.*, Peter Augustine Lawler, *John Courtney Murray as Catholic, American Conservative*, in *THE DILEMMAS OF AMERICAN CONSERVATISM* (Ethan Fishman & Kenneth L. Deutsch eds., 2010).

154. MURRAY, *supra* note 151, at 59–60. All of which he celebrated through his extended reading of, and support for, the First Amendment.

tionary hierarchy, Murray played a pivotal role in the Vatican II conclave that—in line with the views he had been advancing—modernized the Church’s teachings.<sup>155</sup> At the very moment when the U.S. was electing its first Catholic president, Murray, who was prominent enough to have his picture grace the cover of *Time* magazine,<sup>156</sup> demonstrated through systematic philosophic argument starting with the principles articulated in the opening lines of the Declaration of Independence that good Catholics could be good Americans.<sup>157</sup>

The claim, indeed, went further—in a way that contemporary right-wing Catholics have picked up on aggressively. As Peter Lawler, an influential contemporary Catholic conservative political theorist, has noted, it was Murray’s conviction that “*only* the Catholic community,” with its richer and deeper tradition and carefully cultivated systematic philosophy and theology, “could illuminate what was true and good about what our founders accomplished.”<sup>158</sup> Who better than a Catholic theologian trained in natural law to explain to Americans the true meaning of the Declaration of Independence, as elaborated by its most profound and fervent proponent, Abraham Lincoln, “our

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155. Murray was the primary drafter of Vatican II’s Declaration of Religious Freedom. See Robert John Araujo, S.J., *Forming the Well-Formed Conscience*, 47 J. CATH. LEGAL STUD. 219, 228 (2008) (noting that Murray had a “major role in drafting” the declaration and examining his critiques of Vatican II.)

156. TIME, Dec. 12, 1960.

157. Murray noted that people asked repeatedly whether Catholicism was compatible with American democracy. MURRAY, *supra* note 151, at ix. He answered, “The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned round to read, whether American democracy is compatible with Catholicism.” *Id.* at ix–x. Murray offered the book as “the reflections of a Catholic who, in seeking his answer to the civil question, knows that the principles of Catholic faith and morality stand superior to, and in control of, the whole order of civil life.” *Id.* at ix. Murray continued:

The Catholic may not, as others do, merge his religious and his patriotic faith, or submerge one in the other. The simplest solution is not for him. He must reckon with his own tradition of thought, which is wider and deeper than any that America has elaborated. He must also reckon with his own history, which is longer than the brief centuries that America has lived. At the same time, he must recognize that a new problem has been put to the universal Church by the American doctrine and project in the matter of pluralism, as stated in the First Amendment. The conceptual equipment for dealing with the problem is by no means lacking to the Catholic intelligence.

*Id.* at xi. These convictions made Catholics (to borrow Albert Murray’s label for African-Americans) the “omni-Americans”—the group whose worldview most consistently exemplified the soul of the nation. See generally ALBERT MURRAY, THE OMNI-AMERICANS: NEW PERSPECTIVES ON BLACK EXPERIENCE AND AMERICAN CULTURE (1970).

158. Peter A. Lawler, *Critical Introduction* to JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 2 (Rowman and Littlefield Publishers Inc., 2005) (1960) (emphasis added).

most ambitious and philosophic president?"<sup>159</sup> "If veneration for the true accomplishment of our political Fathers is the standard of citizenship," Lawler argues, "those within the Catholic natural-law community of thought are the least alienated of Americans today."<sup>160</sup> "Only a Thomistic or natural-law understanding," Murray stated, "can make sense of our framers' accomplishment."<sup>161</sup>

Lawler argued, moreover, that far from being divisive, the Thomist philosophical method provides a common ground for discussions between Evangelical Protestants, with their emphasis on Revelation, and secular humanists, who prize Reason. Since its animating purpose is to synthesize Reason and Revelation (or, as Straussians put it in one of their animating tropes, "Athens and Jerusalem"), Thomism is the best available framework for appreciating, understanding, and explicating the implications of the American Founding and the U.S. Constitution—or, indeed, of the meaning and creed of the American nation itself.<sup>162</sup>

In *We Hold These Truths*, Murray described the Declaration of Independence's statement that "all men are created equal" as a "theorem" or "proposition," "immortally asserted by Abraham Lincoln."<sup>163</sup> The book is a Thomist exegesis of the nature and implications of this theorem or proposition, which Murray pronounced to be, indisputably, the rock upon which the American nation was built. Murray noted:

Today, when the serene and often naive certainties of the eighteenth century have crumbled, the self-evidence of truths may legitimately be questioned. What ought not to be questioned, however, is that the American Proposition rests on the forthright assertion of a realist epistemology. The sense of the famous phrase is simply this: "There are truths, and we hold them, and we here lay them down as the basis and inspiration of the American project, this constitutional commonwealth." To our Fathers the political and social life

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159. *Id.* at 3.

160. *Id.* at 4.

161. *Id.* at 13 (emphasis added). The Athens (reason) and Jerusalem (revelation) trope is also a major axis for Straussian political thought.

162. *Id.* at 22. Murray states flatly, "Religious pluralism is against the will of God. But it is the human condition; it is written into the script of history. It will not somehow marvelously cease to trouble the City." MURRAY, *supra* note 151, at 23. It is also "the native condition of American society." *Id.* at 27. We must, he argues, deal with it. In this regard, Murray celebrated the First Amendment as providing serviceable "articles of peace." *Id.* at 56.

163. *Id.* at vii, 109.

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of man did not rest upon such tentative empirical hypotheses as the positivist might cast up. . . . The structure of the state was not ultimately defined in terms of a pragmatic calculus. . . . [T]hey thought, the life of man in society under government is founded on truths, on a certain body of objective truth, universal in its import, accessible to the reason of man, definable, defensible. If this assertion is denied, the American Proposition is, I think, eviscerated at one stroke.<sup>164</sup>

While the American Proposition as stated in the Declaration and re-affirmed by Lincoln in his Gettysburg Address may have once truly been “self-evident,” that was no longer clearly the case.<sup>165</sup> Hard demonstrative intellectual, and perhaps political, work needed to be done.

The next natural question—especially in a vibrant democracy, where all power tends to be claimed by the *demos*—was “Do we hold these truths because they are true, or are these truths true because we hold them?”<sup>166</sup> Murray answered the former: The truths are held because they are true, not simply because (in a democratic, majoritarian, consensus spirit) most people happened to believe them.<sup>167</sup> That the American Proposition is true “is a truth that lies beyond politics; it imparts to politics a fundamental human meaning. I mean the sovereignty of God over nations as well as over individual men.”<sup>168</sup>

As a nation firmly anchored in a commitment to God’s sovereignty, the nation “was conceived [by its Founders] in the tradition of natural law.”<sup>169</sup> This was the case whatever the religion (or lack of religion) of those Founders: as Murray explained, they built better than they knew. This made Aquinas truly “the first Whig,”<sup>170</sup> and natural law “the first structural rib of American constitutionalism.”<sup>171</sup> As a consequence, the American tradition of free government pivots on the “profound conviction that only a virtuous people can be free.”<sup>172</sup>

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164. *Id.* at viii–ix.

165. *Id.* at 5.

166. *Id.* at 98.

167. *Id.* at 106–07.

168. *Id.* at 28. It is a commitment to this principle, Murray continued, “that radically distinguishes the conservative Christian tradition of America from the Jacobin laicist tradition of Continental Europe,” the latter of which worships the presumed autonomy of man, and his all-powerful individual reason.

169. *Id.* at 31.

170. *Id.* at 32.

171. *Id.*

172. *Id.* at 36.

We know that people are virtuous only when they are “inwardly governed by the recognized imperatives of the universal moral law.”<sup>173</sup>

This, of course, affects the way that rights are to be understood within the American constitutional tradition. It is a fact that “[t]he American Bill of Rights . . . [is] the product of Christian history.”<sup>174</sup> “The ‘man’ whose rights are guaranteed in the face of law and government is, whether he knows it or not, the Christian man, who had learned to know his own personal dignity in the school of Christian faith.”<sup>175</sup> As such, the content of those rights can only be defined and understood in light of the nature of the supreme Good, as set out in universal natural law. This places natural law philosophy at the center of the inquiry into the nature and proper application of the Bill of Rights.

While there is nothing inherently Catholic about natural law, Murray explains that the natural law tradition and, hence, the American constitutional tradition, finds its “intellectual home within the Catholic Church.”<sup>176</sup> “Catholic participation in the American consensus,” Murray observes proudly, “has been full and free, unreserved and unembarrassed, because the contents of that consensus—the ethical and political principles drawn from the tradition of natural law—approve themselves to the Catholic intelligence and conscience.”<sup>177</sup> While mainline Protestantism may have moved away from the old English and American tradition in this regard, its foundations are “native” to Catholics. On the fundamentals, the “Fathers of the Church and the Fathers of the American Republic” were of one mind.<sup>178</sup>

Particularly in the modern context, Catholics have a special role to play as guardians of the foundations of the American Republic. No society without a substantive core can ever long survive, and, in the modern context of pluralism and democracy, the truths set out in the Declaration of Independence, according to Murray, articulate that core.<sup>179</sup> Catholic natural law philosophy helps us understand and appreciate the nature of that core and its indispensability in the deepest possible way.<sup>180</sup>

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173. *Id.*

174. *Id.* at 39.

175. *Id.*

176. *Id.* at 41.

177. *Id.*

178. *Id.* at 42–43.

179. *Id.*

180. *Id.* at 74–75.

These understandings have evinced a special attraction for the contemporary Catholic right.<sup>181</sup> As we have seen, they also harmonize extensively with Straussianism, which has a considerable influence in conservative intellectual and public policy circles, including magazine and book publishing, television (Fox News), and the Internet.<sup>182</sup> Drawing a sharp distinction between themselves and positivists, relativists, secular progressive liberals, and leftists, these conservatives emphasize their grounding in the unchanging, timeless Truths, as discerned through application of reason.<sup>183</sup>

These conservatives emphasize that other nations—most notably, Hitler’s Germany and Marxist totalitarian states like the Soviet Union—had no such grounding, with results that led to some of the worst catastrophes in human history.<sup>184</sup> Straussians and the contemporary American Catholic right suspect that secular progressives, in their denial of the natural law foundations of the American nation and its constitutional traditions, have more in common with America’s greatest twentieth century enemies than with its eighteenth century Founders, whose principles were set out in the Declaration of Independence’s opening lines, or its Constitution, as redeemed by Lincoln through his rededication to the principles of the Declaration.<sup>185</sup>

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181. See generally *Welcome from Director Robert P. George*, JAMES MADISON PROGRAM IN AMERICAN IDEALS AND INSTITUTIONS, <http://web.princeton.edu/sites/jmadison/welcome.html> (last visited July 31, 2011) (discussing the founding and mission of the program). Compare *Staff*, THE WITHERSPOON INSTITUTE, <http://www.winst.org/people/staff.php> (last visited July 31, 2011) (identifying Luis E. Tellez as the president of the institute) with Max Blumenthal, *Princeton Tilts Right*, THE NATION, Feb. 23, 2006, available at <http://www.thenation.com/article/princeton-tilts-right?page=full> (noting that “Luis Tellez . . . runs an Opus Dei student house on the outskirts of the [Princeton] campus”). The most prominent are Princeton’s Robert P. George and the leadership of the Opus Dei Catholic order with which George has worked closely throughout his career, including in founding Princeton’s James Madison Program in American Ideals and Institutions (whose inaugural scholarly conference was devoted to the Declaration of Independence) and the Princeton-based Witherspoon Institute (which is headed by an Opus Dei cleric). *Id.*

182. See generally Mark C. Henrie, *Straussianism*, FIRST PRINCIPLES (May 5, 2011), <http://www.firstprinciplesjournal.com/articles.aspx?article=871&theme=cotho&loc=b> (discussing the pervasive influence of Straussianism on modern intellectual conservatism).

183. See Richard Sherlock, *The Secret of Straussianism*, 48 MODERN AGE 208, 211 (2006) (“Straussianism rejects the easy relativism and deep nihilism of modernity and replaces it with the rhetoric, if not the substance, of natural right.”).

184. See *id.* at 208 (characterizing the development of modern Straussianism as rooted in certain Christian truths, in contrast to similar philosophical movements in Nazi Germany and the Soviet Union that lacked such moral grounds).

185. See *Media Matters for America*, quoting Bill O’Reilly, *The Radio Factor* (Fox News Radio Nov. 28, 2005), available at <http://mediamatters.org/mmtv/200511300007> (comparing the modern American secular progressive movement to totalitarian regimes of the twentieth century, and claiming that “[i]n every secular progressive country, they’ve wiped out

To many on the right, the situation is grave indeed, not just for America, but for the entire world. As the right-wing priest Father James Schall, S.J., of Georgetown University warned in a review of one of Jaffa's books:

The American situation . . . bears witness to a broader civilizational crisis . . . . [W]hen a universal civilization doubts that there are universal principles, the civilization built on them largely ceases to exist. Thus, the issue is not merely an American issue. If America has now adopted relativist principles to replace those of its founding, then by retaining its universal sense of mission, it spreads profound disorder throughout the world wherever it may exercise its influence.<sup>186</sup>

On this, Father Schall observed admiringly, "Jaffa . . . writes with the vigor and wrath of a prophet."<sup>187</sup> For Schall, a conservative Thomist, it was Jaffa who made it possible for all who cared to see how contemporary liberals and progressives are the legatees of Stephen A. Douglas, while Catholic conservatives and their conservative evangelical Christian and Mormon allies were anchored firmly in the principles of unchanging natural law, and stand proudly in the shoes of Lincoln.

#### IV. AUTOMATIC FOR THE PEOPLE: SOME CURRENT POPULAR CONSTITUTIONAL TAKES

##### A. *From the Old Neo-Confederatism to the New Southernism*

"If the South Woulda Won, We'd a Had It Made"?<sup>188</sup>

The Declarationism of Jaffa (and Murray) offered a powerful alternative to the southern neo-confederate conservatism of M. E. Brad-

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religion . . . Joseph Stalin, Adolf Hitler, Mao Zedong, Fidel Castro, all of them. That's the first step. Get the religion out of there, so that we can impose our big-government, progressive agenda.").

186. James J. Schall, S.J., *Original Intent and the Framers of the Constitution: A Disputed Question*, 41 LOY. L. REV. 77, 79 (1995) (reviewing HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994)).

187. *Id.* at 81.

188. HANK WILLIAMS, JR., *If the South Woulda Won*, on WILD STREAK (Warner Bros. Records 1988), banner epigraph on the cover of CLINT JOHNSON, THE POLITICALLY INCORRECT GUIDE TO THE SOUTH (AND WHY IT WILL RISE AGAIN) (2006). There is no mention of race in Williams's lyrics, which identify the essence of the nation "if the South woulda won" with being tough on crime, an economy based on goods made in America, free-flowing liquor, down-home friendliness, and good ol' country (and rock and roll) music. See <http://www.songlyrics.com/hank-williams-jr/if-the-south-woulda-won-lyrics/> (last visited July 31, 2011).



ford and his fellow travelers—an alternative that was likely to be especially appealing to northerners.<sup>189</sup> But what did it offer, as ideology, to the South? The trick was to reject neo-Confederatism, with its attendant racism and segregationism, while also appealing to localist southern pride. Put otherwise, new understandings were needed to integrate the South ideologically into the post-civil rights movement conservative (Republican) coalition. Two of the members of the Declarationist Triptych, Jefferson and King, were southerners. But even the Kentucky-born Lincoln—always a tricky proposition for southerners—properly understood, might be made to work.

In this section, rather than examining works of serious scholarship, like Bradford's essays for *Modern Age*, Jaffa's *Crisis of the House Divided*, or Murray's *We Hold These Truths*, I turn instead to expressions of "popular constitutionalism." A prominent forum for "popular constitutionalism" on the contemporary right, Regnery Publishing's mass-market *Politically Incorrect Guides* to American history, politics, and culture are aimed at correcting for general readers the ostensible myths propagated by the mainstream media and liberal academic and political elites.<sup>190</sup> One number in that series, Clint Johnson's *The Politically Incorrect Guide to the South (and Why it Will Rise Again)*, suggests that, while the appeal of M. E. Bradford's undiluted Old neo-Confederatism may be fading, what I will call the "New Southernism"—which, while maintaining its conservatism, self-consciously seeks to cleanse itself of any taints of racism and segregation—is alive and well.

This new version of the "politically incorrect" South wears its racial integration proudly on its sleeve, with the guide noting on its very first page that "[m]any of us are descended from Scottish settlers and African slaves . . ."<sup>191</sup> In the spirit of the post-racist "New Southernism," Johnson promises that his book "won't be a selective history—no defenses will be offered for slavery, segregation, or racial discrimination—but it will give the other side of the story too."<sup>192</sup>

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189. See, e.g., KEVIN MCMAHON, *NIXON'S COURT* (2011).

190. *The Politically Incorrect Guides*, REGNERY PUBLISHING, INC., <http://www.regnery.com/pig.html> (last visited July 31, 2011). Other such fora for popular constitutionalism on today's right are talk radio, cable news (particularly Fox News), magazines, and the Internet. All operate in dialogue with each other, to discursively construct an ideological world that helps constitute political identity and motivate political action. See generally Kersch, *supra* note 110 (discussing various sources of conservative constitutional thought and how they interact with one another to form the identity of the movement).

191. JOHNSON, *supra* note 188, at 1. *Id.* at 11. Indeed, Johnson notes, blacks—many fleeing the Northeast—are now moving back to South in droves.

192. *Id.* at 4.

Johnson's "fuller story" is a strange mash-up of old lost-cause history, arguments retrieved from antebellum pro-slavery tracts, cherry-picked facts (transmogrified into half-truths), and widely-noted accounts of northern racism and failures on the slavery question that the book's conservative readers are told (incorrectly) have been hidden from history by elitist scholars and politicians.

In this vein, part of Johnson's fuller story is that southern blacks in the Old South were slave owners and Confederates, just like southern whites.<sup>193</sup> Not only did southern men of both races own slaves, and sign up to protect the Confederacy against northern aggression, but they treated their slaves much better than northern slave owners.<sup>194</sup> Johnson asserts that the northern novelist Harriet Beecher Stowe got the nature of the southern master-slave relationship all wrong. *Uncle Tom's Cabin*, after all, was written by a woman who "had never been to the South and had never even seen a plantation and how they were run."<sup>195</sup>

Using the three-fifths clause as evidence, Johnson sets out to correct the historical record by showing how "Northerners considered slaves to be property with no more rights than [animals] while Southerners insisted slaves were human beings."<sup>196</sup> "At several points during the debate [during the Philadelphia Constitutional Convention], a Southern delegate would try to appeal for full representation of the slaves as human beings," Johnson reminds his readers, "but each time the suggestion was voted down."<sup>197</sup> Any true account of southern racial attitudes, Johnson insists, would explain the ways in which southerners, then and now, "are less race conscious than folks up North."<sup>198</sup> "Just talk to the good ol' boy driving the pickup truck—he

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193. *See id.* (describing a prominent South Carolina slaveholder who was black and a supporter of the Confederacy).

194. *See id.* at 133 (discussing a black slave owner whose son enlisted in the Confederate Army) and 128–29 (explaining that slaves were essential agricultural workers in the South, and therefore treated well). The argument that slaves were treated better in the South than ostensibly free workers were in the antebellum industrial North is the major thesis of the pro-slavery ideologist George Fitzhugh. *See* GEORGE FITZHUGH, *CANNIBALS ALL!, OR SLAVES WITHOUT MASTERS* (1857).

195. JOHNSON, *supra* note 188, at 138.

196. *Id.* at 104.

197. *Id.* at 105. True enough—not because pro-slavery southerners valued blacks as human beings, and northerners saw them as little more than animals, but because counting slaves as full persons for purposes of representation would increase the political power of the South in the national government.

198. *Id.* at 37.

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might even have a John Deere cap-wearing black buddy sitting next to him.”<sup>199</sup>

Johnson concedes that Jim Crow segregation, instituted after Reconstruction, was certainly “an ugly chapter in Southern history.”<sup>200</sup> But it is now gone, he adds, and has not existed for over forty years.<sup>201</sup> What history books do not tell you, Johnson argues, is that racial segregation in the South was actually caused by the North. In the war’s aftermath

Radical Republicans sent armed regiments of black soldiers into the South as occupation troops and installed black politicians into local and state government slots, while barring all former Confederates from holding office. Former Confederates resented what they saw as interference from the North that overthrew responsible government and created a sense of entitlement among blacks. It also bred racial animosity and led to the creation of a vigilante group, the Ku Klux Klan, which expressed the bitterness of former Confederates who had lost their right to vote.<sup>202</sup>

This racial violence in reaction to northern tyranny was regrettable. “[B]ut almost equally damaging was the development of segregation in the *previously unsegregated* South: whites-only bathrooms, drinking fountains, restaurants, and seats on public transportation.”<sup>203</sup> “Because white Southerners could not fight the North again or fight Reconstruction through their own elected legislatures, black Southerners became the unfortunate victims of white Southerners’ anger at Reconstruction’s wrongs. That was the sad legacy of Reconstruction.”<sup>204</sup>

Northern predation hit the South particularly hard because of the special nature of southern society as a region defined by its commitment to localism, and its heightened sense of place—both derived from the uniquely southern appreciation for the value of diversity. For instance, Johnson states that the South was long a “bouillabaisse of nationalities.”<sup>205</sup> It “once spoke Spanish.”<sup>206</sup> Unlike in the anti-

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199. *Id.* at 59.

200. *Id.* at 38.

201. *Id.*

202. *Id.* at 207. This is borrowed from the long-discredited Jim Crow-era Dunning School historiography, which is why today’s history books “don’t tell you it.”

203. *Id.* (emphasis added).

204. *Id.*

205. *Id.* at 84.

206. *Id.* at 78.

Semitic North, Jews held prominent positions in the Confederacy.<sup>207</sup> Strong women were the Confederacy's "backbone."<sup>208</sup> The South's commitment to localism and diversity has long made the region especially sensitive to any moves toward centralization and the uniformity and standardization it entails.<sup>209</sup> "The War wasn't about slavery," Johnson explains.<sup>210</sup> "[I]t was about states' rights."<sup>211</sup> As Jefferson Davis said in his First Message to the Confederate Congress, "All we ask is to be let alone."<sup>212</sup>

No sooner does Johnson set out this multiculturalist appeal than he undercuts it by underlining that while southerners may have been diverse, one thing we do know about those who fought for the Confederacy is that they were Americans. The Union Army, by contrast, was disproportionately comprised of immigrants. Historians will not tell you, Johnson says—in a strange attack on Lincoln as an avatar of affirmative action—that Lincoln promoted Union officers not on the basis of their abilities but rather with regard to their ethnicity alone.<sup>213</sup>

On economics then and now, Johnson asserts that the South has stood for "unfettered free enterprise."<sup>214</sup> The tax protests that sparked the American Revolution started in the South and it was the patriotic South that fought and won the Revolution arising out of those protests against taxes levied by a distant central government.<sup>215</sup> In the Revolution's aftermath, the spendthrift northern states were comfortable foisting their war debts on the new national government.<sup>216</sup> The South was opposed to this swelling of the national debt: During the war, southerners had lived within their means and had paid down their own debts. In the end, they were forced to bail out the profligate North.<sup>217</sup> Similarly, the Civil War, Johnson writes, "was not about slavery" but about thirty years of tax hikes in endless succession by an "overbearing" central government.<sup>218</sup> "Something had to give."<sup>219</sup> Johnson contends that this perennial northern inclination to

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207. *Id.* at 177–78.

208. *Id.* at 195–97.

209. *Id.* at 3, 17–20.

210. *Id.* at 145.

211. *Id.*

212. *Id.* at 150.

213. *Id.* at 176.

214. *Id.* at 77.

215. *See id.* at 87–99 (detailing the South's pivotal role in the American Revolution).

216. *Id.* at 101.

217. *Id.*

218. *Id.* at 136.

219. *See id.* at 135 (citing the antebellum tariff controversies).

tax and spend was evidenced by the fact that the very first thing that the Congress did when its southern members withdrew to defend the South during the Civil War was raise taxes.<sup>220</sup> At that time, they even enacted the nation's first income tax. By contrast, "Southerners have never liked taxes. Not then, and not now."<sup>221</sup>

Johnson goes on to observe that then, as now, God's home address in the U.S. has always been in the South. The South is the region with the strongest sense of right and wrong.<sup>222</sup> "Southerners," Johnson explains,

tend to be more religious, believe what they read in the Bible, and believe that correct moral paths in life can be found by faith in God. If that makes newcomers to the region uneasy, then so be it. The South is a place where people believe in God. Those who wish to make it different should return to the region whence they came.<sup>223</sup>

Accordingly, "when liberal social activists and politicians start demanding 'separation of church and state,' the ears of religious Southerners perk up. When they hear that phrase, they know they are under attack."<sup>224</sup> In his famous 1802 letter to the Danbury Baptists, the great southerner Thomas Jefferson appropriately opposed the idea of the establishment of a national religion, which Southerners agreed with, Johnson states. But when it comes to the notion of separation, "Southerners don't take kindly to liberal activists misappropriating Jefferson's words."<sup>225</sup>

Understandably, and fortunately, the South's religiosity tempered the harshness of its slavery—a humanizing factor absent in northern and Caribbean slavery, and northern industrial capitalism. "Pastors all over the South," Johnson explains, "held the view that slavery was ordained in the Bible and that it was the Christian duty of slaveholders to take care of 'their people.' For the most part," he concludes, "they apparently did."<sup>226</sup>

In a section entitled "God recognized the Confederacy," Johnson details the support the Confederacy received from the Catholic

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220. *Id.* at 147.

221. *Id.*

222. *Cf. id.* at 3 (noting that "Southerners are religious," and discussing their traditions for honoring the dead).

223. *Id.* at 20.

224. *Id.* at 22.

225. *Id.* at 22–23.

226. *Id.* at 130–32.

Church.<sup>227</sup> He describes Pope Pius IX's longstanding friendship with Jefferson Davis, the Pope's decision (at Davis's request) to discourage European Catholics from enlisting in the Union Army in exchange for American citizenship, and the Vatican newspaper's editorializing on the Confederacy's behalf.<sup>228</sup> As a young man, Johnson additionally notes, Davis had attended a Catholic school, and had seriously considered converting to Catholicism. Of course, other religious leaders lent their support to the Confederacy as well, including the Louisiana Episcopal Bishop Leonidas Polk.<sup>229</sup>

"Why did religious men like . . . the pope, and Bishop Polk support the Confederacy?" Johnson asks.<sup>230</sup>

Many reasons, but one that is as true today as it was then is that they recognized in the South a traditional conservative religious society being attacked in an aggressive war by a modern centralized state that put state-enforced, coercive law ahead of the dispersed authority of families, churches, and localities. A lot of folks up North still think the federal government should tell us how to live our lives; folks down South think that's the job of families, preachers, and local officials we can know and can hold accountable.<sup>231</sup>

"Others can joke about the 'Bible Belt' all they want, but the nation needs at least one region willing to speak up about what is right and what is wrong," a region with a strong "sense of morals and religion."<sup>232</sup> "We believe," Johnson explains, "that [God] prefers folks who trust in His ways over those who want to use liberal judges to re-define marriage and morality. And that's not going to change."<sup>233</sup> "That's because in the South conservatism is not just a collection of opinions that can easily change. It's rooted in who we are, in faith and family and tradition."<sup>234</sup>

The *Politically Incorrect Guide* does not take a favorable view of Lincoln—in no small part because of his alleged racism and opposition to civil liberties and civil rights. One of the things "the [h]istory [b]ooks [l]eave [o]ut" is that Lincoln did not believe in the social and

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227. *Id.* at 191–93.

228. *Id.* at 193.

229. *Id.* at 191–93.

230. *Id.* at 194.

231. *Id.* at 194–95.

232. *Id.* at 236.

233. *Id.*

234. *Id.* at 237.

political equality of blacks, and that he favored colonization.<sup>235</sup> In this regard, Lincoln was no Jefferson Davis. Davis “had a black foster son, and enjoyed taking care of and being around ‘his people.’”<sup>236</sup> The heartless Lincoln, by contrast, wanted to ship the freed blacks back to Africa.<sup>237</sup> Johnson suggests that Davis was apparently braver than Lincoln, too. Early in their careers, both had served in the Black Hawk War in Illinois during the 1830s. The Illinois militia of which Lincoln was a part studiously avoided actual combat, and Lincoln used the war to burnish his resume.<sup>238</sup> Davis, by contrast, fought hard, and had a strong commitment to military strength and service throughout his career.<sup>239</sup> Lincoln’s shortcomings aside, however, Frederick Douglass’s *Narrative* is unambiguously described as “a memorable and moving account by an exceptional man.”<sup>240</sup> While the racist and centralizing Lincoln is not a man to be too much admired, the New Southerner can look admiringly on the thoughts and accomplishments of Frederick Douglass and the Rev. Martin Luther King, Jr.<sup>241</sup>

*B. Evangelizing the Triptych: Glenn Beck and the Restoration of American Honor*

For many liberals, the sight of the Mormon former Fox News conservative political commentator Glenn Beck holding a rally on the steps of the Lincoln Memorial on the anniversary of Martin Luther King, Jr.’s “I Have a Dream” speech might have seemed the height of effrontery. Ideologically, however, there was nothing especially audacious about such a rally, since much of Beck’s rhetoric sounds in Declarationism and appeals to its Triptych. Like Lincoln, King too was a Godly Declarationist: seen through post-segregationist, post-racist conservative eyes, the key fact about King is that he not only propounded natural law, the philosophy of the equality of natural rights, but, as a Protestant, did so ecumenically by building on the theology of Augustine of Hippo and Thomas Aquinas.<sup>242</sup> Those organizing and

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235. *Id.* at 171, 181, 183–85, 192.

236. *Id.* at 181.

237. *Id.*

238. *Id.* at 119–20.

239. *Id.* at 120.

240. *Id.* at 127.

241. *Id.*

242. Martin Luther King, Jr., *Letter from Birmingham Jail*, in AMERICAN POLITICAL THOUGHT *supra* note 3, at 1308. See also Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 989 (1987) (quoting from Dr. King’s letter: “A just law is a man-made code that squares with the moral law or the law of God . . . . An unjust law is a human law that is not rooted

attending Beck's "Restoring Honor" rally—denizens of the post-civil rights movement right—were (as they saw it) the self-evident inheritors of this tradition.

Born in Atlanta, the son of a prominent Baptist minister, King too dreamed of reconciliation, and the redemption of the American South. "I have a dream," he shared, "that one day on the red hills of Georgia the sons of former slaves and the sons of former slave owners will be able to sit down together at a table of brotherhood," concluding, "This is the faith with which I return to the South."<sup>243</sup>

During his own rally, Beck called upon his fellow Americans to be true to the legacy of the American Founders and Dr. King. That legacy, Beck explained in his welcoming remarks, "has nothing to do with politics. It has everything to do with [God,] turning our faith back to the values and principles that made us great." Something beyond man was happening, according to Beck.<sup>244</sup> America, on that day, began to turn back to God.<sup>245</sup>

Like the scholar Harry Jaffa, the populist Glenn Beck emphasized both the world-historical accomplishments of the American Founding, and its profound flaws. In his lengthy address to the crowd, far from ignoring or downplaying the sin of slavery, and imputing perfection to the nation's eighteenth century founders (as liberals often wrongly accuse conservatives of doing), Beck spoke of the nation as bearing many scars, as having within it, and having manifested over the course of its history, both good and bad.<sup>246</sup> "We have a choice today," Beck told the crowd, to "either let those scars crush us or redeem us."<sup>247</sup> As metaphor, Beck directed the crowd's attention to the Washington Monument at the other end of the Lincoln Memorial Re-

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in eternal law and natural law.") (internal citation omitted). These same quotes from King are featured prominently on Declarationist web sites such as that of the Witherspoon Institute. See generally *Natural Law, Natural Rights and American Constitutionalism*, THE WITHERSPOON INSTITUTE (2011), <http://www.nlnrac.org/> (offering numerous scholarly articles and other material concerning King's proposition). King's "Letter from Birmingham Jail" is a major touchstone of conservative Declarationists. See, e.g., Carolyn Garris, *Martin Luther King's Conservative Legacy*, THE HERITAGE FOUNDATION (Jan. 12, 2006), <http://www.heritage.org/Research/Reports/2006/01/Martin-Luther-Kings-Conservative-Legacy> (discussing the influence of King's "core beliefs," as espoused in his "Letter from Birmingham Jail" and other texts, on the conservative movement).

243. King, *supra* note 242, at 1317.

244. Glenn Beck, Address at the Restoring Honor Rally (Aug. 28, 2010) (transcript and video available at C-SPAN Video Library, <http://www.c-spanvideo.org/videoLibrary/clip.php?appid=598714463>).

245. *Id.*

246. See *id.* (referencing the scars America has accrued throughout its past).

247. *Id.*



flecting Pool. He asked if the audience noticed—and was willing to acknowledge—that the Washington Monument’s marble changed color part way up. This, he explained, is because the builders had stopped constructing the monument during the Civil War, and then, at its conclusion, set themselves again to completing their task. When, after recommitting themselves to begin anew, their work was finally complete, they put an inscription on the top of the obelisk facing east, reading “Laus Deo”—“praise be to God.”<sup>248</sup>

Turning his attention to the memorial on whose steps he stood, Beck called Lincoln “a giant of an American casting a shadow on all of us.”<sup>249</sup> “We look to a giant for answers,” he told the crowd.<sup>250</sup> Then Beck recounted how, the previous week, he had brought his children to the memorial, and read to them aloud both Lincoln’s Gettysburg Address and his Second Inaugural from the inscriptions on the monument’s walls. Moreover, he had hoisted each of them upwards to have them touch the very words themselves.<sup>251</sup> These great documents of American history, Beck insisted, are as “alive today just as any other scripture is. It speaks to us from the past.”<sup>252</sup> As he stood in Washington, D.C.—itself once a battlefield “filled with warriors on each side,” Beck then read to the crowd the Gettysburg Address in its entirety.<sup>253</sup> “[We are] at a crossroads,” he explained. He said the country must decide whether Lincoln’s words still have “relevance or meaning for us today.”<sup>254</sup> In his Second Inaugural, Beck continued, “Abraham Lincoln found God in the scars of Gettysburg. He was bap-

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248. *Id.* In her speech at the rally, Sarah Palin praised Lincoln as the “Great Emancipator” who “freed those whose captivity was our greatest shame.” Sarah Palin, Address at the Restoring Honor Rally (Aug. 28, 2010) (transcript and video available at The Sarah Palin Blog, <http://www.thesarahpalinblog.com/2010/08/video-and-transcript-of-restoring-honor.html>). “[W]e feel the spirit of Dr. Martin Luther King, Jr.,” she told the crowd. *Id.* Quoting from the Declaration of Independence, Palin announced that the assembled crowd was meeting to honor of “these giants, who were linked by a solid rock foundation of faith in the one true God of justice.” *Id.* It was a meeting to “restore America and restore her honor.” *Id.* “[H]ere together, at the crossroads of our history, may this day be the change point,” Palin said. *Id.* “Look around you. You’re not alone. You are Americans! You have the same steel spine and the moral courage of Washington and Lincoln and Martin Luther King. It is in you. It will sustain you as it sustained them.” *Id.* The crowd responded with a wave of chants of “USA! USA! USA!” *Id.* (see video).

249. Beck, *supra* note 244.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

tized and gave the Second Inaugural. He looked to God and set men free. America awakens again.”<sup>255</sup>

That very same story of slumber and awakening, of blindness and sight, of sin and redemption, is the same throughout history, as “it has [been] since the burning bush,” Beck asserted.<sup>256</sup> We wander until we remember that “God is the answer.”<sup>257</sup> Beck appealed to his audience to “look to God, [and] make your choice.”<sup>258</sup> The Lord is “sending us wake-up calls . . . . We await the resurrection.”<sup>259</sup> He called for all to get down on their knees and pray—more, to get down on their knees with their children, and pray. “America,” he proclaimed, “is crying out for the truth.”<sup>260</sup>

Beck then read and provided an extended exegesis of what he told the crowd was his favorite part of the Declaration, its conclusion affirming that “with firm Reliance on [the Protection of] DIVINE PROVIDENCE, we mutually pledge to each other our *Lives*, our *Fortunes*, and our *sacred Honour*.”<sup>261</sup> As part of the exegesis, Beck told the story of his own personal redemption from alcohol and drugs through Truth, which he affirmed “shall set you free.”<sup>262</sup> He called upon the crowd to “heal our nation,” adding that, through us, “the world” shall be healed.<sup>263</sup>

In concluding his address, Beck issued a call for restoring the nation’s preachers—whom he referred to as the country’s “Black Robe Regiment”<sup>264</sup>—to their rightful place at the heart of American poli-

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255. *Id.*

256. *Id.* Beck recounts the history of the hymn “Amazing Grace,” written by the captain of a slave ship.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* (quoting THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776) (emphasis in original)).

262. *Id.*

263. *Id.*

264. The Black Robe Regiment, according to its web site, is a formal, organized group that has been organized to serve as

a resource and networking entity where church leaders and laypeople can network and educate themselves as to our biblical responsibility to stand up for our Lord and Savior and to protect the freedoms and liberties granted to a moral people in the divinely inspired US Constitution. The Regiment had its historical beginnings during the Revolutionary War when Pastors from across the colonies arose and lead [sic] their congregations into the battle for freedom. Unlike today, the church during this time served as the center-point for political debate and discussion on the relevant news of the day. Today’s church leaders have all but lost that concept of leading their congregations in a Godly manner in all as-

tics. The preachers were the first to say that “all men are created equal . . . that right comes from God,” he explained.<sup>265</sup> But “[w]e have fallen asleep as a nation,” he lamented. “For 240 years [the preachers] have been absent from the American landscape. The Black Robe Regiment is back [again today].”<sup>266</sup> At that moment, a group of robed ministers lined up behind Beck, hands joined. Beck himself preached, in his peroration: “America: it is time to start the heart of this nation again, and put it where it belongs. Our hearts with God.”<sup>267</sup> He implored the crowd to go to church and to heed those who are teaching “the lasting principles,” the preachers “who stand with America and God.”<sup>268</sup> “God is the answer,” he concluded.<sup>269</sup>

#### V. DECLARATIONIST DEVELOPMENTAL THEORY: CONSTITUTIONAL REDEMPTION THROUGH GREAT (AND GODLY) MEN

*“The lapse of the American people from the faith of their fathers, like that of the people led by Moses, was a lapse from a truth immediately accessible.”* Harry V. Jaffa<sup>270</sup>

Jack Balkin has argued that a forward-looking commitment to redeeming the nation from injustice has always been a crucial part of the American constitutional order.<sup>271</sup> Americans, he maintains, treat their Constitution as a form of civic religion that inspires within them an impulse to redemptive politics.<sup>272</sup> They are particularly inspired by the abstract principles and standards that were set out by the nation’s founders, and return to those again and again. By arguing for both the reality and the legitimacy of this dynamic of eternal return at the

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pects of their worldly existence and are afraid to speak out against the progressive agenda that has dominated our political system for the past century. Through this time the church and God himself has been under assault, marginalized, and diminished by the progressives and secularists. The false wall of separation of church and state has been constructed in such a manner that most are unaware of its limited boundaries. The church and the body of Christ has been attacked on all fronts and challenged by the progressive courts and groups such as the ACLU while we have sat idle in consent.

<http://www.blackrobereg.org/>.

265. Beck, *supra* note 244.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. JAFFA, CRISIS, *supra* note 78, at 230.

271. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011).

272. *Id.* at 249–50.

heart of the American constitutional order, Balkin offers his argument as a species of originalism—a commitment to the proposition that the original constitutional understandings of We the People continue to govern us, actually and rightly, today.<sup>273</sup> This is a very different vision from standard legal academy accounts of originalism, including the “constitution-in-exile version,” which emphasize *restoration*, not *redemption*.<sup>274</sup>

The Declarationism of the modern American right is probably the most currently influential and vibrant form of redemptive constitutionalism. I have argued here that we can go beyond the claim that a redemptive conservative Declarationism in the second half of the twentieth century, on into the first half of the twenty-first, has served as a vehicle for the mobilization of constitutional politics on the right. It has also served as a vehicle for unifying the diverse strands of the Religious Right, and of re-integrating the post-civil rights South into the nation as the nation’s (purportedly) rock-solid moral core.<sup>275</sup>

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273. See generally *id.* (providing an overview of Balkin’s central arguments); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007) (same).

274. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) (expanding upon this more uncommon approach to originalism and distinguishing it from its mainstream academic counterpart).

275. For examples of the ecumenical unification of the Religious Right in recent years, see, e.g., Charles Colson et al. & William Abraham et al., *Evangelicals & Catholics Together: The Christian Mission in the Third Millennium*, 43 FIRST THINGS 15 (1994), available at <http://www.firstthings.com/article/2007/01/evangelicals-catholics-together-the-christian-mission-in-the-third-millennium-2> (this statement is familiarly known by insiders as “ECT”); Gerald L. Bray et al. (Evangelical Protestants) & James J. Buckley et al. (Roman Catholics), *The Gift of Salvation*, 79 FIRST THINGS 20 (1998), available at <http://www.firstthings.com/article/2008/09/001-the-gift-of-salvation-28> (offering an updated version of the “ECT”). See also Francis A. Schaeffer, *A CHRISTIAN MANIFESTO* (2005) (advocating for a return of national policies rooted in Biblical principles); A. Scott Lovelless, *The Forgotten Founding Document: The Overlooked Legal Contribution of the Declaration of Independence and California’s Opportunity to Revive It Through Proposition 8*, HUGH HEWITT BLOG (Sept. 27, 2008, 10:26 PM, revised Oct. 25, 2008), <http://www.hughhewitt.com/blog/print.aspx?guid=5ba97d38-5b1c-494e-b573-82acafc575b5> (discussing the contemporary importance of the Bill of Rights as an enumeration of Christian-based natural law limitations). For a brief, accessible, and illustrative Straussian appreciation of Catholic natural law theory, see George Anastaplo, *Natural Law or Natural Rights? An Appreciation of James V. Schall, S.J.*, 38 LOY. L. REV. 915, 915–16 (1993), and for a Catholic natural law theorist’s appreciation of Strauss, see James V. Schall, S.J., *The Natural Law Bibliography*, 40 AM. J. JURIS. 157 (1995). See also George Anastaplo, *Seven Questions for Professor Jaffa*, 10 U. PUGET SOUND L. REV. 507, 528 (1987); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984); *THE NAKED PUBLIC SQUARE RECONSIDERED: RELIGION AND POLITICS IN THE TWENTY-FIRST CENTURY* (Christopher Wolfe ed., 2009) (foreword by Robert P. George). See generally Kersch, *supra* note 110.

Declarationists are certainly originalists of a sort. But unlike the caricature of conservatives proffered by many on the liberal/left (including historians like Nancy MacLean, who dub them neo-confederates),<sup>276</sup> no one is more self-conscious about the failures of the Founding, and the evil of the institution of chattel slavery, than conservative Declarationists. Like the Yale Law School constitutional theorists—most notably Akhil Reed Amar and Bruce Ackerman—Declarationists offer a regime account of American constitutional development.

We might usefully consider the most prominent of those models, Bruce Ackerman's, as set out in his ongoing *We the People* project,<sup>277</sup> which shares the redemptionist presuppositions with contemporary Declarationism. While Ackerman's tripartite model of American constitutional regimes is structured around three (ostensibly) highly participatory "constitutional moments"—the Founding, Reconstruction, and the New Deal<sup>278</sup>—contemporary Declarationism is centered on selected aspects of the political thought of the three "Great Men" who constitute its Triptych: Jefferson, Lincoln, and King.<sup>279</sup> The lives of Jefferson and Lincoln, of course, are temporally parallel to the first two of Ackerman's constitutional moments (the Founding and Reconstruction), whereas contemporary Declarationists in effect substitute the civil rights movement of the 1950s and 1960s for Ackerman's focus on the New Deal of the 1930s.<sup>280</sup> The Declarationist substitution of Great Men for Constitutional Moments, it is worth noting, avoids much of the messiness that Ackerman must deal with in discerning the values of the sovereign people as a whole during a "moment"—or a time period in which there are many political actors, movements, interest groups, acts, pieces of legislation, bureaucratic decisions, etc. In their constitutional theory, Declarationists choose a single "Representative Man"—grounded in a time of stark moral choice by an unyielding commitment to "first things"—who is deemed to embody the

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276. Nancy MacLean, *Neo-Confederacy versus the New Deal: The Regional Utopia of the Modern American Right*, in *THE MYTH OF SOUTHERN EXCEPTIONALISM* 318–19 (Matthew D. Lassiter & Joseph Crespino eds., 2010).

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

278. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 456, 477 (1989).

279. See, e.g., JAFFA, *CRISIS*, *supra* note 78, at 208 ("Lincoln was quite convinced that the decisive factor in the great political equations is 'towering genius' of the caliber of Washington and Jefferson or of Caesar and Napoleon [sic]. It is they, above all, who demonstrate the capacity—or incapacity—of 'the people' to govern themselves.")

280. Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation*, 111 *PENN ST. L. REV.* 413, 414 (2006).

principles and spirit of the moment, which is considered to be democratic to the degree it comports with the timeless, universal Truths.<sup>281</sup> The thoughts and actions of these representative men are not taken as a whole, but rather by a selection of quotations from a few great texts, which are treated as philosophical and theological premises.<sup>282</sup>

In Declarationist stories both sophisticated and popular, these representative men step into the shoes of Biblical patriarchs and prophets.<sup>283</sup> This is the case not simply in the popular constitutionalist speeches by media figures like Glenn Beck, but in works of serious political theory too. Harry Jaffa's work (as M. E. Bradford discerned well) is the most influential case in point.<sup>284</sup>

In *Crisis of the House Divided*, Jaffa explained that "Lincoln's deliberate invocation of the analogies with the New and Old Testament indicates that the trials of the faith of the forefathers must be reduplicated by their subsequent [sic] political savior."<sup>285</sup> "[T]he task of the savior" like Lincoln, Jaffa continued, "differs from, and is in crucial respects more noble because it is more difficult than, the task of the

281. I borrow the label from RALPH WALDO EMERSON, REPRESENTATIVE MEN (1850), which begins:

It is natural to believe in great men . . . . All mythology opens with demigods, and the circumstance is high and poetic; that is, their genius is paramount . . . . Nature seems to exist for the excellent. The world is upheld by the veracity of good men: they make the earth wholesome . . . . Life is sweet and tolerable only in our belief in such society; and actually or ideally, we manage to live with superiors. We call our children and our lands by their names. Their names are wrought into the verbs of language, their works and effigies are in our houses, and every circumstance of the day recalls an anecdote of them. The search after the great man is the dream of youth and the most serious occupation of manhood . . . . Our religion is the love and cherishing of these patrons.

*Id.* at 9–10.

282. See generally HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE (1986). Arkes's title was adopted by Richard John Neuhaus as the title for the (once ecumenical, now largely Catholic) conservative religious journal he founded, *First Things* (the same path was followed by Arkes himself, who (recently) converted from Judaism to Catholicism, just as Neuhaus before him converted from Lutheranism to Catholicism—to the point, in Neuhaus's case, of receiving orders as a Catholic priest). See also MURRAY, *supra* note 151, at 11 ("In the public argument there must . . . be a continued recurrence to first principles. Otherwise the consensus may come to seem simply a projection of ephemeral experience, a passing shadow on the vanishing backdrop of some given historical scene, without the permanence proper to truths that are 'held.'").

283. JAFFA, CRISIS, *supra* note 78, at 222.

284. See M. E. BRADFORD, THE REACTIONARY IMPERATIVE: ESSAYS LITERARY & POLITICAL 93 (1990) (discussing how the American right utilizes rhetorical discourse grounded in the Church).

285. JAFFA, CRISIS, *supra* note 78, at 222; see also PETERSON, *supra* note 50, at 8 (noting the depiction of Lincoln through religious imagery dates at least from his assassination—on Good Friday, no less—when one contemporaneous poet declaimed that "[h]is blood is freedom's eucharist").

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original Founders.”<sup>286</sup> “[F]or the republic to live, the act of creation or founding must be repeated.” Indeed, Lincoln’s argument, Jaffa says, implies that the need for this re-grounding through re-founding may be necessary at any time. The republic can be saved, and the rights of its people preserved, however, only by “men of transcendent ability and virtue who . . . stand guard outside the community . . . .”<sup>287</sup>

“The political savior,” Jaffa wrote, “like that other Messiah, must await the fulfillment of prophecies implicit in the very conception of his own function before he could step forth.”<sup>288</sup> In the beginning, the Declaration was prophetic. But “[t]he pillars of the first temple, the work of the Revolutionary Fathers, were, alas, not quarried from a solid substance.”<sup>289</sup> It was necessary to build “a second temple.”<sup>290</sup> Conceived in disobedience to an established order, it would have been hard for the Founders to inculcate the necessary reverence for the timeless political truths, Jaffa explained. An “at least temporary failure” of the Founding was all but “predestined” “because of the inner tension, engendered by the idea of equality, between the people’s rights and the people’s duties.”<sup>291</sup> In time, however, Lincoln “en-graft[ed] the passion of revealed religion upon the body of secular political rationalism.”<sup>292</sup>

The “incompleteness” of the Founders’ “excellent and noble” work, Jaffa insisted, was

no necessary reflection upon the Fathers themselves. In asserting their independence from the British, they could not help appealing to passions of revenge and hatred; nor could they, in appealing to the principle of equal rights, avoid setting in train passions which would resist both just and unjust restraints. The people must be taught, as Jefferson taught them, to assert their rights. But they had not yet learned to respect what they had asserted. The people had not yet learned to be submissive in the presence of their own dignity . . . . Whoever sees the law as the product of his will . . . is prone to think that all things are lawful.<sup>293</sup>

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286. JAFFA, *CRISIS*, *supra* note 78, at 223.

287. *Id.* at 224.

288. *Id.* at 236.

289. *Id.*

290. *Id.*

291. *Id.* at 237.

292. *Id.* at 238.

293. *Id.* at 225.

They had acted popularly, as a newly constituted people. But they had yet to understand that, in a true democracy, the people are subservient to the commands of the natural law.<sup>294</sup>

“We would now observe,” Jaffa continued, in detailing the thought of the man who redeemed America’s Founding, “that Lincoln’s political thought is cast almost wholly in the metaphor of a double perspective, in which the function of his statesmanship is seen either on the analogy of the salvation of Israel from Egypt or the salvation of the world by the Messiah.”<sup>295</sup> Through his speeches, it is apparent that “Lincoln’s whole conception of political salvation and of the role of statesmanship . . . necessarily agree[s] in its higher reaches with the purposes and methods of the divine teacher.”<sup>296</sup> The “great central tenet” of the “all men are created equal” clause of the Declaration, Jaffa noted, was constantly referred to by Lincoln as an “ancient faith.”<sup>297</sup> “The truth which, in the Declaration, gave each man, as an individual, the right to judge the extent of his obligations to any community,” Lincoln made clear in his Gettysburg Address, “also imposes an overriding obligation to maintain the integrity, moral and physical, of that community which is the bearer of the truth.”<sup>298</sup> “The sacrifices both engendered and required by that truth—for the lapses from the faith are, in a sense, due to the moral strain imposed by its loftiness—transforms that nation dedicated to it from a merely rational and secular one, calculated to ‘secure these rights’—that is, the rights of individuals—into something whose value is beyond all calculation.”<sup>299</sup> After Lincoln’s address at Gettysburg, Jaffa explained:

The ‘people’ is no longer conceived . . . as it is in the Declaration of Independence, as a contractual union of individuals existing in a present; it is as well a union with ancestors and posterity; it is organic and sacramental. For the central metaphor of the Gettysburg Address is that of birth and rebirth . . . the birth resulting from the baptism or conversion of the soul.<sup>300</sup>

Thomas Jefferson, the author of the Declaration, often used religious language, Jaffa noted. But Jefferson was nevertheless, at base,

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294. *Id.* at 226.

295. *Id.*

296. *Id.*

297. *Id.* at 227.

298. *Id.* at 227–28.

299. *Id.* at 228.

300. *Id.*



anticlerical and an opponent of “revealed theology.”<sup>301</sup> “The preamble to the Declaration of Independence” issuing from the pen of Jefferson “invokes not the God of Israel or the persons of the Trinity but the God of Nature and is wholly a document of the rationalistic tradition. This God reveals himself, not in thunder from Sinai, nor through any gift of faith, inspiration, or private judgment upon sacred scriptures. He reveals himself through ‘self-evident’ truths; i.e., through the unassisted natural process of ratiocination.”<sup>302</sup> In contradistinction, Jaffa explained:

Lincoln, however, achieved on the level of the moral imagination, a synthesis of elements which in Jefferson remained antagonistic. He incorporated the truths of the Declaration of Independence into a sacred and ritual canon, making them objects of faith as well as cognition. Through his interpretation of the Civil War as both a Hebraic and Christian ritual atonement, this canon was made sacred to the American people as the Declaration of Independence, of itself, could not be made. This interpretation did not depend for its conviction upon the intellectual acknowledgment of the truth alone . . . but upon a passionate and passion-conquering conviction born of the sense of the awful price exacted by that truth of its votaries.<sup>303</sup>

Jaffa concludes his “teaching” with the observation that “Lincoln sought, in a political religion, the reconciliation of the hostile elements in the American secular and religious traditions . . . by saying that one element called for reverence without reason and the other reason without reverence. Yet neither was politically true or viable without the other.”<sup>304</sup> The man was (as Clinton Rossiter had aptly described him) “the martyred Christ of democracy’s passion play.”<sup>305</sup>

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301. *Id.* at 229.

302. *Id.*

303. *Id.* As Merrill Peterson makes clear, the description of Lincoln as a devout Christian is very much a part of the history of the construction of Lincoln as a political and religious symbol. Lincoln never belonged to, or attended, church, and was quite cryptic, to the point of evasiveness, in describing his religious beliefs. He has been made into an American Christian symbol, a pious believer, a freethinker, and an infidel, by various biographers and commentators at various times, each insisting that they had captured the true Lincoln. PETERSON, *supra* note 50, at 68–81, 136, 217–32, 284, 359–62. The remaking of Lincoln by Jaffa, and contemporary conservatives, is part of this history of the construction of political symbols. See MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 19 (2d ed. 1985) (discussing how democratic institutions “are largely symbolic and expressive in function”).

304. JAFFA, *CRISIS*, *supra* note 78, at 231.

305. *Id.* at 232.

C. *The Declarationist Narrative*

The Declarationist narrative I have described here represents one strain of the constitutional nationalism forged by the contemporary conservative movement, with the aim of forming movement identities and allegiances, and distinguishing friends from enemies. It positions contemporary conservatives—and the Republican Party—as the true heirs and guardians of the legacy of the American Founders, Abraham Lincoln, and Martin Luther King, Jr. Far from signaling a (wholly) reactionary return to pre-civil rights movement neo-Confederatism, contemporary conservative Declarationism—with sometimes millennialist overtones—looks to the present, and, especially, the future. It emphasizes sin, and redemption, with a very modern focus on the sin of racism. It explains to conservatives the ways in which, through their rock-solid commitment to the first principles of the Declaration, they are the legatees of the Great Men who founded the Great Nation, and then redeemed it from the evil of chattel slavery, and from the sin of racial segregation.

Contemporary conservative ideologists are well aware that many historical misconceptions are taught in school (through alleged misinformation spread by academic elites), and that it was liberals and progressives who opposed slavery and fought against racism and for civil rights. But conservative Declarationists explain that, as legal positivists, secularists, and moral relativists, the contemporary liberal-left is without an anchor, and has no solid basis for holding either slavery or segregation to be wrong. Like Stephen A. Douglas, they are committed, ultimately, to the separation of morals from politics—to the position that might makes right (a view, it is suggested, they shared with America's communist and Nazi totalitarian enemies).

Is it under the sway of these very same liberals and progressives, conservatives emphasize, that the U.S. Supreme Court has insisted upon the severing of religion from public life, declared a constitutional right to abortion<sup>306</sup> and homosexual sodomy,<sup>307</sup> and is sidling up both to the protection of gay marriage and the euthanizing of the elderly and the infirm?<sup>308</sup>

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306. *Roe v. Wade*, 410 U.S. 113 (1973).

307. *Lawrence v. Texas*, 539 U.S. 558 (2003).

308. DVD: Dr. Francis Schaeffer, *How Should We Then Live?* (Gospel Communications International 2009 [1977]); DVD: Dr. Francis Schaeffer & Dr. C. Everett Koop, *What Ever Happened to the Human Race?* (Gospel Films Distribution 2007 [1979]); FRANCIS A. SCHAEFFER, *A CHRISTIAN MANIFESTO* (2005); 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,

Conservative Declarationists are committed to reminding as many Americans as they can—thereby expanding their political base—that there is another American tradition that predates the (presumptively malignant) invention of positivist, secular, relativist progressivism, a tradition set out by Jefferson in the Declaration and redeemed by Lincoln and King: the tradition of natural rights and natural law—the real American constitutional tradition with which we as a nation were providentially “endowed by our Creator.”<sup>309</sup> Although this tradition is all but dead in the precincts of the nation’s elites, in its universities, its mainstream media, and on its (north)eastern and west coasts, conservative Declarationists repeatedly remind us, it is being kept alive by the nation’s devout Christians—conservative Catholics, conservative evangelical Protestants, and conservative Mormons—and remains predominant in the nation’s most consistently religious region, the South. Its institutional home, should it not betray its roots, is the contemporary Republican Party.

The polity’s drift away from the bedrock commitment to the principles of the Declaration, conservative Declarationists emphasize, is rooted in the political philosophy of progressivism—an alien and enemy force. Its impetus (and effect) is nothing less than discrimination against Christians, whose views are inherent in the nation’s founding documents, properly construed—and a persistent assault on their liberty of conscience, an assault that would have appalled the giants/patriarchs/prophets of the American Constitutional tradition: the Founders, Lincoln, and King.<sup>310</sup>

The restoration of the Declaration of Independence to its rightful place as the foundation of the nation’s constitutional politics, far from amounting to any breach of the ostensible “wall” of separation between church and state, Declarationists posit, amounts to a re-

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Newport, R.I., April 2010); Ryan Lizza, *Leap of Faith: The Making of a Republican Front-Runner*, *NEW YORKER*, Aug. 15, 2011, at 54. See also Daniel L. Dreisbach, Lecture for the Family Research Council: The Bible and the Founding Fathers (May 13, 2010), available at <http://www.frc.org/events/the-bible-and-the-founding-fathers>.

309. Conservative Declarationists all but ignore highly significant distinctions between natural rights philosophy, in the Enlightenment tradition, and (Catholic) natural law. There is, at base, a symbolic and emotional gambit, and an exercise in distinguishing themselves from progressive and liberal opponents, enemies, and traitors. What counts is that both start with the Creator, upon whom they depend, in contradistinction to positivist, secular liberals and progressives.

310. SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA*, 142–43 (2010). See Robert P. George, Timothy George & Chuck Colson, *The Manhattan Declaration* (released November 20, 2009), <http://manhattandeclaration.org/the-declaration/read.aspx> (commenting that those who support progressive rights such as abortion and rights for gays do not support traditional rights such as religious rights).

demption of the nation and the Founding from its abduction by an alternative religion, secular humanism, which has been established in its place in significant part through fiat by the U.S. Supreme Court.<sup>311</sup> Since Declarationists believe that the (God-given) principles of the Declaration provide the only stay we have against chattel slavery and other egregious violations of human rights—see abortion, euthanasia, and gay marriage—it was all too predictable that their abandonment would lead to *Dred Scott*, the Holocaust, communist totalitarianism, “Obamacare,” the celebration of sodomy, and government funding for Planned Parenthood.<sup>312</sup>

Glenn Beck may not be a man of possessed of the *gravitas* and stature of Jefferson, Lincoln, and King—in part due to the army of personal flaws and weaknesses he so readily confesses. But many conservatives will appreciate that, flawed though he is, Beck at least can recognize moral greatness, and the rock on which that greatness is built. He knows, moreover, as do other conservatives, that the country that once countenanced racism, slavery, and segregation was once redeemed by a recommitment to the principles of the Declaration. Given the dominance of progressivism in our politics and our law, a progressivism which has abandoned our grounding commitment to natural law, natural rights, and the Constitution which enshrined them, conservative Declarationists posit that the nation is once again in dire need of spiritual and constitutional redemption. The principles of the Declaration, as elaborated by the giants of the Triptych, are our North Star, and will guide us on our way.

## VI. CONCLUSION

A constitutionalism rooted in, and unfolding out of, the natural rights philosophy of the Declaration of Independence and its Triptych, while consonant with originalism in many respects, clearly moves beyond originalism in significant ways. Originalism, Eldon Eisenach has claimed, is largely offered as an interpretive “hermeneutic” for judges, advanced by lawyers for other lawyers, and debated within the

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311. See, e.g., DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002); Dreisbach, *supra* note 308.

312. See *supra* note 308. See also Harry V. Jaffa, *Faith and Reason*, N.Y. TIMES, July 3, 2011, at BR 16 (reviewing ROBERT C. BARTLETT, *ARISTOTLE’S NICOMACHEAN ETHICS* (2011)) (referring to “the crisis of the West, a chaos of moral relativism and philosophic nihilism in which every lifestyle, no matter how corrupt or degenerate, can be said to be as good as any other.”).

elite precincts of American law schools.<sup>313</sup> Declarationism—which partakes of the patriotic and nationalistic strains implicit within originalism, but whose sources run much deeper in the broader currents of American political history and thought—is much more than a law school or judicial hermeneutic.<sup>314</sup> Declarationism is more than an argument about the best way for judges, in deciding cases, to interpret the constitutional text: its emphasis is “on defending natural rights as part of an American moral narrative of freedom and equality.” It is offered as “a common faith binding together a national community of moral equals.”<sup>315</sup> As an often either expressly or implicitly religious narrative, with an animating focus on redemption, it is, moreover, a “discourse through which American citizens [are able to] integrate their personal experience and their public lives.”<sup>316</sup>

Declarationism need not replace originalism as the predominant constitutional philosophy of the contemporary American right. As the trajectory of Harry Jaffa’s work makes clear, Declarationism is more than capable of selling itself as a form of originalism: after all, it venerates the nation’s Founders and their grounding in natural rights. To be sure, Declarationism emphasizes the need for the principles of the Founding to be vindicated and redeemed. But this vindication and redemption must always take place through an eternal return to the natural rights philosophy of the American Founders. In the courts, and within the legal academy, Declarationists like Clarence Thomas might spar with positivist, contractualist proponents of interpreting the Constitution according to its “original meaning,” like Antonin Scalia and Robert Bork. All, however, are happy to call themselves “originalists,” and arrive at the same conservative positions in the great majority of concrete constitutional disputes.<sup>317</sup>

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313. Eldon J. Eisenach, *Some Second Thoughts on Progressivism and Rights*, 29 SOC. PHIL. & POL’Y (forthcoming 2012).

314. However, there are a few legal academic and judicial Declarationists who recommend the principles of the Declaration as an interpretive hermeneutic for judges. See Thomas, *supra* note 242, at 983–95; see also SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 126 (1995) (noting the Constitution should be interpreted in accordance with the Declaration of Independence); but see Strang, *supra* note 280, at 414 (arguing the Declaration is only one source of original meaning of the Constitution and an insufficient source at that); Dennis J. Mahoney, *The Declaration of Independence as a Constitutional Document*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 54 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

315. Eisenach, *supra* note 313.

316. *Id.*

317. Thomas, *supra* note 242, at 983–95; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (quoting the Declaration of Independence); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*

In the precincts of constitutional politics more generally—where constitutional arguments are used to constitute political identities and motivate electorates—Declarationism goes beyond originalism. As a species of popular constitutionalism, originalism usefully argues that liberal judges and progressives in politics have betrayed the Founders by rejecting their legal/contractual stipulations in favor of their own personal and ideological preferences and agendas. Declarationism goes further in offering a compelling story about God, Country, and Truth, about fall and redemption. When joined together under the umbrella of a single political movement, the combined outlooks offer a powerful constitutional politics capable of both affecting legal doctrine and altering both the tenor and content of American public policymaking and the practice of American politics.

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134 (1997); *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting); *Neder v. United States* 527 U.S. 1, 30–31 (1999) (Scalia, J., dissenting); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 5 (1997).