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

INTRODUCTION

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

2. Dwight Macdonald, “Scrambled Eggheads on the Right,” Commentary (April 1956): 367–73, 368–69 (“Culturally, a conservative is someone like Irving Babbitt or Paul Elmer More, not always the liveliest company … but a respecter and defender of tradition … politically, a conservative is someone like … the late John Marshall Harlan … whose respect for the Constitution was such that he insisted on interpreting the Fourteenth Amendment according to the clear intent of the Congress that passed it.”).
anchor dropped by the Founders in favor of relativist experimentation and the reading of ever-shifting and often dangerous modern notions of progress into the constitutional text.

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

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

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

CONSTITUTING IDENTITY DISCURSIVELY

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


4. I do not seek here to “prove” that the postwar conservative movement shifted from either a non- or a less-constitutionalist to a Constitution-focused paradigm. Because my research has surveyed only constitutional discussion, I cannot demonstrate that there is more or less of it than some other kind of talk (such as non-constitutional “policy” discourse). Moreover, because I did not survey earlier conservatisms, I cannot “prove” that constitutionalism became a more important part of conservative discourse in this period. My interest is in illustrating the ways in which that discourse was important to this movement, at this time. Given space limitations, I look only at constitutional discourse in the movement’s flagship journal, and focus on only a few illustrative areas: judicial power, race, and morals (abortion). —The article is suggestive, providing circumstantial evidence for its thesis, anticipating future scholarship on its subject.
the maintenance of alliances essential to conservatism’s political success. In the formative 1950s and 1960s, Medvetz notes, conservative magazines served a similar cohesive function. It was there—as in Norquist’s meetings subsequently—that core principles were forged, and a slate of enemies—“ideological foils”—were constructed.5 As mass-produced commodities selling for a price, implicating “a socially organized technology of production and distribution,” magazines are unique sites for the production of movement cohesion. And, as a magazine expressly conceived by its founder, William F. Buckley, Jr., as a crucible for such cohesion, and an engine of movement advancement, NR is an unusually interesting case study in the phenomenon.1

NR succeeded as a magazine in part because it entertained. Buckley’s comic sensibility was legendary, and he consistently valued spirited presentation, humor, and wit. Moreover, NR educated. Political discussion in NR, while lively, was always serious. The impressive academic and intellectual pedigree of many of its writers was especially important in a context in which conservatism had been perceived as bigoted, ignorant, and provincial—of being unable to hold its own in the battle of new ideas that constituted political modernity. NR’s initial readers had witnessed the end of World War II, the onset of the Cold War, and watched with increasing uneasiness the outbreak of the civil rights movement, the cultural upheavals of the 1960s, and the chaos and decline of the 1970s. Yet, as World War II ended, American men, in particular (many of whom, like Buckley, were veterans and G.I. Bill beneficiaries), were assuming relatively anonymous white-collar positions in large, bureaucratic corporations. Many moved from cities to stand-alone houses in the new suburbia, potentially taking them—so it felt—out of the game at a critical moment for the future of the free world, and the American constitutional experiment. Magazines like NR drew these men back in, offering them intellectual community and camaraderie, and providing a thrilling sense that they remained vitally involved in the most significant contests and debates of their day. NR’s readers were invited to imagine themselves as bulwarks of God, morality, Western civilization, and country—and defenders of the Constitution—at a time when, they were repeatedly reminded, all were under siege. NR gave these men an “opportunity to feel that education has not ceased for [them],” and that, their day jobs in grey flannel suits and the placid domesticity of Levittown and New Canaan notwithstanding, they remained denizens of the world of ideas and soldiers in their era’s intellectual and political combat.7

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

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


aggressively vetted Office of Legal Counsel, Justice Department, and Judiciary.  

CONTEXT: A FRAGMENTED LANDSCAPE—CONSERVATISM AT MIDCENTURY

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

During liberalism’s heyday, conservative intellectuals flew beneath the radar of the liberal intelligenzia to forge a powerful, unifying, antiprogressive political—and constitutional—counter narrative. Given the diverse intellectual strands feeding the movement, the contours of that counter narrative were largely up for grabs. The imperatives of successful coalition politics, however, pressured conservatives to unite around common principles and policy objectives and to regulate the emotional temperature of their disagreements. The movement was initially composed of three major intellectual strands: 1) libertarianism, 2) traditionalism, and 3) neoconservatism.

The Three Strands of Postwar Conservative Thought

LIBERTARIANISM

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

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


11. See, e.g., the contemporary debate about whether the movement is suffering from “epistemic closure.” Patricia Cohen, “‘Epistemic Closure’? Those are Fighting Words,” New York Times (April 27, 2010).
major figure was the University of Chicago economist Milton Friedman, whose *Capitalism and Freedom* (1962) provided a roadmap for much of the Republican policy world of the 1980s.14

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

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

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

**TRADITIONALISM**

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

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

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

Another traditionalist journal, though one that also acted more broadly as a clearinghouse for diverse perspectives, was Human Events, founded in Washington, D.C., by Frank Hanighen and Felix Morley.22 Its first issue (February 2, 1944) was published as a newsletter broadsheet and was sent to only a few hundred subscribers. These subscribers, however, became opinion leaders. Human Events was incorporated in 1945, with Morley as its president, Hanighen as its vice president, and Henry Regnery as its treasurer. Each contributed $1,000 of his own money to the venture and received one third of the corporation’s stock. Regnery moved the magazine’s offices to his base in Chicago and published a series of pamphlets to spotlight issues from the magazine he considered most important. He eventually separated the pamphlet publishing and magazine divisions of Human Events. Increasingly preoccupied with disseminating conservative ideas and frustrated that while liberals and leftists had many publishing venues, conservatives had few, Regnery quit the textile business (where he had made his fortune) and turned most of his attention to books, founding Regnery Publishers in Chicago. In time, Morley and Hanighen once again assumed full control of Human Events and moved the magazine’s offices back to Washington, though Regnery remained personally involved. Human Events is still published today, and Regnery is the leading publisher of conservative books.23

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

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

22. Morley, a Rhodes Scholar and Pulitzer Prize–winning journalist, left his position as the editor of The Washington Post (1933–1940) to assume the presidency of his alma mater, Haverford College (1940–1945).
23. Hoplin and Robinson, Funding Fathers, 39–41; Allitt, Conservatives, 175.
for Social Research, where he taught before Chicago). The leading Straussians were Joseph Cropsey, Herbert Storing, and Allan Bloom at the University of Chicago; Bloom, Walter Berns, and Werner Dannhauser at Cornell; Bloom, Berns, Thomas Pangle (now at the University of Texas) at the University of Toronto; Harry Jaffa and Ralph Rossum at Claremont McKenna College and the Claremont Graduate University; Hadley Arkes at Amherst College; Martin Diamond at Northern Illinois University; Ernest Fortin, David Lowenthal, Robert Scigliano, Christopher Bruell, and Robert Faulkner at Boston College; Michael and Catherine Zuckert at Notre Dame; and Harvey Mansfield, Jr. at Harvard. Other “second generation” Straussians were students of Strauss, and a third generation is now being trained (at these same institutions, plus a set of anointed feeder liberal arts colleges like Kenyon, Holy Cross, and St. John’s College at Annapolis and Santa Fe).

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

**NEOCONSERVATISM**

Neoconservatives were liberal Democratic intellectuals—mostly Jewish, and mostly based in New York City—who, during the 1960s and 1970s, became increasingly disillusioned with the direction liberalism, and the Democratic Party, were taking. In the face of increasing crime and urban disorder and in the context of the massive expansion of governmental ambition and power that characterized Lyndon Johnson’s Great Society, neoconservatives began to worry that the proliferation of liberal social programs, many associated with the War on Poverty, were doing more to empower an ideologically driven “new class” of policy intellectuals than achieve their designated objectives. As such, neoconservatives emphasized that, where public policy was concerned, good intentions were not enough. They came to believe that many of the government programs aimed at helping the poor and racial and ethnic minorities were actually harmful, encouraging reliance on government, a decline in initiative and self-discipline, and, through its corrosive effects on the public and private morals indispensable to a free society, either encouraging, or doing nothing to mitigate, the drift towards a hedonistic counterculture, an extremist antiliberal and antifamily feminism, and a reflexive anti-Americanism. Over time, these policy intellectuals became increasingly preoccupied with the importance of the moral bases of free society as an essential component of the formulation of sound public policy.26

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

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

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

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

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

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

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

**MOBILIZING RESOURCES TO CULTIVATE AND PROPAGATE IDEAS: HAYEK’S THOUSAND SHIPS**

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

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

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thought in the second half of the twentieth century.\footnote{Hoplin and Robinson, \textit{Funding Fathers}, 28–29.}

The Volker Fund also provided money for the Intercollegiate Studies Institute (ISI), the Foundation for Economic Education (FEE), and the Institute for Humane Studies (IHS). The fund additionally underwrote the publication of many landmark conservative books, including Frédéric Bastiat’s \textit{The Law}, Murray Rothbard’s \textit{Man, Economy, and State}, and Richard Weaver’s \textit{Visions of Order}. It also sponsored the lectures that Milton Friedman later turned into \textit{Capitalism and Freedom}.\footnote{Ibid., 30.}

English chicken magnate Antony Fisher founded the Institute for Economic Affairs (IEA) in London—the first modern free-market think tank—soon after reading \textit{The Road to Serfdom} and summoning its author to discuss what could be done.\footnote{For a similar process amongst progressives, see Daniel T. Rodgers, \textit{Atlantic Crossings: Social Politics in a Progressive Age} (Cambridge, MA: Belknap Press of Harvard University Press, 1998). On the transatlantic dynamic within twentieth-century free-market conservatism, see Burgin, \textit{The Return of Laissez-Faire.}} After the two met in 1947, Hayek said: “He [Fisher] thought you could sway mass opinion. What I insisted and what was strictly followed by the Institute was not to appeal to the large numbers, but to the intellectuals. My conviction is that, in the long run, political opinion is determined by the intellectuals, by which I mean . . . the second-hand dealers in ideas—the journalists, school masters, and so on.” Fisher wanted to “do for the non-Labour Parties what the Fabian Society did for Labour.”\footnote{Hoplin and Robinson, \textit{Funding Fathers}, 26–30.}

The IEA sponsored the publication of many of Hayek’s subsequent books, including \textit{The Constitution of Liberty}, and later served as the intellectual fount of Thatcherism. In 1978, Fisher founded an American counterpart to the IEA in New York City: the Manhattan Institute, which midwifed the publication of Charles Murray’s \textit{Losing Ground} (a major spur to welfare reform) and George Kelling and James Q. Wilson’s landmark “Broken Windows” article in the \textit{Atlantic Monthly} (which revolutionized urban policing and played a significant role in the subsequent reduction of urban crime rates, in New York City and elsewhere). The Manhattan Institute also publishes \textit{City Journal}.\footnote{Ibid., 28–29.}

In 1960, Pierre Goodrich, longtime president of the Indiana Telephone Company, gave his fortune to establish the Indianapolis-based Liberty Fund, a leading publisher of classic and modern texts that advance traditional understandings of free markets.
and constitutional liberty and a sponsor of a perpetual round-robin of academic conferences on related themes. In these conferences, which typically last two days and convene in high-end hotels and resorts (and, pointedly, not on (corrupted) college and university campuses), professors read from classic and modern works and discuss them in seminar format and over meals. The aim is to nourish enthusiasms and cultivate understandings that the professors might ultimately pass on to their students.\[40\]

No publisher has been more central to the modern conservative movement—then and now—than Regnery. William Regnery, whose parents had fled the Bismarckian statism of their native Germany for Wisconsin, got his start in business as a young man working for William Volker and Co.\[41\] William’s son Henry, an M.I.T. math major, later returned to his ancestral Germany to study, where he made friends, many of whom were subsequently killed under Europe’s Nazi and Communist regimes. In response, and in fulfillment of his patrimony, Henry became a passionate opponent of repressive statist ideologies. Drawn increasingly to the study of economics and public affairs, Henry entered graduate school in economics at Harvard. Turned off by the university’s prevailing socialist milieu, however, he soon dropped out. Still unsettled in his politics, however, Regnery went to work in Washington for Franklin Roosevelt’s Resettlement Administration. That experience set him firmly on the conservative path he would pursue for the rest of his life.\[42\] Regnery came to publishing through Felix Morley and Human Events (two of Regnery’s first three books were essay collections culled from Human Events).\[43\] Regnery chose the Porta Nigra Gate at the entrance to Trier, Germany—a symbol of emergence and strength of Western civilization—as the mark for his new imprint.\[44\]

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


\[42\] Hoplin and Robinson, Funding Fathers, 36–38, 43. See Boutros, “William Volker and Company.”

\[43\] Since the books Regnery was driven to publish cut against intellectual currents of the time, he had no expectation of ever turning a profit. When he founded the company in 1947, he first tried to organize it as a nonprofit, but the IRS rejected his application. The earliest Regnery book runs were a response to immediate post—World War II challenges to Western civilization. Conservatives understood themselves as Western civilization’s most firmly grounded stay against Nazism and Nazi ideology. (Hoplin and Robinson, Funding Fathers, 42.) These early books included Blueprint for World Conquest, As Outlined by the Communist International (Chicago: Human Events, 1946); Victor Gollancz, In Darkest Germany (Hinsdale, IL: H. Regnery, 1947) (introduction by Robert Maynard Hutchins); Max Picard, Hitler in Our Selves (Hinsdale, IL: H. Regnery Co., 1947); and Victor Gollancz, Our Threatened Values (Hinsdale, IL: H. Regnery Co., 1948). Victor Gollancz, a Jewish publisher and author, was, in almost every respect, a man of the British Left. He was (with John Strachey and Harold Laski) a founder of Britain’s Left Book Club—publishers of George Orwell’s The Road to Wigan Pier (1937)—an opponent of capital punishment, and a humanitarian, antipoverty, and antinuclear activist. A staunch anti-Fascist and anti-Communist, Gollancz was frustrated in his efforts to get Britain (and the world) to recognize and act early against the Nazi efforts to exterminate the Jews, and worked to rescue Jews from Hitler’s Germany. Picard, a Swiss physician, Jew, and Catholic convert, abandoned the practice of medicine to devote himself to philosophical reflection on the ills of the modern age. His The Flight from God (Chicago: H. Regnery and Co., 1951) is an attack on the decline of faith and on modern relativism. The book was re-issued by Regnery Gateway in 1989. See also Max Picard, The World of Silence (Chicago: H. Regnery, 1952).

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

\[45\] Beam, A Great Idea at the Time, 88, 133, 182. Mortimer Adler was one of William F. Buckley’s favorite guests on Firing Line. Adler converted to Catholicism shortly before his death.

\[46\] Beam’s Old Dominion Foundation also helped support St. John’s College, a Great Books college in Annapolis, Maryland, and was a predecessor of the Andrew W. Mellon Foundation, named for Paul Mellon’s father. The flame of the Great Books burns brightest today at St. John’s College (Annapolis and Santa Fe), with outposts at Straussian centers like Kenyon College and...
The movement gained momentum in the late 1940s and was strong through the early 1960s. Initially, 2,500 Great Books discussion groups blossomed in private homes, public libraries, church basements, corporate conference rooms, army bases, chamber of commerce offices, and even prisons. This movement drew strength from the intellectual curiosity and ambition of the new postwar middle class, including returning GIs, and contributed to the rise of the era’s so-called “middlebrow” culture. In the immediate aftermath of the Nazi experiment and during the heyday of Stalinist tyranny (and the Communist takeovers in China and Eastern Europe), scientific materialism was on the defensive and the appeal of a morally (and religiously) grounded humanism was on the rise. Moral relativism and the siren song of “value free” social science became, for many, intellectual bètê noires. The problem was that, just when the need for foundations was greatest, the Great Books were hard to find. Many remained untranslated. It was Hutchinson’s idea, in conjunction with his Yale classmate William Benton, to meet this need by publishing them.

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

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

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


50. Beam, A Great Idea at the Time, 70–71. Benton later founded the advertising firm Benton and Bowles (1929-2002), served as a U.S. Senator from Connecticut and U.S. Ambassador to UNESCO, and founded the Encyclopedia Britannica. See Sidney Hyman, The Lives of William Benton (Chicago: University of Chicago Press, 1989). See also Harry S. Ashmore, Unseasonable Truths: The Life of Robert Maynard Hutchins (Boston: Little Brown, 1989). While dean of Yale Law School, Hutchins championed legal realism. He moved to Chicago in 1930, where, turning away from realism, he began to question the ability of empirical social science to solve important social problems. As such, the origins of the Great Books can be considered in part an outgrowth of the reaction against legal realism by one of its prominent proponents. Eventually, Hutchins made his way all the way to Aristotelianism and Thomism. ("[Hutchins’] opponents at [the University of Chicago] spread rumors that Hutchins and Adler, who simply couldn’t shut up about St. Thomas Aquinas, were plotting to convert the student body to Catholicism. Historian Tim Lacy writes that the Chicago faculty thought Hutchins “was calling for the restoration of the medieval university.”). This situation gave rise to the oft-repeated quip that the University of Chicago was a former Baptist school where Jewish professors were now teaching Catholic theology to atheists. Upon retiring from Chicago in 1952, Hutchins took up the cause of global justice and world government. (Beam, A Great Idea at the Time, 59, 94, 120-121.) The official relationship between Regnery and The Great Books Foundation ended in 1951, when the heads of the foundation were incensed by Regnery’s publication of Buckley’s vitriolic God and Man at Yale (1951). (Hoplin and Robinson, Funding Fathers, 47.)

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

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

52. Hoplin and Robinson, Funding Fathers, 45–48. Later, Regnery Books was aptly cited by many pivotal policymakers in the Reagan administration as a wellspring of many of the era’s most influential ideas. Regnery remains a major player in contemporary conservatism, where it has published many notable books, including Ann Coulter, High Crimes and Misdemeanors: The Case Against Bill Clinton (Regnery, 2002); Bernard Goldberg, Bias: A CBS Insider Exposes How the Media Distort the News (Regnery, 2001); Laura Ingraham, Power to the People (Regnery 2008); Edwin Meese, Matthew Spalding, and David F. Forte, eds., The Heritage Guide to the Constitution (Regnery, 2005); and (most recently) Dinesh D’Souza’s, The Roots of Obama’s Rage (Regnery, 2010) and Newt Gingrich’s To Save America: Stopping Obama’s Secular—Socialist Machine (Regnery 2010). Regnery’s Politically Incorrect Guides series offers a broad-ranging (one is tempted to say comprehensive), playful, and easily readable conservative counternarrative to American history, U.S. constitutionalism, and controversial policy issues. In addition to its guide to the U.S. Constitution, the series includes “politically incorrect” guides to American history, the Founding Fathers, the New Deal, the Bible, Western civilization, the Civil War, the South, Islam, Darwinism and intelligent design, capitalism, global warming, hunting, the Vietnam War, and women, sex, and feminism. Henry Regnery gave generously in helping to establish the Young Americans for Freedom (YAF) (http://www.yaf.com) and the Philadelphia Society (http://www.phillysoc.org). (Hoplin and Robinson, Funding Fathers, 52–53, 55.) See http://www.regnery.com.
principles could meet to forge a coalition that could ultimately win political power. As Buckley aptly noted late in life, the magazine “took its place, very soon after its nativity, at the center of conservative political analysis in America.” Its target audience was an interested readership who, motivated and informed by the magazine, would help to steer public opinion, over the long term, in a decidedly conservative direction.

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

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


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

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

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

59. At William F. Buckley, Sr.’s request, Regnery agreed to buy back $25,000 worth of shares in Buckley’s company, which made it possible for Buckley père to underwrite his son’s new magazine. (Hoplin and Robinson, Funding Fathers, 55.) See also Nash, “Forgotten Godfathers,” in Nash, Reappraising the Right, 204–5; Hoplin and Robinson, Funding Fathers, 70–71; and Phillips-Fein, Invisible Hands, 77–81, 147, 224. William Casey, a New York lawyer, and, like Buckley, a devout Catholic, drew up NR’s initial articles of incorporation and later ran Ronald Reagan’s 1980 presidential campaign, subsequently becoming one of his closest advisors and a controversial CIA director. Casey was also a co-founder of The Manhattan Institute. Major investors in NR included Henry Salvatori, a California engineer and pioneer of offshore oil drilling, who was active in the 1964 Goldwater campaign and part of the group of influential businessmen who encouraged Ronald Reagan to run for Governor of California in 1966. In 1969, Salvatori became the beneficiary of
The magazine’s birth coincided with a time of ascendant liberalism. The magazine was launched shortly after the premature death of the great presidential hope of post-New Deal movement conservatives, Ohio Republican Senator Robert A. Taft (d. 1953), and after Joe McCarthy’s implosion in the Army–McCarthy hearings (1954) and the near-collapse of The Freeman (1954). In the early 1950s, there was only one conservative magazine with any significant readership or influence—Human Events. 60

NR’s features and opinion pieces proved crucial in cultivating conservative intellectual talent and in disseminating conservative political ideas. The magazine served as a major underwriter of the conservative publishing industry by regularly reviewing books published by Regnery, which received little, if any, publicity elsewhere. 61 Buckley commissioned and disseminated crucial ideological manifestos, including the magazine’s inaugural Mission Statement 62 and “The Sharon Statement” issued by the Young Americans for Freedom (YAF) at their founding meeting on Buckley’s Sharon, Connecticut, estate. 63 He helped found activist organizations committed to the battle of ideas (like YAF), trained their leaders, and encouraged them to train future leaders. These organizations in turn served as prototypes for the efflorescence of movement institutions that followed: the Young America’s Foundation, The Fund for American Studies, The American Conservative Union, and the Conservative Political Action Conference. 64 Buckley seized a national platform for movement ideas as well through brilliant publicity stunts aimed at major media markets—such as his spirited run for mayor of New York against liberal, silk-stocking Republican John Lindsay. Buckley then parlayed his run into a nationally syndicated PBS television show, the Emmy Award–winning Firing Line (1966–1999), which showcased the movement’s élan and intellectual seriousness. 65

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

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

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

66. William F. Buckley, Jr., “The Week,” National Review (28 November 1980), 1434, quoted in Hoplin and Robinson, Funding Fathers, 74. Speaking as a sitting president at the magazine’s thirtieth anniversary banquet, Reagan testified to NR’s significance to his own political education, noting that he had been a Democrat when he had first read it, and hadn’t stopped reading since. “National Review is to the offices of the West Wing of the White House what People is to your dentist’s waiting room,” President Reagan declared, adding “I want to assure you tonight: you didn’t just part the Red Sea—you rolled it back, dried it up, and left exposed, for all the world to see, the naked desert that is statism.” The magazine, he said, was the “principal intellectual influence in [the] formative years” for “young [conservative] leaders in the media, academia, or government” in the postwar United States. Quoted in Hoplin and Robinson, Funding Fathers, 73–75.
CONSTITUTIONAL DISCOURSE IN NATIONAL REVIEW, 1955–1977

Starting from Extra-Judicial Constitutionalism

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

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

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

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

Axis One: The Structuralist–Moralist Debate

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

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

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


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

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

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

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


73. Charles Kesler, “A Special Meaning of the Declaration of Independence: A Tribute to Harry V. Jaffa,” National Review (July 6, 1979): 850–59, 850. Jaffa had been a speechwriter for Barry Goldwater’s 1964 presidential campaign and he became famous for penning the line in Goldwater’s nomination acceptance speech asserting that “Extremism in the defense of liberty is no vice … And … moderation in the pursuit of justice is no virtue.”


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

79. Kesler, “A Special Meaning of the Declaration of Independence,” 854. Jaffa’s understandings have served as the wellspring of the contemporary conservative constitutionalist vision some have called “Declarationism.” With its intellectual core housed at Claremont McKenna College, in the Claremont Review of Books, and at Claremont’s Salvatori Center, Declarationism rests on the conviction that the Declaration of Independence is not only an inherent component of the U.S. Constitution, but foundational. Declarationists understand the Declaration to be both philosophically and temporally prior to the Constitution. For, without a prior commitment to the (purportedly Christian) proposition that all men are created equal, there is no basis for considering consent to the Constitution binding. That shared philosophical commitment created the American nation, which then composed and ratified the Constitution. Significantly, this understanding amongst many conservative intellectuals serves as a bridge between the Founders and conservative Catholics, fundamentalist and evangelical Protestants, and Mormons. See, e.g., John Courtney Murray, We Hold These Truths: Catholic Reflections on the American Proposition (New York: Sheed and Ward, 1960); Francis A. Schaeffer, A Christian Manifesto (Wheaton, IL: Crossway Books, 2005); A. Scott Loveless, “The Forgotten Founding Document: The Overlooked Legal Contribution of the Declaration of Independence and California’s Opportunity to Revive It Through Proposition 8,” SSRN Working Paper (October 23, 2008). See also Kirkpatrick, “Right Hand of the Fathers.” Declarationism has the special virtue to many conservatives of putting them on the “right side” of civil rights (Lincoln is a hero to Declarationists, which had initially made them anathema to the now largely vanished remnant of neo-confederates). And, because of its appeal to natural law as the root of human equality, Martin Luther King, Jr.’s “Letter From a Birmingham Jail”—which quotes Thomas Aquinas—has been adopted as a core Declarationist text. Today, even the University of Mississippi has a newly opened Declaration of Independence Center for the Study of American Freedom (founded by a Princeton Ph.D. student of conservative Catholic natural law philosopher Robert P. George)—with images of Lincoln, Jefferson, and King on its homepage banner (http://www.olemiss.edu/depts/independence/). In recent years, Princeton’s James Madison Program in American Ideals and Institutions, founded and directed Robert George, and his relatively new, free-standing, Princeton, New Jersey think tank, The Witherspoon Institute, which is led by an Opus Dei cleric, is assuming increasing leadership in the propagation of the Declarationist vision. Operating under a “teach the controversy” rubric, Witherspoon (with the sponsorship of the Bush administration’s National Endowment for the Humanities) has recently launched a “Natural Law, Natural Rights and American Constitutionalism” web resource, with banner graphics (quotes and photos) juxtaposing the opening lines of the Declaration, Abraham Lincoln on the Declaration, and Martin Luther King, Jr. (quoting Catholic natural law—here, St. Augustine) with the positivist counter-tradition, as represented by Oliver Wendell Holmes, Jr., and Hugo Black. See http://www.nhhrac.org/ (for the initiative’s announcement notice, see http://www.winst.org/announcements/11_01_17_natural_law.php).

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

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

The danger of traditionalism’s reverence for the past is that it is unreasonable, unprincipled—and fundamentally no different from liberalism’s unprincipled commitment to the future. . . . It does not acknowledge any objective standards by which we may distinguish just from unjust, good from bad, true from false, and so provides us no guidance in choosing what elements of the past should be conserved as a matter of expedience, and what elements must be conserved as a matter of justice. Nor . . . can it provide us with what the past does not furnish—living statesmanship and virtue. . . . Jaffa’s interpretation of the
American political tradition points toward a politics that prizes virtue more highly than does libertarianism, and reason more highly than does traditionalism.82

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

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

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

Countering Kesler, M. J. Sobran and Jeffrey Hart took on Jaffa on Kendall’s behalf. 85 Throughout his career,” Sobran reported, “Kendall deployed the messianic pretensions … of what we may … call the Declaration Tradition, with its universalism and stress on individual rights.” “Against this,” Sobran explained, “he placed the Constitutional Tradition of government by consensus, which tended to mute sharp moral issues and scale down grandiose causes to politically assimilable dimensions.”86

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

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

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

82. Ibid.
83. Harry V. Jaffa, “Another Look at the Declaration,” National Review (July 11, 1980): 836–40, 836, 840. In recent years, Jaffa has been arguing that Thomas Aquinas’s thought was more important to the American Founding than John Locke’s. See Harry Jaffa, “Natural Law and American Political Thought,” Lecture in the America’s Founding and Future Series, James Madison Program in American Ideals and Institutions, Princeton University (September 29, 2003).
85. Kendall was once described by Dwight Macdonald as “a wild Yale don of extreme, eccentric, and very abstract views who can get a discussion into the shouting stage faster than anybody I have ever known.” Dwight Macdonald, “Scrambled Eggheads on the Right,” 368. A more enduring portrait was drawn by Saul Bellow in “Mosby’s Memoirs,” where the title character Willis Mosby is based on Kendall. Saul Bellow, Collected Stories (New York: Viking, 2001), 555–73 [originally published in The New Yorker]. See also Nash, “The Place of Willmoore Kendall in American Conservatism,” in Nash, Reappraising the Right, 60–71.
86. M.J. Sobran, “Saving the Declaration,” National Review (December 22, 1978): 1601–2, 1601. Hart’s characterization of both Kendall and Strauss suggests that they are progenitors of originalism in that both sought to read texts as their authors intended them to be read. Kendall sought to “define a constitutional orthodoxy based on common sense, American experience, and the founding texts, closely read.” His approach was to start with the “‘We the People’ of the preamble filtered through the delaying and refining process of constitutional forms, democratic instincts and experience combined with high political theory.” See Hart, Making of the American Conservative Mind, 30, 36.
88. Ibid. To the consternation of many conservatives, Hart endorsed Barack Obama for president in 2008. We might in part attribute this turn as a reaction against the influence of messianic Straussianism in the contemporary Republican Party. See Jeffrey Hart, “Obama is the Real Conservative,” The Daily Beast (October 31, 2008) (http://www.thedailybeast.com/blog-and-stories/2008-10-31/obama-is-the-true-conservative/).
now careering out of control, it was because they had spurned Kendall’s go-slow, consensus approach.89

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

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

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

NR’s first ten years largely coincided with the Warren Court’s (1953–1969) first decade, and much of NR’s constitutional discussion in those years expressed incredulity at the audacity and looseness of that Court’s rulings. Major themes included the view (concerning civil rights cases) that good intentions do not justify radical departures from constitutional strictures and traditions and that (concerning national security cases) governments must have the powers necessary to deal effectively with threats. The earliest articles strained to maintain a deferential respect for the Court as an institution, but these efforts gave way as what first looked like a smattering of erroneous rulings calcified into a set of firm and cohesive commitments. At this point NR writers began contrasting the Court’s reasoning with what they insisted was the original understanding of the Constitution, transforming the magazine into an early forum for what Keith Whittington has called “old originalism”—although I prefer the more descriptive “reactive originalism”—an originalism (then) newly fashioned in direct response to the Warren Court’s rulings.92

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

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

89. Hart, “Peter Berger’s ‘Paradox’,” 513.
had it drummed into us that the Constitution is what the Supreme Court says it is,” wrote NR’s editorial board in 1962:

If that is true … it begins to look as if it were only an indirect way of saying that we do not have a Constitution, that our government is a constitutional government no longer. To call a government “constitutional” must mean, as a minimum, that its particular laws and day-to-day operations are conceived within some sort of stable structure that represents a consensus or compact, changing only slowly, and by prescribed, deliberate methods. This structure may be in part written down, as ours was, or embodied in tradition, custom, and precedent, as is the English case; but the structure must be there and accepted, or the Constitution is a myth….

That said, Kilpatrick argued that the essence of a constitution is that it disciplines. Kilpatrick explained that “[t]o Judge Cooley, most famous of the professors of constitutional law, this rule of strict construction—to go first to the intention of the framers and ratifiers—was the very ‘pole star’ of constitutional adjudication.” He continued that

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

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

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

NR’s reactive originalism was typically, and frankly, qualified. In assessing foreign affairs powers as late as 1970, for instance, NR’s editors soberly concluded that “like most constitutional issues, it is a problem that cannot be settled by mere reference to the words of the Constitution. The Constitution is ambiguous about the locus of the ‘war power.’”

James J. Kilpatrick—no moderate on the Warren Court or the Constitution—insisted that “[t]his séance theory, which treats the eye sees what it wants to see. The Constitution beholder sits in one of those nine great swivel chairs, beauty: it lies in the beholder’s eye; and when the beholder sits in one of those nine great swivel chairs, the eye sees what it wants to see. The Constitution … is what the judges say it is.”

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

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


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

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

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

James J. Kilpatrick noted that “[a]t every point in its history, the Court has drawn the same criticism from those it has offended. The indictment that is drawn against the Warren Court thus is not different in kind: it is different only in degree.” Kilpatrick even praised the substance of the Court’s landmark right to privacy decision—later the beˆte noire of conservatives. “[I]f one is indifferent to the means employed to reach an end,” he wrote in the late 1960s, “it is possible to admire many of the new landmarks erected. In Griswold v. Connecticut, for one example, the Court reached a clearly desirable end: It dumped Connecticut’s ridiculous law on the sale and use of contraceptives. But the Court, stomping through the penumbras of the law, attained this end by trampling upon the power of a state, if it chooses, to enact ridiculous laws.”102 Similarly, Kilpatrick admitted in 1973 that “The Court, under Warren, accomplished ... a vast deal that was good.” As legal craft, Earl Warren’s Brown v. Board of Education opinion was “clearly a monstrosity.” It neverthe- less “served to smash a rotten barrier that cried out for removal.” In its reapportionment decision Baker v. Carr, Kilpatrick thought that the “cogent
dissents of Frankfurter and Harlan ... plainly had the better view of the law and of the Court’s scheme of government.” The decision, nevertheless, “righted a flagrant wrong,” and Kilpatrick also admitted that “[s]o, too, with many of the Warren opinions going to the protection of the rights of the accused in criminal prosecution: the Court tossed precedents to the four winds, but it halted some palpable evils.”103 However, Kilpatrick also felt that the Warren Court’s “record of judicial activism is without parallel in the Court’s long history.”104

**BROWN V. BOARD OF EDUCATION AND CIVIL RIGHTS**

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

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

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

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


105. See Allitt, *Conservatives*, 182.

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

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

NR writers argued that while civil rights were a noble cause, the means the Court was deploying to advance them were destroying the Constitution. Indeed, according to NR, the Court’s civil rights imperative had rendered their claim to be interpreting the Constitution ridiculous. NR’s arguments sometimes gave way to satire. One 1966 article announced with mock solemnity that “The United States Supreme Court yesterday declared the federal Constitution unconstitutional on the ground that it is in direct and complete conflict with the Voting Rights Act of 1965 … It declared that in the light of Gunnar Myrdahl’s [sic] discovery of ‘The American Dream,’ the intent of the Constitution’s framers could only be construed to denote that they had no real intent of framing a constitution, and did so merely to pass the time as pleasantly as possible. . . .”

The satire referenced an opinion by a Supreme Court Justice in the fictional decision “holding that the unconstitutionality of the Constitution should be made retroactive and ex post facto in order to establish instant integration everywhere. . . . All those criminals who had been caught and imprisoned would be automatically released sine dia, having been convicted under laws enacted under an unconstitutional Constitution.” For good measure, it cited an apocryphal concurring opinion announcing that the Constitution “was additionally unconstitutional by reason of being at total variance with the Atlantic Charter, the By-laws of Americans for Democratic Action, and the Medulla Oblongata. That opinion quoted as authority . . . three chapters from Catcher in the Rye, and 26 pages from the Reader’s Digest condensation of The Eleanor Roosevelt Story.”

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

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

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

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


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

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

Brent Bozell emphasized that Brown “was not a faithful interpretation of the Constitution as the document was conceived by its framers, but rested entirely on the justices’ views of correct social policy. . . . The authors of the Fourteenth Amendment did not intend to withdraw public education from the realm of state power.” He argued that, given the explosive nature of the subject, progress on desegregation should be slower, more flexible, and incremental, and led by the elected branches. “A wiser course for the Court . . . would have been to defer indefinitely any decrees in the cases before it while simultaneously calling attention to Section V of the Fourteenth Amendment . . . . It might also have expressly reminded the states of their obligation to enforce the Constitution. . . . [I]t would have given prime responsibility for the integration program, and thus leadership of it, to the political departments.”117

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

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

Fortunately, Brown “may . . . shak[e] inchoate state-righters out of their . . . stupor. Perhaps it is too late; but political resistance in the South seems to be centering on the broad and—potentially—dynamic concept of decentralized political authority,” the magazine cheered. “There has been more talk, these past few months, about the meaning of federation and about the significance of the Tenth Amendment . . . than there has been for a generation . . . . We welcome . . . the return of serious discussion of states rights. This resistance might dovetail with the related fights over the federal treaty making power, and matters of political thought: Herbert J. Storing, ed., What Country Have I? Political Writings by Black Americans (New York: St. Martin’s Press, 1970).


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

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

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

Kilpatrick was an outspoken critic of the 1964 Civil Rights Act. 123 "The logic … go[es] something like this … All decent Americans should support good things. All decent Americans should oppose bad things. Racial discrimination is a bad thing. Bills to prohibit racial discrimination are good things. The … Civil Rights Bill is intended to prohibit racial discrimination. Therefore, his bill is a good thing and all decent Americans should support it.” He insisted upon the constitutional imperative of distinguishing ends from means. The CRA violated the Constitution in a half dozen ways, he argued. It destroyed states’ control over their own voting requirements. 124 It stretched the commerce clause beyond recognition. In its voting provisions, it mistakenly invoked the Fourteenth rather than the Fifteenth Amendment. It disregarded property rights, undermined the right to defend, with all the power at my command, the citizen’s right to discriminate … If this be destroyed, the whole basis of individual liberty is destroyed. The American system … rests solidly upon the individual’s right to be wrong—upon his right in his personal life to be capricious, arbitrary, prejudiced, biased, opinionated, unreasonable—upon his right to act as a free man in a free society. 125

Kilpatrick concluded “I do not propose to defend racial discrimination. I do defend, with all the power at my command, the citizen’s right to discriminate … If this be destroyed, the whole basis of individual liberty is destroyed. The American system … rests solidly upon the individual’s right to be wrong—upon his right in his personal life to be capricious, arbitrary, prejudiced, biased, opinionated, unreasonable—upon his right to act as a free man in a free society. 126

Looking back at Brown a decade later, NR’s editors observed that “The rate of school integration … has been no more rapid in this decade since 1954 than in the decade before 1954, when, without benefit of the Court, it was progressing slowly but continuously under the influence of economic change, social pressures, shifts in community sentiment, and state or local law.” By contrast, court orders had provoked white flight from cities to the suburbs, worsening the plight of African Americans, devastating their schools, and exacerbating their social alienation. Brown was not only “bad law and bad sociology,” but it had yielded bad results. 127

Into the 1970s: Against the New Civil Rights

By the mid-1960s, NR writers switched from opposing Brown to defending it—properly interpreted—as a new baseline. Brown had prohibited de jure segregation, they concluded—no less, and no more. Fortunately, the noxious racism of yore was fast receding into history. George Gilder reported in 1980 that “The last thirty years in America … have seen a relentless and thoroughly successful advance against the old prejudices, to the point that it is now virtually impossible to find in a position of power a serious racist.” 128

American rights. They are concerned rather with federal enforcement of special group privileges.” 129

On the provisions aimed at voting intimidation, he wrote: “I have no patience with conspiracies or chicanery or acts of intimida
tion intended to deny qualified Negroes the right to vote…[But] there is abundant law on the books … to prohibit and to punish such willful acts by local registrars.” Kilpatrick cited the 1957 Civil Rights Act as a case in point. But, see the earlier contemporaneous editorial in NR opposing the 1957 Civil Rights Act, which had argued against “put[ting] the South under the domina

tion of federal prosecutors, federal civil rights commissioners, federal judges, and the federal Department of Justice.” In its pro

visions for the federal control of state election procedures, the editors wrote, “the bill remains a force bill which invades the

right of Negroes to equal treatment and dignity before the law. But no clause in that bill is concerned with such old-fashioned

124. Ibid., 231 (“It should never be forgotten that whenever we vote, we vote as citizens of our states … The Constitution makes it so.”).
125. Ibid., 236 (referring to Title VI’s expansion of federal power to deny federal funds to individuals, without judicial process).
126. See also Frank S. Meyer, “The Attack on Congress,” National Review (February 11, 1964): 109–10. 110, apropos of the 1964 Civil Rights Act that he was concerned: “… not to deny the right of Negroes to equal treatment and dignity before the law. But no clause in that bill is concerned with such old-fashioned
These “old prejudices” were, of course, distinguishable from the legitimate preference of members of racial (and other) groups for associating with their own kind, making colorblindness “a fiction, partly noble, partly hypocritical.”

This defense of voluntary separatism led some NR writers to a perhaps surprising defense of Black Power, arguing that “a permissive separatism—i.e. one which is uncoerced; where whites are genuinely free to mix with blacks and vice versa—is not intrinsically evil and surely not unconstitutional.”

One NR writer argued that “The Court … must stop viewing American citizens as racial or ethnic groups, must cease encouraging quota systems of any kind, and … must permit those groups that want to preserve a separate identity to do so.”

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

“Their is presently but one remedy for putting an end to forced busing,” NR editorialized in 1976, “And that is a constitutional amendment.”

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

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

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

Hart emphasized that “virtually all legal barriers to Negro advancement have been eliminated. . . . Negro energies… should be turned inward to the problems of the Negro community, rather than...”
directed outward toward confrontations with the rest of society.141

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

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

MORALS AND ABORTION

Conservatives perceived the Warren Court’s landmark Establishment Clause decisions striking down official prayer and Bible reading in the schools as an assault on one of the major means the country had of instilling a commitment to the moral order in its youth. Because most conservatives understood that order as a sine qua non of political freedom, they saw the Court as having struck like a viper at the heart of the nation’s constitutional order as well, injecting poison into its civic bloodstream.144

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

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

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

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

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

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

Will Herberg responded that the question was not a matter of persuasion and opinion, but rather of objective right and wrong. “There are certain views and
positions... that are not simply the reflection of... 'sectarian' beliefs, but are held in obedience to norms and standards that far transcend any conceivable pluralistic diversities. ... Right and wrong are not determined by popular opinion or even by democratic majorities."

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

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

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

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

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

160. John T. Noonan, Jr., "Raw Judicial Power," National Review (March 2, 1973): 260–64, 261. Noonan, who, besides having a law (and undergraduate) degree from Harvard, received a Ph.D. from the Catholic University of America, was a law professor, first at Notre Dame, and, subsequently, at UC-Berkeley. He is one of the nation’s preeminent (conservative) scholars of the relationship between morality and law. In 1985, President Reagan appointed Noonan to the Ninth Circuit Court of Appeals in San Francisco, where he currently has senior status. A past recipient of Notre Dame’s Laetare Medal, Noonan substituted at the University’s 2009 graduation ceremony when Mary Ann Glendon of Harvard Law School declined the Medal, and the opportunity to address the graduates, in protest against Notre Dame’s selection of (pro-choice) President Barack Obama as its commencement speaker. On Noonan, see Allitt, Catholic Intellectuals and Conservative Politics. Byron White’s "raw judicial power” language was picked up extensively on the Right, serving, for example, as a key refrain in Francis Schaeffer’s documentaries. See Kersch, "Roe and the Supreme Court in Thick Ideological Context."
religious motives from public life, we in effect favor nonbelievers over believers, virtually establishing irreligion." This would amount to "requiring ... a kind of loyalty oath to secularism."163

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

**INTO THE 1980S: RAOUL BERGER'S PROACTIVE ORIGINALIST MANIFESTO**

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

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

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

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

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

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General Robert Bork wrote, ‘Value choices are attrib-
the Constitution. Instead, as former Solicitor
has never openly laid claim to a power to amend
not to revise it. . . . Unlike its apologists, the Court
“Judges are appointed to ‘defend the Constitution,’
framed and adopted a provision.” But Berger insisted
should depend chiefly on the intent of those who
insisting that ‘the constitutional interpretation
Berger continued: “Like Miller, [Stanford Law Pro-
claim of judicial power to rewrite the Constitution.”
But Miller’s euphemisms disguise a
“must have” acted as he himself would. Thus,
judge inevitably “legislates” to fill in the
gaps in his “judgment”. He cannot close all
gaps in his “judgment”. He cannot close all
for the Founding Fathers, not the Court.”

concluded, “it is a disservice to the American
people to delude them into thinking they have sur-
rendered self-government to the Court.”

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

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

Not the least of the virtues of the Reagan Court is
that it will cause many law professors to insist on
the application of the Framers’ values. But is it
possible to discern those values? Even after a
judge has buried himself in history books, will
he not ultimately arrive at a dead end, and
perhaps a dozen dead ends? What about con-
flicts among the Framers themselves, not
clearly resolved by the text of the Constitution
or the records of debates? What about those
modern phenomena that have no eighteenth
century parallels? Will not the judge eventually
choose among the competing historical evi-
dence on the basis of his own beliefs about
what is right and wrong? Does it really make
any difference whether he does this before or
after examining the historical evidence? It does
make a difference. There is no such thing as a
perfect record; nobody can hope to be certain
of precisely what the Framers thought, or
would have thought, about a certain controversy;
not, indeed, can anyone ever know every single
relevant fact about an automobile accident or a
contract dispute that happened six months
ago; but one can try, and it makes a difference
whether one tries. A judge will make interstitial
decisions about what the Framers “must have”
thought, just as he will fill in gaps in his infor-
mation about the automobile accident or the
contract dispute by assuming that the parties
“must have” acted as he himself would. Thus,
the judge inevitably “legislates” to fill in the
gaps in his “judgment”. He cannot close all
these gaps, but he can strive to make them
fewer and smaller. I do not contend that our judi-
cial Emperors will ever be fully clothed; but
I wish never again to see them as naked as on
the day they decided Roe v. Wade . . . . ”

Dangerous Branch,” Human Events (December 24, 1977): 13. See
also James J. Kilpatrick, The Sovereign States (Chicago, IL: Regnery,
1957).

168. Richard S. Williamson, “Court Decisions Have Trans-

169. Raoul Berger, “Academe vs. the Founding Fathers,”


172. Grover Rees III, “The Constitution, the Court, and the
1602. Rees taught law at the University of Texas at Austin,
served as Special Counsel to Edwin Meese III (1986), where he
weighed in on appointments to the federal bench. He subsequently
held a variety of judicial, executive branch, and ambassadorial
appointments in the Reagan and two Bush administrations.
173. Rees, “The Constitution, the Court, and the
President-Elect,” 1601.
"If the Supreme Court changes its approach," Rees predicted, "the considerable resources of the adversarial system of criminal and civil justice will be devoted to discerning the original understanding. Soon even law professors will find it necessary to take a sabbatical from teaching Reason and Moral Science, in order to study history." 174 Originalism was now the conservative movement’s fighting faith.

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

CONCLUSION

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

174. Ibid., 1001–2.


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

178. See Edelman, Constructing the Political Spectacle, 1, 119–20.
distinguishing themselves politically that had eluded them in their movement’s more fractious and heterodox earlier stages. Whatever their ideological and intellectual starting points, all could agree that alien currents of thought had been imposed upon them by a renegade judiciary that had served as a conduit for the constitutionalization of the views of an antidemocratic intellectual elite. A regrounding in the Founding was the answer.

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

After 1980, originalism became for conservatives “a term that excites the imagination of large numbers of people and also helps to organize and discipline them as a potent political instrument . . . .”180 It “[lent the political spectacle] emotional depth as well as the intellectual satisfaction that springs from the transformation of uncertainty, ambivalence, and complexity into an understandable phenomenon.”181 The weeping and gnashing of teeth unleashed by the martyrdom of failed Supreme Court nominee (and originalist saint) Robert Bork in 1987 only strengthened the movement’s faith, uniting conservatives of diverse intellectual origins in a paroxysm of grief and indignation, followed by angry and embittered calls to battle.182

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

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


181. Ibid., 40.

182. See Bork, *Tempting of America*.