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The Alternative Tradition of Conservative Constitutional Theory

The years between the end of World War II and the election of Ronald Reagan as president – conservatism's political wilderness years – were some of the richest in terms of conservative constitutional thought and theory. While hardly obscure to movement participants, and outsiders who know where to look, much – indeed, perhaps most – of this thought and theory has gone missing in accounts of American constitutionalism and constitutional theory. Given that conservatives were all but excluded from legal academia in this period – especially elite academia – this thinking hid in plain sight; the lawyers or legal academics who stole the constitutional theory limelight at mid-century were not conservatives. The unconsidered presumption of these lawyers and legal academics was that if they or their interlocutors were not doing it, it was not important constitutional theory. With a few exceptions, constitutional theory on the Right during the heyday of American liberalism was undertaken by journalist-intellectuals, independent scholars, and a small cohort of political philosophers typically working in political science departments. The work of these constitutional thinkers often followed very different lines from those engaged in by the era's well-known liberal academic constitutional theorists, even when, as sometimes happened, it was engaged with, and reacted against, that work. The questions it asked, and the framework within which it took up constitutional questions, were distinctive and often advanced theories that were disconnected from – albeit no less sophisticated than – the professionalized world of legal academia and professionalized constitutional theory.

One feature of this constitutional thought and theory that liberals might not suspect – and contemporary conservatives have chosen to forget – is not only that it was diverse but also that that diversity was structured by major theoretical disagreements – and, in some cases, battles. Although much of this work was "originalist" in a broad sense (it devoted considerable attention to its understanding of the nation's Founders, with an eye to the relevance of the Founding to contemporary political and constitutional questions), it was hardly consistently originalist in the narrow sense of insisting upon eighteenth-century

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understandings, or requiring either judicial deference to legislatures (judicial restraint) or, for that matter, in focusing on judges and their duties at all.

Another feature of conservative constitutional thought and theory in the heyday of American liberalism that might make many contemporary conservatives uncomfortable is that, considered over the long term, from a bird's eye perspective – that is, as I provide a scholarly account of it here – it was developmental: its emphases, arguments, and understandings changed across time in engagement with both world events and the altering interests, coalitions, and strategies within the conservative movement and the Republican Party. Put otherwise, postwar conservative constitutional thought "lived." As such, in practice, at least, "living constitutionalism" was prevalent on the postwar Right as well as the Liberal/Left, albeit perhaps less expressly.

While there were many debilities to being on the outside of political power looking in, one of the advantages of not holding responsibility for winning or losing elections or governing is the absence of goal-directed discipline from above, which allowed for the introduction and the relatively free play of ideas. And one of the advantages of being outside the academy is that one need not situate oneself within the delimiting lines of entrenched academic debates that, over time, can tend toward scholasticism, banality, and complacency (if not irrelevance).

The most prominent studies of "conservative legalism" in recent years have been accounts of conservative "legal mobilization" describing the ways in which, following the model set by liberal litigation groups like the NAACP and the ACLU, conservatives created institutions to undertake strategic litigation campaigns aimed at overturning liberal legal precedents that set the substructure of institutionalized liberalism and substituting a new set of conservative precedents in their stead.[1] While I do avail myself of this work on conservative legal mobilization at places along the way, the temporal center of gravity of this study is at a time when such campaigns, if dreamed of at all, were a mere glint in the eye of the modern conservative movement. After all, to even imagine that such strategic litigation campaigns might work requires that one have a hope of finding a receptive audience in the judges before whom one is arguing. Prior to the election of Richard Nixon as president in the late 1960s, but especially of Ronald Reagan in the early 1980s, conservatives had few realistic hopes in that regard. During their wilderness years, conservative constitutional thinkers and theorists were trafficking not in test cases but in political and constitutional visions. The cacophonous, multivocal discursive space in which they did so was strewn with immigrant Austrian economists, Fundamentalist and Evangelical Christians, classicist political philosophers, segregationists and white supremacists, sunburnt sagebrush libertarians, disillusioned and wavering New Deal and Great Society liberals, Ivy League

[1] For an earlier mobilization sometimes overlooked, see Daniel R. Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* (Urbana: University of Illinois Press, 1995).

social scientists, Neo-Thomists, pillars of the bar, Main Street Babbitts and business titans, Burkean traditionalists, and apostate ex-socialist and communist journalists, all of whom wrote about the Constitution in ways that were both serious and fundamentally different from the refined, professionalized discourse of the era's institutionalized academic liberal law professors.

These diverse political and constitutional visions preoccupied themselves with thought along certain lines – lines that, as the prospect of political success became real from the mid-1970s forward, narrowed into what became the legal academic theory of legal positivist originalism, as preached by conservative law professors Robert Bork (Yale) and Antonin Scalia (University of Virginia/University of Chicago), that emphasized a judge's duty of restraint in the exercise of his judicial review powers. This law school originalism actually represented a revival and appropriation by conservatives of the arguments for judicial restraint that had first been purveyed by Progressives in the early twentieth century when they had squared off against the activist *conservative* pre–New Deal Court. Conservatives like Bork and Scalia revived this old Progressive constitutional theory and hurled it back against the modern liberals whose progenitors had invented it, but in a new age of liberal (Warren/Burger Court) judicial activism. The charge was, in essence, hypocrisy.

There was little in this later, narrowed originalism that was necessarily conservative in any theoretical or ideological sense, although it was certainly conservative in its effects in its political and historical context, since it was aimed at kneecapping the development of recent liberal precedent and lines of constitutional development that had expanded, for instance, the regulatory powers of the federal government or the rights of criminal defendants. The earlier, more open conservative constitutional thought and theory undertaken outside of legal academia, however, had a deeper ideologically conservative substructure. Its preoccupations were, for instance, the underlying principles of government, often understood in terms of political theory (Aristotle, Machiavelli, Hobbes, Locke, Christianity, the rooted national community). Memory mattered in significant ways that went beyond the stories told about the Supreme Court's New Deal "switch-in-time": the early theory told stories about the rise (and decline) of Western civilization, the American Founding, Abraham Lincoln, and the Civil War. Those stories provided a deep context for contemporaneous legal developments that lent them resonance and meaning beyond justifying whether the application of a particular clause of the Constitution has been rightly applied in a contemporary constitutional case. In this way, the earlier period's constitutional thought and theory were much more closely tied to the identity-forging thrust of the modern conservative movement. Much of this work, either implicitly or explicitly, went well beyond asking whether the judge followed the law to much broader questions: Where have we been? Where are we now? What went wrong? How can we set things right?

CONSERVATIVE ORIGINALISMS

There were also quite a few proponents of originalism within postwar conservatism who pre-dated the legal academic originalism of the conservative law professors Robert Bork, Raoul Berger, and Antonin Scalia in the 1970s. One was the civil engineer and steel company executive Ben Moreell, who spearheaded Americans for Constitutional Action (ACA) (founded in 1958), which Moreell described as "a non-partisan, non-profit, nation-wide ... political action organization" devoted to the propositions, "first, that the Constitution of the United States, as originally conceived, provides a solid foundation upon which the structure of our free social order has been erected; and, second, that if we are to preserve that social order in America it is imperative that we protect its foundation against erosion or destruction." The focus of Moreell's ACA, however, was not the courts but Congress: it was initiated as a conservative answer to the liberal ADA (Americans for Democratic Action) to support constitutionally committed conservatives in congressional elections.[2]

As such, the ACA's focus was different from that of later originalist organizations like the Federalist Society. The ACA was not composed mainly of law students, law professors, and lawyers. In promoting its understanding of the Constitution, it did not target judges so much as the underlying sources of the liberal worldview. These included the Swedish sociologist Gunnar Myrdal's claim, prominently advanced in his landmark study *An American Dilemma: The Negro Problem and Modern Democracy* (1944), that the Constitution was unsuited to modern conditions. In doing so, the ACA took positions against broad interpretations of the general welfare clause, Congress's abdication of power to "an all-powerful Chief Executive," what it characterized as the bribery of the country's sovereign states through federal subsidies, and in favor of a constitutional amendment repealing the constitutionalization of the federal income tax through the adoption of the Sixteenth Amendment. Like the liberal ADA, the conservative ACA instituted a rating system for members of Congress, with the aim of "inform[ing] the people of the United States with respect to the probable effects of important legislative measures on the preservation of the basic values of our Constitution and, most importantly, the actual voting preferences of all Senators and Representatives."[3]

[2] See Hemmer, *Messengers of the Right*, 145–146; [ACA Advertisement], *Detroit Free Press* (May 31, 1963), 6. See also [ACA Advertisement], *The Palm Beach Post* (November 4, 1968), 21. The ADA had been founded in 1947 by, among others, Eleanor Roosevelt, John Kenneth Galbraith, Arthur Schlesinger Jr., Reinhold Niebuhr, and Walter Reuther.

[3] Admiral Ben Moreell, "Americans for Constitutional Action," *Human Events* 18:50 (December 15, 1961): 849–850, 849; Ben Moreell, "Americans for Constitutional Action: Principles and Purposes," address delivered to the Pensacola, Florida, Chapter of the ACA (September 27, 1966). See Andrew J. Glass, "Americans for Constitutional Action" in Judith G. Smith, editor, *Political Brokers: People, Organizations, Money, Power* (New York: Liveright/National Journal, 1972), 35–68; Jonathan M. Schoenwald, *A Time For Choosing: The Rise of Modern American Conservatism* (New York: Oxford University Press, 2001), 222–227. *National*

Other conservatives in the early 1960s expressed similar originalist views. Some were apodictic about their originalism – although at the time this interpretive stance was simply asserted or assumed rather than argued for.[4] Writing for the *ABA Journal* in the early 1960s, the conservative Virginia lawyer S. Bruce Jones, for instance, cited Thomas Cooley's *Constitutional Limitations* (1868) as having laid down the foundational originalist rule of interpretation:

> A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule ... seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control that these instruments are framed, and there can be no such steady or imperceptible change in their rule as inherent in the principles of the common law.[5]

In 1962, American Bar Association President John C. Satterfield issued a stern assessment of current conditions, and a call to action to his membership. "[T]he government [now] emerging has little resemblance to that which was set up under the Constitution of the United States as adopted and amended by the several states," Satterfield warned, "The republic formed under the Constitution of the United States as adopted and amended by the several states is now being transformed into a ... centralized monolithic government with broad and sweeping control over the individual actions of citizens, extending to almost every phase of human relationship. These changes have resulted largely from judicial decisions rendered since the turn of the century." Satterfield called upon the nation's lawyers to awaken to the threat, and to speak out with "no hesitancy or timidity" on the Court's performance.[6]

Review's publisher William Rusher used the ACA ratings to determine which members of Congress would receive free copies of *National Review*. The ACA forged a close alliance with *Human Events*. Hemmer, *Messengers of the Right*, 146–148.

[4] See, e.g., Hamilton A. Long [Washington, D.C.], Letter to the Editor, *American Bar Association Journal* 49 (1963): 708, 712.

[5] S. Bruce Jones, "Heartbreaks for the Constitution," *American Bar Association Journal* 50 (August 1964): 758–761, 758, citing Thomas Cooley, *A Treatise on Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 123 (8th ed., 1927). See also S. Bruce Jones, "A Warning: Was It Justified?" *American Bar Association Journal* 43 (January 1957): 55–58, 92–93; David Lawrence, "Does 'Might Make Right'?" *US News and World Report* (April 17, 1961), 110, 114–116; Howard Lydick, "The Supreme Court is Wrong," *Human Events* 24:19 (May 9, 1964): 11 (also citing Cooley for the proposition that "The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it").

[6] John C. Satterfield, "President's Page," *American Bar Association Journal* 48 (July 1962): 595, 612, 662–663.

Many American lawyers took up Satterfield's call to reflect and speak out and did so in an originalist spirit. Dalton, Georgia's R. Carter Pittman recounted that "[i]n his *Discourses*, Machiavelli ... demonstrate[s] the integrity of the maxim that governments, to be long lived, must be frequently corrected and reduced to their first principles." "Why does not the American Bar Association compile into book form such documented articles dealing with the fundamental principles of our republican governments for use as reference material by students and others?" Pittman asked.[7] Los Angeles lawyer George W. Nilsson argued that a lack of knowledge of our Constitution and the founding principles of the Republic was making the United States a soft target, all too receptive to the communist propaganda then flooding the United States (he said) – Nilsson was alarmed by new evidence from US military psychiatrists that American GIs captured by the Red Chinese had been unable to resist brainwashing by their captors because of their ignorance of American history and the principles and structure of American constitutional government. Among the culprits in this horrifying state of affairs, Nilsson charged – "'Huns and Vandals' Within" – were the likes of Pennsylvania Senator Joseph Clark, Harvard Law Professor Arthur Miller, the liberal Harvard economist John Kenneth Galbraith, and Yale Law School Dean Eugene V. Rostow – who "advocate ideas that are diametrically opposed to the principles of The Declaration of Independence, the Constitution and the Bill of Rights."[8]

Writing in *Human Events* the following year, Jesse Helms – then a Raleigh, North Carolina, radio station executive and segregationist editorialist (and a future US senator (1973–2003) and Republican Party leader) – contended that "[d]uring the past generation, governmental processes have drifted so far from their original concept that our citizens no longer are being governed: they are being ruled."[9] Appealing (like S. Bruce Jones) to Thomas Cooley as an originalist authority, the Texas lawyer (and Prohibition Party activist) Howard Lydick attacked liberal Supreme Court Justice William O. Douglas's dismissiveness of the Article V amendment process as too slow by reminding readers that "[t]he meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."[10] The dramatist, screenwriter, and former socialist-turned-conservative firebrand Morrie Ryskind (1895–1985) chimed in: "I do not maintain that the document the Fathers gave us came from Sinai, but surely few man-made tablets have come nearer perfection."[11]

[7] R. Carter Pittman [Dalton, Georgia], Letter to the Editor, *American Bar Association Journal* 47 (1961): 228.

[8] George W. Nilsson, "On the Battle Front: To Preserve, Protect and Defend the Constitution," *American Bar Association Journal* 48 (March 1962): 232–235, 232–234.

[9] Jesse Helms, "Curb the Supreme Court," *Human Events* 22:2 (July 13, 1963): 15.

[10] Howard Lydick, "The Supreme Court Is Wrong," *Human Events* 24:19 (May 9, 1964): 11.

[11] Morrie Ryskind, "They Were Giants Then," *Human Events* 32:1 (January 1, 1972): 6.

By the early 1970s, the traditionalist conservative political theorist George Carey (1933–2013), a Georgetown University government professor, was arguing in *Modern Age* that originalist understandings were the only legitimate approach to constitutional interpretation.[12] No Lockean liberal, Carey nevertheless reminded readers that the Constitution was a contract, binding until amended through constitutionally prescribed processes. Any other approach, he argued, led to "insurmountable difficulties that seem to defy rational resolution," though Carey insisted upon nuance by acknowledging that "the Constitution itself on many fundamental issues cannot be read independent of the prevailing morality of the time which, though not expressly articulated in the document, serves to give it a broader meaning, purpose, and moral framework."[13]

The Pulitzer Prize–winning *Washington Post* editor and former Haverford College president Felix Morley took a similarly nuanced contractualist view. "[C]onstitutional interpretation is more subtle than that of a will, or deed, or contract," he observed, "It must take cognizance of changing circumstance as well as of the collective purpose of the authors and of all amendments of their

[12] George W. Carey, "The Supreme Court, Judicial Review, and Federalist Seventy-Eight," *Modern Age* 18:4 (Fall 1974): 356–368. Carey was known within the movement for his insistence that the US Constitution was underwritten and undergirded by a "constitutional morality" – that is, by a virtuous, self-controlled, self-ruling, self-governing citizenry, and that self-government in one sphere was inextricably dependent upon self-government in the other. This morality, inherent from the Founding forward, derived from an understanding of foundational truths, as embodied in the country's Judeo-Christian heritage (the Puritans were especially significant for Carey), the English common law inheritance, and the traditional authority of Religion, Church, Parents – and free, constitutional government. Carey was critical of the corrosive effects that Enlightenment (liberal) thinking had had on this constitutional morality, as instantiated in the writings, e.g., of Thomas Jefferson (the Declaration of Independence), John Locke, and John Stuart Mill. In complicated ways, however, Carey rejected hermeneutical orthodoxy of the kind that frequently characterized law school originalism – and, indeed, other "schools" of political thought, liberal and conservative alike. Carey was collaborator and frequent coauthor in the 1960s with William F. Buckley Jr.'s Yale mentor Willmoore Kendall and maintained long-standing ties with Buckley himself. Among Carey's many books were *The Basic Symbols of the American Political Tradition* (Baton Rouge: Louisiana State University Press, 1970) (with Willmoore Kendall), *Liberalism Versus Conservatism: The Continuing Debate in American Government* (Princeton: D. Van Nostrand, 1966) (with Willmoore Kendall), *The Federalist: Design for a Constitutional Republic* (Urbana: University of Illinois Press, 1989), *In Defense of the Constitution* (Indianapolis, IN: Liberty Fund Press, 1995), *A Student's Guide to American Political Thought* (Wilmington, DE: ISI Books, 2004). Carey edited the Liberty Fund's edition of *The Federalist* (with James McClellan). In 1971, Carey also founded ISI's *The Political Science Reviewer*, which published "essay-length reviews of classic and contemporary studies in law and politics, as well as examinations of leading political science textbooks … [with] [e]ach review provid[ing] in-depth evaluation without a narrow, over-specialized focus." (The journal is now based at the Center for the Study of Liberal Democracy at the University of Wisconsin, Madison) (https://politicalsciencereviewer.wisc.edu/index.php/psr). See Bruce Bartlett et al., "Farewell to a Constitutional Conservative," *The American Conservative* (June 27, 2013); Bruce Frohnen and Kenneth Grasso, editors, *Defending the Republic: Constitutional Morality in a Time of Crisis: Essays in Honor of George W. Carey*, 2nd ed. (Wilmington, DE: ISI Books, 2008).

[13] Carey, "The Supreme Court, Judicial Review, and Federalist Seventy-Eight," 358.

original work. Nevertheless, the interpretation must be in reasonable accord with the basic principles of the constitution. Otherwise, this 'organic law' is left without significance and the political form of the organism created is undermined."[14] For his part, writing in the early 1960s, *U.S. News and World Report* founder David Lawrence (1888–1973), who wrote extensively on constitutional issues over the course of his long and influential career, emphasized textualism, condemning the development (under FDR) of "a cult which believes that the 'spirit' of the Constitution is more important than the letter of the document." Lawrence called this "the doctrine of Machiavelli – that 'the end justifies the means.'"[15]

CONSERVATISM'S LIVING ORIGINALISMS

In this open and undisciplined period on the American Right, professions of originalism were supplemented by an array of what, by contemporary conservative standards, are rather flexible – one might even (following Jack Balkin) say "living" – originalisms.[16] A few, at least, writing in even the most traditionalist conservative journals like *Modern Age*, expressed outright hostility to originalist presumptions, occasioning little discernible backlash or controversy. One *Modern Age* writer, for instance, asked, "Who defends today the historic Constitution, now an archaic document, which in its historical form is dead" before moving on to more serious issues.[17] The linguist Mario Pei opined in the same forum that "[t]he American Constitution is probably the best document of its kind in existence. But history marches on. Issues and problems face us which the original framers could not even conceive of."[18] Pei criticized constitution worship, writing that "[t]he machinery of government itself is cumbersome, and far better suited to the eighteenth than to the twentieth century. Are we convinced that we have the best possible method of electing a President? Of apportioning representation? Of selecting Supreme Court justices and Cabinet members? Is no improvement possible in our system of multiple and multiplying taxation?" He complained that "it somehow has never seemed desirable to go over the Constitution as a whole, and bring it into line with present-day conditions and problems." Pei issued a call to put these issues back into the hands of the deliberative sovereign people

[14] Felix Morley, *Freedom and Federalism* (Chicago: Henry Regnery, 1959), 229.
[15] David Lawrence, "Downgrading the Constitution," *US News and World Report* (December 17, 1962): 104.
[16] Jack Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2014).
[17] Francis Wilson, "The Supreme Court's Civil Theology," *Modern Age* 13:3 (Summer 1969): 254.
[18] Mario Pei, "The Case for a Constitutional Convention," *Modern Age* 12:1 (Winter 1967/1968), 8–13. Pei, a Columbia University professor and renowned linguist, was the author of *The America We Lost: The Concerns of a Conservative* (New York: World Publishing Co., 1968). A staunch conservative, he was also, incongruously within contemporary conservatism, an internationalist who led the fight for the worldwide adoption of Esperanto.

once again in a new constitutional convention that would undertake a wholesale revision of the Constitution.[19] Pei had some specific revisions in mind. He thought it worthwhile for Americans to ask themselves in this new convention whether, in the modern world, the constitutional "right to life" might be properly understood to entail a right to "essential services in a modern mechanized world, such as light, heat, telephone, water, garbage disposal, the willful interruption of which endangers [their] life and health?" "It is high time," Pei insisted, "that the purely human rights of life, liberty, and property receive, along constitutional lines, the same careful scrutiny and definition that civil rights have been receiving in recent times."[20]

To the extent he was an originalist, perhaps the most widely published conservative commentator on constitutional issues of the period, James Jackson Kilpatrick (1920–2010), the *Richmond* [Virginia] *News Leader* editor who covered the Supreme Court and constitutional issues for *National Review*, evinced at least a healthy suspicion of some of the shibboleths later associated with the stance. Writing in the late 1960s, Kilpatrick – no moderate on the Warren Court or the Constitution – insisted that "[t]his seance theory, which treats Supreme Court Justices as table-knocking mediums, speaking in trance through the spirits of the founding fathers, is a theory of convenience. It is hokum." Alas, he concluded, "[c]onstitutionality is like beauty: it lies in the beholder's eye; and when the beholder sits in one of those nine great swivel chairs, the eye sees what it wants to see. The Constitution . . . is what the judges say it is."

That said, Kilpatrick simultaneously held that the essence of a constitution as a *genus* is that it disciplines. He admiringly noted 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." There was no opposition between this, however, in Kilpatrick's view, and at least the general idea of a living constitution:

> 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.[21]

[19] Pei believed, "Were one of our major political parties to sponsor a constitutional convention, it would mark itself in the eyes of the voters as the champion of true democracy and the will of the people." Pei, "Case for a Constitutional Convention," 9, 13. Today, similar calls tend to issue from the Left, most prominently, recently, from Sanford Levinson. Some contemporary conservatives have called in a more limited way for the passage of a set of restorative "liberty amendments." Mark Levin, *The Liberty Amendments: Restoring the American Republic* (New York: Simon and Schuster, 2013).

[20] Pei, "Case for a Constitutional Convention," 11.

[21] James Jackson Kilpatrick, "A Very Different Constitution," *National Review* (August 12, 1969): 794–800, 795–796.

Like Mario Pei, Kilpatrick was quite accepting of the idea that neither the 1787 Constitution nor the Founding more generally was either perfect or especially well adapted to modern conditions. If not insisting on a new constitutional convention, Kilpatrick at least asked that the Americans give serious consideration to Article V Amendments that could alter core provisions of both the original text and the crucial Civil War Amendments. He suggested, for instance, that "[t]he ambiguities of the welfare clause and the 14th Amendment ought to be tidied up," and that "we need a better procedure for electing Presidents."[22]

While not taking a position in favor of convening a new constitutional convention, no less a figure than Brent Bozell, William F. Buckley Jr.'s brother-in-law, orthodox-unto-ultramontane conservative Catholic, and the ghostwriter of Barry Goldwater's *The Conscience of a Conservative* (1960), adopted what might today be classed as a living constitutionalist approach – although Bozell disagreed with liberals about the results such an approach, properly applied, would and should yield in important constitutional cases.[23] Similarly, an article in the conservative *Reader's Digest* celebrating the career of Judge Learned Hand fondly alluded to Hand's view

> that the law is a living, growing instrument which must keep pace with the developing needs of society. Judges, he believes, "must be aware of the changing social tensions in every society which will disrupt it, if rigidly confined." Thus a judge must continually decide how old law is to be applied to new problems – a process that *begins* by determining the original intent of the lawmakers.[24]

Other conservatives dismissed at least an overly doctrinaire originalism as simply unworkable. The *ABA Journal* in its conservative phase (on the cusp of its campaign for the adoption of the Bricker Amendment confirming the supremacy of the Constitution to international treaties and agreements) complained editorially as follows:

> This reverence for the original architects of our Government assumes for them an infallibility that they would have been among the first to disclaim. Thought-stultifying clichés like "the wisdom of the Founding Fathers" can become dangerous because they are blind guides if slavishly followed . . . Many of the problems of the present day will be more readily solved by a careful analysis of human nature than by antiquarian research into ancient history.[25]

[22] James Jackson Kilpatrick, "Tugwell's 'Model Constitution' Just Won't Do," *Human Events* 31:4 (January 23, 1971): 18.

[23] L. Brent Bozell Jr., *The Warren Revolution: Reflections on the Consensus Society* (New Rochelle, NY: Arlington House, 1966). See Brian Flanagan, "'New Ultramontanists': Why Do Some Catholics Fear Change?" *National Catholic Reporter* (August 13, 2018) (www.ncronline.org/news/opinion/new-ultramontanists-why-do-some-catholics-fear-change).

[24] Irwin Ross, "The Legend of Learned Hand," *Reader's Digest* 59:351 (July 1951): 105–109, 107 [emphasis added].

[25] "The Dead Hand," *American Bar Association Journal* 37 (1951): 440–441, 440.

NEOCONSERVATISM – LOOKING BEYOND IDEOLOGY TO WHAT WORKS

The group that came to be known as "neoconservatives" evinced a distinctive approach to constitutional questions that reflected their unique political predispositions as chastened social scientifically inclined liberals disillusioned by the direction liberalism was taking under the auspices of the Great Society and the gravitational pull of the New Left. Genus neoconservatives were public policy intellectuals. As such, they were more inclined to distill and critique the policy initiatives undertaken by those wielding liberal constitutional theory and court rulings inspired by it than to set out any unifying, ideal interpretive theory of how the Constitution should be read. When it came to public policy, neoconservatives were staunch critics of those who let good intentions blind them to the likely real-world consequences of their programs. In his critical assessment in *Commentary* of the state of the ACLU in the early 1970s, for instance, Joseph Bishop condemned the group for engaging in moral or "aspirational" readings of the Constitution – for taking the position that "the Constitution of the United States, read with the eyes of faith, hope, and sometimes charity, mandates Good and prohibits Evil," collapsing the distinction between quasi-religious moralizing and constitutional law. Implicitly appealing to the old Progressive/New Deal commitment to judicial restraint, which drew a sharp distinction between wise policy and good law, Bishop charged the ACLU with taking an approach that "differs very little from that which the National Association of Manufacturers used to advance against the National Labor Relations Act, the Securities Acts, and the rest of the seditious innovations of the New Deal." Bishop characterized the ACLU's constitutionalism as a motley set of "evangelistic sermons."[26]

Given neoconservatives' preoccupation with public policy rather than general and abstract constitutional theory, I will discuss constitutional arguments made by them not here, but rather in my two future books on postwar constitutional conservatism that emphasize more specific substantive issues. I make one partial exception by mentioning the Straussian Martin Diamond, discussed in detail later. Although not properly classed as a neoconservative himself, Diamond published important constitutional theory essays in *The Public Interest* which, along with *Commentary*, were the flagship neoconservative journals. If, as a political philosopher, he did not write in the typical neoconservative idiom, Diamond's conclusions, at least – as

[26] Joseph Bishop, "Politics and the ACLU," *Commentary* (1971): 51–52. See also Nathan Glazer, "Is Busing Necessary?" *Commentary* (1972): 44 (noting that, in ordering busing, the Court seemed to be unconsciously or unreflectively adopting specific substantive positions on public policy outside of its institutional competence); Elliot Abrams, "The Chains of the Constitution," *Commentary* 64:6 (December 1977): 84–85.

The Public Interest's editor Irving Kristol clearly recognized[27] – fit harmoniously with the core tendencies of the movement: a sense that the new departures in governance undertaken by the Progressives and New Dealers in the first third of the twentieth century were largely compelled by that era's massive political-economic changes. These new departures, they believed, were even admirable and worth not only accepting but also celebrating. That said, as Great Society liberalism and the New Left were reworking the New Deal, their concerns mounted. The group that came to be known as neoconservative grew increasingly preoccupied with the diverse ways in which regulatory, redistributive, and administrative liberalism occasioned its own problems, especially once it became marked by oversized ambitions, including a renegade new egalitarianism. Neoconservatives were proponents of thinking realistically in light of sober human truths about how a modern American state might work – its possibilities and its limits. On a parallel track, Martin Diamond wanted the same thing for the Constitution.

ORIGINALIST STRAUSSIANS, EAST AND WEST

Modern constitutional conservatism has come to be defined by its commitment to jurisprudence of "original intent" [28] or (as refined, to the eventual agreement of almost all conservative scholars active in these debates) to "original meaning."[29] Even the most careful historical account of the origins of originalism in contemporary American law, however, makes only passing reference to the intellectual movement that most originalist conservatives in politics and intellectual life, if not the law schools, were inspired by, weaned on, and today get their information from on the meaning of the Founders' achievement: the Straussians – the students of émigré University of Chicago philosopher Leo Strauss.[30] That this body of writing has gone unnoticed in

[27] Diamond and Kristol had been friends since their New York City childhoods. Like Kristol and other first-generation neoconservatives, Diamond had started on the Left, actively: in his youth he had been a leader in the New York City Socialist Party, had been personally close to Norman Thomas, and had cut a figure as a street corner socialist orator.

[28] Portions of the text to follow, in places somewhat revised, were first published in Ken I. Kersch, "Constitutional Conservatives Remember the Progressive Era," in Stephen Skowronek, Stephen Engel, and Bruce Ackerman, editors, *The Progressives' Century: Political Reform, Constitutional Government, and the Modern America State* (New Haven: Yale University Press, 2016), and are republished here by permission of Yale University Press.

[29] See Teles, *Rise of the Conservative Movement*. See Antonin Scalia, "Originalism: The Lesser Evil," *Cincinnati Law Review* 57 (1989): 849–865.

[30] Or the students of students of Strauss. Or the students of students of students of Strauss. Or the students of students of students of students of Strauss: the teaching is passed on in what are referred to internally as "generations" of Straussians. Strauss had been hired at the University of Chicago on the basis of a single interview with Robert Maynard Hutchins, who admired his devotion to the classic texts. Beam, *Great Idea at the Time*, 193. See Jacob Heilbrunn, *They Knew They Were Right: The Rise of the Neocons* (New York: Doubleday, 2008). See,

plain sight by those writing about originalism is an artifact of disciplinary boundaries: Straussians, especially in the postwar conservative movement's ascendency, rarely wrote for legal journals or directly engaged the legal literature on constitutional interpretation (though, today, second- and third-generation Straussians sometimes do). The Straussians were, nevertheless, the modern conservative movement's chief constitutional theorists and (ersatz) historians.[31]

Straussians have a strong sense of identity, both as individuals and collectively, as philosophers questing after Truth, on the model of the ancient Greeks. In practice, however, many Straussians write as centurions zealously guarding a Truth already discovered, possessed by the spirit of righteous mission as the defenders of a Faith. They are unrelenting in their commitment to preserving it from corruption, and successfully passing it on to the rising generations (what debates do take place are almost always internal – typically between clashing proponents of the East Coast versus West Coast Straussian paradigms, or over what to outsiders may seem like arcane scholastic disagreements concerning readings of a few touchstone thinkers).[32] Although

e.g., O'Neill, *Originalism in American Law and Politics*, 192–193. O'Neill does not mention Martin Diamond, the Straussian who devoted himself relentlessly to the significance and explication of the Founding. The Leo Strauss Center at the University of Chicago has posted a large number of reminiscences by Leo Strauss's students, along with recordings of some lectures by Strauss himself (transcripts of many of Strauss's lectures are also posted) (https://leostrausscenter.uchicago.edu/).

[31] The influence here was every bit as important – indeed, much more important – than the Straussian influence on foreign policy, a subject that, in the wake of the Iraq War, has received considerably more attention. See, e.g., Anne Norton, *Leo Strauss and the Politics of American Empire* (New Haven: Yale University Press, 2004); Heilbrunn, *They Knew They Were Right*. The literature on Strauss by Straussians is voluminous. See John A. Murley, editor, *Leo Strauss and His Legacy: A Bibliography* (Lanham, MD: Lexington Books, 2005); Kenneth L. Deutsch and John A. Murley, editors, *Leo Strauss, the Straussians, and the American Regime* (Lanham, MD: Rowman and Littlefield, 1999).

[32] See Gordon Wood, "The Fundamentalists and the Constitution," *New York Review of Books* (February 18, 1988); Michael L. Frazer, "Esotericism Ancient and Modern," *Political Theory* 34 (February 2006): 33–61. Of course, Straussians also hotly dispute the implications of the label, and some reject the East Coast–West Coast distinction. For a partial but significant overview by the late founder and leader of the West Coast camp, see Harry V. Jaffa, *Crisis of the Strauss Divided: Essays on Leo Strauss and Straussianism, East and West* (Lanham, MD: Rowman and Littlefield, 2012), and one from the East Coast camp by Michael and Catherine Zuckert, *The Truth About Leo Strauss: Political Philosophy and American Democracy* (Chicago: University of Chicago Press, 2006). The East Coast School is most often associated with Allan Bloom, Martin Diamond, Walter Berns, Thomas Pangle, and Harvey Mansfield, and the West Coast [Claremont] School with Jaffa and his disciple, Charles Kesler, and – more prominent lately, as West Coast Straussianism has expanded its influence – Thomas G. West. Steven Hayward recounts key aspects of the disagreements between Jaffa (West) and Berns (East). Steven F. Hayward, *Patriotism Is Not Enough: Harry Jaffa, Walter Berns, and the Arguments that Redefined American Conservatism* (New York: Encounter Books, 2017). The Zuckerts have also posited the category of "Midwest Straussians." For a critical but perceptive account of Strauss and his relationship to American politics from a different conservative perspective, see

some Straussians are temperamentally more relaxed and most vehemently deny hewing to any orthodoxy, many are quick to sniff out heresy and to identify and isolate the ostensibly mistaken philosophical move that has walked the individual or nation – if not civilization itself – to the precipice of a chasm, and cataclysm: they are trained on fixing the moment of corruption, of the fatal philosophical error. Straussians are perpetually rallying for restoration of founding principles – of Western civilization, of the US constitutional republic, or if they hold the two compatible (as they as a group have tended to do in more recent years) both. Their thought embodies and promotes the conservative virtues of reverence, loyalty, piety, and restraint and takes the American constitutional tradition – the American regime – rightly understood, as the embodiment of these virtues.[33]

A core conviction of Straussians, which meshes nicely, albeit incompletely, with orthodox, conservative Roman Catholicism and the natural moral order traditionalism of the likes of Russell Kirk, is that a transcendent Truth is out there, known, and accessible to the disciplined and well-trained mind, mostly in classical works of ancient political thought ("Athens," in the Straussian nomenclature) – but also, to a significant extent, in revealed religion ("Jerusalem") (the extent to which it resides in one or the other, or in what proportion in each, and how, are perpetual subjects of Straussian debate, and even bitter contention). Students are trained to love it, seek it, know it, and promulgate it. As such, the school emphatically rejects and wars against Leo Strauss's *bêtes noires*: historicism, relativism, and secularism, emphasizing instead the eternal, unchanging "human nature," authority, sanctity, and piety. Whether or not the movement's philosophers are theists (and rumor has it that many are not), their outlook is, as William James would recognize, essentially religious. The flip side of worshipping the wisdom of the ancients was a fixation on heresy, corruption, decline, with a healthy dose of panic over possibility of contamination.[34]

Paul Gottfried, *Leo Strauss and the Conservative Movement in America* (New York: Cambridge University Press, 2012).

[33] See Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon, 2012). As Hayward put it, "Jaffa and Berns and their allied camps that seem abstract or remote on the surface are connected to a serious question, perhaps the most serious political question of this or any time: What kind of country is America?" Hayward, *Patriotism Is Not Enough*, 3.

[34] William James, *The Varieties of Religious Experience: A Study in Human Nature* (New York: Modern Library, 2002) [originally published 1902]. Hayward dedicates his recent book on Jaffa and Berns to C. S. Lewis and introduces the book with an epigraph from a letter from Lewis to a Catholic priest praising Saint Thomas More and William Tyndale for "the depth of their faith" and humbly leaving their disagreements "to the judgment of God." Hayward, *Patriotism Is Not Enough*, v. Although prominent and influential, Straussianism was far from the consensus outlook within the broader conservative intellectual movement during the movement's ascendency. As will be explicated later in this chapter, it was for a long time sharply criticized by neoconfederates (see, e.g., M. E. Bradford, "The Heresy of Equality: Bradford Replies to Jaffa,"

Leo Strauss himself did not write about the US Constitution: he was focused on the great texts of ancient and modern political philosophy. But one of his trademarks was the injunction that students read a text as the author intended it to be read – which, of course, is highly congenial to, if not consonant with, originalism as an interpretive method.[35] Strauss, moreover, was a strong defender of the value and importance of a "public orthodoxy," which, in the US context especially, is conducive to Constitution worship.[36]

The Strauss phenomenon arose in part out of the Great Books movement that Robert Maynard Hutchins had initiated at the University of Chicago, with the philosopher Mortimer Adler as perhaps the movement's most well-known public face, until the political philosopher Allan Bloom assumed the role following the publication of his exposé of American higher education's abandonment of the Great Books (and thus the pursuit of the highest moral and philosophical ideals) in *The Closing of the American Mind* (1987).[37]

Modern Age 20 (1976): 62; M. E. Bradford, "A Firebell in the Night: The Southern Conservative View," *Modern Age* 17 (Winter 1973): 9), positivistic social scientists later associated with neoconservatism (see, e.g., Stanley Rothman, "The Revival of Classical Political Philosophy: A Critique," *American Political Science Review* 56:2 (June 1962): 341–352), and libertarians (see, e.g., C. Bradley Thompson and Yaron Brook, *Neoconservatism: Obituary for An Idea* (London: Routledge, 2010)). On contamination and disgust, see Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (London: Penguin Books, 1966); William Ian Miller, *The Anatomy of Disgust* (Cambridge, MA: Harvard University Press, 1997); Barrington Moore Jr., *Moral Purity and Persecution in History* (Princeton: Princeton University Press, 2000); Martha Nussbaum, *Hiding From Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2006). On the focus on corruption and decline in republican thought, see Niccolo Machiavelli, "The Discourses" (c. 1517), in Niccolo Machiavelli, *The Prince and the Discourses* (New York: Modern Library, 1950), First Book, Chs. XVII–XVIII; Third Book, Ch. I ("To Insure a Long Existence to Religious Sects or Republics, It is Necessary Frequently to Bring Them Back to Their Original Principles"), Ch. VI; J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967). The turn to visceral social issues involving the body in US politics – the culture wars –joined the republican with the Victorian, and its attendant bodily revulsions.

[35] See Jeffrey Hart, *The Making of the American Conservative Mind: National Review and Its Times* (Wilmington, DE: ISI Books, 2005), 30.

[36] Hart, *Making of the American Conservative Mind*, 85. The key word here is "public." As philosophers and profound admirers of Socrates and the Athenian philosophic tradition, they are not supposed to submit to any orthodoxy in their philosophic investigations. As *political* philosophers, of course, they recognize the dangers to the polity of the public questioning of the Gods of the City. These matters, within Straussian thought, are complex, and related to Strauss's theory of "esoteric" writing by philosophers, who, it is said, are often pushed to conceal their (dangerous) thought between the lines of their texts. On Constitution worship, historically, on the Right, see Aziz Rana, "Progressivism and the Disenchanted Constitution," in Stephen Skowronek, Stephen Engel, and Bruce Ackerman, editors, *The Progressives' Century: Political Reform, Constitutional Government, and the Modern American State* (New Haven: Yale University Press, 2016).

[37] Allan Bloom, *The Closing of the American Mind* (New York: Simon and Schuster, 1987).

Adler's Great Books movement was part of the mid-century "masscult" (mass culture) phenomenon. But the Jewish-German exile Strauss's writings reflect the author's confrontation with the rise of Nazism in his own country, which he sought to diagnose and answer through philosophy – passionately searching for the philosophical equivalent of Chamberlain's capitulation at Munich. Strauss and his compatriots transformed this search and would-be diagnosis into a rarified, recondite elite movement of (usually) conservative political philosophers.[38] This entailed a certain irony, as neither of the initial great books champions Robert Maynard Hutchins nor Mortimer Adler was a conservative (Hutchins even ended his days as a champion of world federalism).[39] When a mischievous William F. Buckley Jr. goaded his *Firing Line* guest Adler in the 1980s by throwing the phenomenal sales figures at him for Bloom's *The Closing of the American Mind*, Adler punched back:

> [Bloom] and his master, Leo Strauss, teach the Great Books as if they were teaching the truth. But when I teach them, I want to understand the errors . . . They indoctrinate their students . . . Strauss reads Plato and Aristotle as if it was all true, i.e. women are inferior, and some men are destined to be slaves.[40]

When it comes the United States and its constitutional republic, much contemporary Straussian work is celebratory, if not hagiographic. In the postwar period, however, the Straussians worked their way toward patriotism. Straussianism's initial position was that the highest achievements in political philosophy were in the ancient world – Greece and (to a lesser extent) Rome. Modernity, including liberal modernity, was, in many important ways, a falling off. The United States, as such, far from amounting to an apotheosis, posed a problem. Drawing upon close readings of ancient political thought (mostly Greek) and of the moderns who had (problematically, in his view) set out in new directions, Strauss challenged the historicism, nihilism, relativism, and faith in progress rampant in the West and called for a return to the study of the eternal, transcendent truths of nature and natural right. Despite not writing about the Constitution – and reportedly voting for Adlai Stevenson (though some close to Strauss say that he also, later, expressed admiration for Barry Goldwater) – Strauss's writings became a foundation for new departures in conservative constitutional theory. In *Thoughts on Machiavelli* and *What Is Political Philosophy?* Strauss taught how important

[38] One would have only the barest inkling of the conservatism among Straussians from listening to the interviews with Straussians, and the lectures of Strauss himself, posted on the website of the University of Chicago's Leo Strauss Center, where the teaching(s) are presented as simple common sense: read important works of political philosophy, read closely and carefully, be skeptical, perpetually question, asking 'is this true'?, consider the political dangers surrounding the writers of the texts, and be open to the possibility that the writer was not able to openly say what was truly on his mind, and value serious discussion, debate, and friendship.

[39] Beam, *Great Idea at the Time*, 127, 192.

[40] Quoted in Beam, *Great Idea at the Time*, 128–129.

it was to have "a universal confrontation with the text." This approach proved adaptable to a consideration of the American political and constitutional system of government – or, as the Straussians would have it, the US political and constitutional "regime."[41]

No conservative scholar in the twentieth century was more influential in insisting upon the significance of the Founding for constitutional understanding than the socialist-turned-Straussian Martin Diamond. Diamond was the first of Strauss's students to focus not on traditional political philosophy but on American political thought – specifically, the Founding. Writing in the long shadow of, and in response to, the progressive critique of the Founding by Charles Beard and others, Diamond celebrated the Founders for their genius in arriving at an effective solution to the dilemmas of democratic government in the modern world.[42] By the 1950s, others besides Diamond had also begun to attack the Beardian account of the Founding. But Diamond uniquely insisted that that American Founding provided a "useable past . . . available to us for the study of modern problems."[43]

In this project, Diamond joined a small cohort of early Cold War historians striving to unseat the then-dominant Progressive critique of the Founders' (allegedly) disfiguring elitism and mistrust of democracy.[44] Diamond insisted that the Founders remained "necessary," carrying "both the authority of the founding and a wisdom . . . [un]surpassed within the American tradition." Catherine and Michael Zuckert – who have called Diamond's achievement the "rough equivalent to Strauss's rediscovery of the ancients" – praised Diamond's insistence that the Founding was "a beginning that must be re-won in the face of progressivist prejudices that steadfastly reject the beginning as superseded."[45]

[41] Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953). See also John Marini, "Progressivism, Modern Political Science, and the Transformation of American Constitutionalism," in John Marini and Ken Masugi, editors, *The Progressive Revolution in Politics and Political Science: Transforming the American Regime* (Lanham, MD: Rowman and Littlefield, 2005), 235–243. The one area in which Strauss's conservatism seemed most obvious to students – and it rarely did – was in his hostility to communism and the Soviet Union: Strauss was a staunch Cold Warrior. In context, however, this would not distinguish him from his era's Cold War liberals.

[42] Zuckert and Zuckert, *Truth About Leo Strauss*, 209–217. I draw on the Zuckerts' account in what follows, *Truth About Leo Strauss*, 214–215.

[43] Zuckert and Zuckert, *Truth About Leo Strauss*, 215.

[44] Douglass Adair, *Fame and the Founding Fathers* (New York: W. W. Norton, 1974) (Trevor Colbourn, editor)[essays from 1940s/1950s]; Robert E. Brown, *Charles Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution"* (Princeton: Princeton University Press, 1956); Forrest McDonald, *We the People: The Economic Origins of the Constitution* (Chicago: University of Chicago Press, 1958). See Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913).

[45] Zuckert and Zuckert, *Truth About Leo Strauss*, 209–221.

Diamond devoted his career to both explaining why Americans needed the Founders now, and how to get them right. He sympathized with Henry Cabot Lodge Sr.'s 1911 lament of the decline in what Diamond described as the once "universally held . . . conviction . . . by Americans of the original and continuing excellence of their Constitution." Like Lodge, Diamond held the Progressives responsible. "The conventional wisdom of those who give academic and intellectual opinion to the nation" had been formed by Charles Beard's contention that the Constitution was "the handiwork of a reactionary oligarchy" and by Populist and Progressive demands that the Constitution be democratized.[46] This fostered a fundamental misunderstanding of the relationship the Founders had struck between democracy and liberty and fomented a succession of misguided attempts at reform in democracy's name. Since the Progressive view of the Founding was "false in both history and political philosophy," Diamond called for a "renewed appreciation of our fundamental institutions and rededication to their perpetuation."[47]

The Progressives held that the Revolution's democratic spirit – as affirmed in the Declaration of Independence – had been snuffed out by the Founders in the Constitution, and in the rationalizations provided in *The Federalist*. Diamond, by contrast, treated the Declaration as a statement of Lockean contractualism, "neutral with regard to the democratic form," holding only that the people had the right to chose their own form of government. Diamond taught that "[s]ix writings tell nearly the whole story": "The Declaration of Independence, the Articles of Confederation, the proceedings of the Federal Convention, the Constitution, *The Federalist*, and the anti-Federalist essays." Diamond's understanding of American constitutionalism had a clear architecture. *The Federalist* he pronounced "the brilliant and authoritative exposition of the meaning and intention of the Constitution. The anti-Federalist essays are the thoughtful defense of the political tradition the Constitution was displacing." Diamond's description of the Founding put Founding Era disagreements at its center. "[T]he framers were not themselves unanimous regarding the actual character of the document they framed," he noted, "[f]urther, the Constitution was ratified on the basis of many understandings." He proudly noted, "there have been two centuries of amendment, interpretation, and the sheer working of great events and massive changes in our way of life. All these things," Diamond insisted, "must be taken into account in an understanding of what the Constitution was and is."[48]

In Diamond's systematic reading, the Constitution was designed to form a popular government that would sagely correct for democracy's well-known

[46] Martin Diamond, "The Declaration and the Constitution: Liberty, Democracy, and the Founders," *The Public Interest* 41 (Fall 1975): 39–55, 39, 40, 42–45.
[47] Diamond, "Declaration and the Constitution," 45.
[48] Martin Diamond, "What the Framers Meant by Federalism," in Robert Goldwin, editor, *A Nation of States* (Chicago: Rand McNally, 1963), 25–26, 42.

deficiencies (like the tyranny of the majority) by protecting the legitimate (low, modern) ends of government – security, "the pursuit of happiness," and the protection of rights. It was in this specific sense that the Founders were friends of democracy, an argument Diamond dilated on in a career-long exegesis of *The Federalist*.[49]

Unlike later Straussian constitutionalists (to say nothing of contemporary law school originalists), Diamond, who published in neoconservative outlets and was generally supportive of the New Deal and modern welfare state, threw a spotlight on Founding Era disagreements. Diamond venerated the Founders, but notably, he did not insist that we were strictly obliged to abide by their understandings. "With us the Founding Fathers have great authority," he explained in 1963:

> The Constitution they framed is our fundamental legal document. The worthiness of their work has rightly earned from us a profound respect for their political wisdom. [They thus] have for us the combined authority of law and wisdom ... But to pay our respect to that authority – *to know how to obey intelligently or, sometimes, when and how to differ intelligently* – we must know precisely what their Constitution meant and the political thought of which it is the legal expression. "What you have inherited from your fathers/You must first learn to make your own." Ours is such a patrimony that its possession requires constant recovery by careful study.[50]

Diamond lectured the liberals and conservatives alike of the time he was writing for, while professing Madisonianism, "fundamentally misconstru[ing]" the Constitution's nature by misreading a crucial portion of Federalist 51: "A *dependence on the people* is ... the primary control on the government; but experience has taught mankind the necessity of *auxiliary precautions*." The liberals of his time, he observed, favored the people over the precautions, and his era's conservatives "ambiguously accept[ed] the 'dependence' but ... vastly esteem[ed] 'auxiliary precautions.'"[51] Diamond believed they had both misunderstood Madison. Diamond argued that Madison had conceived of these two elements not as forcing a choice but rather as comprising a coherent whole entailing "the fundamental compatibility of the Constitution's restraining devices with a system of majority rule." While Diamond granted that the early twentieth-century Progressives were "understandably outraged by late-nineteenth century scholarship and statesmanship that tended to convert the Constitution into a fixed and immutable code enshrining liberty of contract," he argued nevertheless that they were mistaken in holding the Constitution to be fundamentally undemocratic, an error that was repeated by later liberals and conservatives alike. But this was little more than political

[49] Zuckert and Zuckert, *Truth About Leo Strauss*, 211–212.
[50] Diamond, "What the Framers Meant by Federalism," 25 [emphasis added].
[51] Diamond, "Liberals, Conservatives," 96–97 [emphasis in original].

gamesmanship. What liberals really objected to, Diamond observed, was "the character of the majorities that result from the constitutionally generated process of majority coalition." "The real complaint is that majorities simply do not act as Liberals want them to act" – in a way that would transform the human condition.[52] "The majorities generated by the constitutional system," that is, "reject or insufficiently accept the substantive politics and goals of Liberalism"; he held this to be the "Liberal's deepest ... [a]nd ... most accurate charge."[53]

Under the circumstances, liberals thus came to see programmatic political parties as their great hope: "To achieve this transformation, [the liberal] seeks the right kind of constitutional institutions to produce the right kind of party to produce the right kind of majority." Conservatives answered by anathematizing parties as constitutional corruptions. As such, Diamond concluded, "the Liberal dislikes the Constitution for what ... are correct reasons. The Conservative likes the Constitution for what ... are wrong reasons ... [making] the Liberal ... the intelligent foe of the Constitution and the Conservative its foolish partisan ... Given the dominance of either the Constitution would perish."[54]

Diamond found in Madison an altogether different and more congenial constitutional design.[55] "[F]or the founding generation," Diamond declared in another important *Public Interest* article, "it was liberty that was the comprehensive good, the end against which political things had to be measured; and democracy was only a form of government which, like any other form of government, had to prove itself adequately instrumental to the securing of liberty." The evidence for this reading was to be found, plainly, in both *The Federalist Papers* and in the Declaration of Independence's opening paragraph, which, Diamond declared, "does not mean by 'equal' anything at all like the general human equality which so many now make their political standard," but rather "equal political liberty."[56]

Progressives and liberals were certainly correct to say that the Framers were sharp critics of democracy. But these criticisms had to be contextualized: "The American Founders, like all sensible men before them, regarded *every* form of government as problematic, in the sense of having a peculiar liability to corruption, and they accepted the necessity to cope with the problematics peculiar to their *own* form of government." "*Of course*, the Founders criticized the defects and dangers of democracy," Diamond riposted, "and did not waste much breath on the defects and dangers of the other forms of government. For ... [t]hey were not founding any other kind of government;

[52] Diamond, "Liberals, Conservatives," 97–98, 106–108.
[53] Diamond, "Liberals, Conservatives," 97–98, 106–108.
[54] Diamond, "Liberals, Conservatives," 109.
[55] Diamond, "What the Framers Meant by Federalism," 47–49.
[56] Diamond, "Declaration and the Constitution," 47–49.

they were establishing a democratic form, and it was the dangers peculiar to it against which all their efforts had to be bent."[57]

Diamond criticized the early twentieth-century Progressives (and their liberal successors) for demanding "imprudent democratizing reforms" occasioning potentially serious threats to liberty. Making matters worse, in the 1960s and 1970s liberals launched yet another assault on the Founders' Constitution – "a vast inflation of the idea of equality, a conversion of the [Declaration's] idea of equal political liberty into an ideology." This "demand for equality in every aspect of human life ... [amounting to] a kind of absolutization of a single principle," when conjoined with the "absolutization of the democratic form of government understood as the vehicle for that complete equality" amounted to a systematic critique of the Founders' entire regime:[58] "This is a different posture toward democracy ... than that embodied in the American founding." Diamond wrote in opposition to those who would "[deny] democratic credentials to the traditional American posture toward democracy and thereby [tilt] the scales in favor of egalitarian claims against the present constitutional order." The country's bicentennial was a time for restoration.[59]

Instead of focusing on constitutional institutions and structures like the East Coast Straussian Martin Diamond, a different variety of Straussianism, most prominently conveyed in the "teaching" of Claremont McKenna College's Harry V. Jaffa, focused intently on rights: Jaffa held the commitment to the equality of natural rights as set out in the opening of the Declaration of Independence – and as reaffirmed by Abraham Lincoln's Gettysburg Address (1863) – to be the keystone of American constitutionalism.[60] Although a necessary compromise, the country's acceptance of the reality of chattel

[57] Diamond, "What the Framers Meant by Federalism," 51–52 [emphasis in original].

[58] Diamond, "What the Framers Meant by Federalism," 55.

[59] Diamond, "Declaration and the Constitution," 55. Diamond's originalism as outlined here, it is worth noting, was different from the legalist originalism being forged at about the same time by law professors Robert Bork and Raoul Berger. Preoccupied with matters of design, structure, and principle, Straussians said relatively little about judicial review and how it should be exercised. The law professors, by contrast, were focused primarily on remedying the "problem" of (Warren Court) judicial activism. Far from repudiating Progressivism, the law professors' strategy was to appropriate progressivism's majoritarianism – its conceptualization of judicial review as "countermajoritarian," its suspicion of a politicized judiciary, its call for judicial restraint, and its attack on "Lochnerism" – to indict Warren-era liberals for hypocrisy. See David E. Bernstein, "The Progressive Origins of Conservative Hostility to *Lochner v. New York*," in Johnathan O'Neill and Joseph Postell, editors, *Toward an American Conservatism: Constitutional Conservatism During the Progressive Era* (New York: Palgrave Macmillan, 2013).

[60] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." Declaration of Independence (July 4, 1776); "Fourscore and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." Abraham Lincoln, Gettysburg Address (1863), in Kramnick and Lowi, eds., *American Political Thought*, 683.

slavery at its Founding involved a terrible and tragic betrayal of the nation's foundational commitment to the equality of natural rights. In time, though, this commitment was redeemed by Lincoln's actions and thought, which redirected the nation to this constitutive proposition. As such, this variety of redemptive West Coast Straussianism is heavily focused on the Declaration and Lincoln – and the infinite number of ways in which their principles and teachings have been, and continue to be, ignored, flouted, or corrupted. In the annals of the Supreme Court, Exhibit A in this regard is Chief Justice Roger Taney's opinion in *Dred Scott* v. *Sandford* (1857).[61]

Devotees of this redemptive form of Straussianism have often moved promiscuously between claims to natural right and natural law (and a variety of understandings of each), preoccupied more with the alleged "relativism," positivism, rejection of God, denial of eternal Truths (including about human nature), and the teachings of revealed religion by their secular liberal antagonists (if not sworn enemies). Too much clarity about definitions on their own side of the great divide, the movement tacitly recognized, at least in its earlier stages, would have the unfortunate effect of spotlighting intellectual divisions within the conservative movement – such as by pitting classical liberal Lockeans (natural rights) against partisans of Roman Catholic theology (Thomistic natural law). In recent years, much of the intellectual work on the Right (including constitutional theory) has been aimed at tilling as much common ground here as possible, to underline that the Lockeans, Evangelicals, Fundamentalists, and right-wing Catholics and LDS/Mormons (and even a few, usually Orthodox, Jews) have much more in common with one another in fundamental ways than they do with (ostensibly) secular liberals ("progressives") – and that everything is at stake in the alliance of one side against the other.[62]

It should be noted that appeals to natural law on the Right were not confined to Straussians. They could come in the guise of appeals to Catholic natural law teaching, Enlightenment understandings of the "laws of nature," (Judeo-) Christian traditionalism, or some unspecified admixture of any or all of these. In a classic article in *The Public Interest* on the use of social science by the courts, the neoconservative Democratic New York Senator Daniel Patrick Moynihan defended such appeals in explaining the limitations of the understanding of law as a science propounded by the early twentieth-century

[61] See, e.g., Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, DC: Regnery Gateway, 1994); Harry V. Jaffa, *Storm Over the Constitution* (Lanham, MD: Lexington Books, 1994).

[62] In recent years, as this alliance has solidified, West Coast Straussian scholarship has revisited the question of the relationship between natural right and natural law and, in an integrative spirit, sought to refine its understandings of the nature of the relationship. See, e.g., Thomas G. West, *The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Conditions of Freedom* (New York: Cambridge University Press, 2017). See generally, Strauss, *Natural Right and History*.

"progressive realists." Moynihan "wonder[ed] at the legal realists' seeming perception of 'natural law' as pre-scientific." The idea of natural law, he explained, was perfectly consistent with science – as anyone who had studied the American Founding would recognize. Indeed, Moynihan attested, it was only through a commitment to natural law in some sense that Americans could arrive at a bedrock commitment to liberty. Moynihan praised Martin Diamond for reminding us that "the framers' respect for human rights, which constituted liberty as they understood it, was not an idiosyncratic 'value' of a remote culture but rather *the* primary political good, of whose goodness any intelligent man would convince himself if he knew enough history, philosophy, and science." Moynihan stood opposed to any suggestion that science, morals, and religion – and America's commitments to foundational freedoms – were antagonists.[63]

Joining Martin Diamond in the East Coast Straussian cohort writing about constitutional matters was Harry Jaffa's antagonist Walter Berns, another student of Strauss's from the University of Chicago. Where Diamond affirmatively set out his reading of how the Constitution was designed to work as a system and Jaffa insisted on professions of a redeeming Faith, Berns wrote extensively (and critically) on constitutional law as expounded by the contemporaneous Supreme Court: his first scholarly article was a critique of the Court's notorious eugenics decision *Buck* v. *Bell* (1927), and his first book, *Freedom, Virtue, and the First Amendment* (1957), was a critical survey of the Court's modern free speech jurisprudence.[64] While Berns's earlier work tended to advocate for jurisprudential statesmanship by virtuous judges who rightly understood the grounding of the US constitutional order as according with a substantive conception of the good, as the activist, egalitarian Warren Court took flight Berns pivoted. He increasingly downplayed his natural law/natural rights approach and became increasingly positivistic – if not in his political philosophy more generally, then at least as concerned the role of the judge.[65]

A MAJOR CONSTITUTIONAL THEORY DEBATE ON THE RIGHT: LOW BUT SOLID STRUCTURALISTS VERSUS REDEMPTIVE MORALISTS

One major axis of conservative movement constitutional debate between the 1950s and the mid-1970s publicly staged for an attentive, educated mass public through articles in conservative magazines like *National Review* was between

[63] Daniel Patrick Moynihan, "Social Science and the Courts," *The Public Interest* 54 (Winter 1979): 12–31, 13 [emphasis in original].

[64] Walter Berns, "*Buck v. Bell*: Due Process of Law?" *Western Political Quarterly* 6 (December 1953): 762–775; Walter Berns, *Freedom, Virtue, and the First Amendment* (Baton Rouge: Louisiana State University Press, 1957). See also Walter Berns, "Oliver Wendell Holmes, Jr.," in Morton Frisch and Richard Stevens, editors, *American Political Thought: The Philosophic Dimension of American Statesmanship* (New York: Charles Scribners Sons, 1971). See also Zuckert and Zuckert, *Truth About Leo Strauss*, 216.

[65] Hayward, *Patriotism Is Not Enough*, 154–158.

"deliberate sense" structuralists like Willmoore Kendall and Martin Diamond and redemptive (critics said "messianic") West Coast moralists like Harry Jaffa – and their various surrogates and partisans. None of these figures was a legal academic; all were political scientists 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 order and thought.

The maverick Yale political scientist Willmoore Kendall (1909–1967), one of the postwar Right's most brilliant political and constitutional theorists, was a man who enthralled, or appalled, nearly all who encountered him.[66] Like Harry Jaffa, Kendall referred to his own works as setting out not a "philosophy" or an "ideology," but rather simply as his "teaching."[67]

Like G. K. Chesterton, Kendall was a contrarian proponent of orthodoxy, which he defended not just in fact, but (in the *American Political Science Review* and elsewhere) theoretically as being of unique value in personal and political life.[68] Kendall's constitutional theory was derived from a close reading of the

[66] 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, "On the Horizon: Scrambled Eggheads on the Right," *Commentary* (April 1, 1956). A more endearing portrait was drawn by Saul Bellow in "Mosby's Memoirs," where the title character Willis Mosby is based on Kendall. Saul Bellow, *Collected Stories* (New York: Viking, 2001), 355–373 [originally published in *The New Yorker* (July 20, 1968)]. See also George Nash, "The Place of Willmoore Kendall in American Conservatism," in *Reappraising the Right* (Wilmington, DE: ISI Books, 2009), 60–71. Kendall inspired Yale to take the rare, if not unprecedented, step of buying out his tenure contract to get rid of him (Kendall decamped to the rabidly orthodox Roman Catholic University of Dallas). While still at Yale, Kendall mesmerized William F. Buckley Jr. (Buckley and the Reagan, George H. W. Bush, and George W. Bush national security and intelligence official and diplomat John Negroponte were allegedly the only students ever to receive an "A" in a Kendall course). *National Review* editor and Dartmouth English professor Jeffrey Hart, another Kendall devotee, even reported that one can trace the origins of Buckley's famous enunciations and inflections (part Southern, part-Anglophilic) to the speaking style of the Oklahoma born-and-raised/Oxford-educated Kendall.

[67] Hoplin and Robinson, *Funding Fathers*, 64; Hart, *Making of the American Conservative Mind*, 163, 166 See also Jeffrey Hart, "Two Paths Home: Kendall and Oakeshott," *Triumph* 2:10 (October 1967): 28–34 (observing that "Both [Kendall] and [the conservative English political philosopher Michael] Oakeshott . . . are reflecting upon *constitutions*, getting at the roots of their respective political systems" [emphasis in original].

[68] Willmoore Kendall, "The 'Open Society' and its Fallacies," *American Political Science Review* 54:4 (December 1960): 972–979. G. K. Chesterton, *Orthodoxy* (New York: Dodd, Mead, and Co., 1908). Kendall was an outspoken defender of Wisconsin Senator Joseph McCarthy, and McCarthyism. See Willmoore Kendall, "McCarthyism: The Pons Asinorum of American Conservatism," in his *The Conservative Affirmation* (Chicago: Henry Regnery Co., 1963) (defining the central question as "are we or are we not going to permit the emergence, within our midst, of totalitarian movements?"). Kendall argued that "a vital democratic society has two functions, one is inclusive – *bring in the new ideas*, assimilate them. The other is exclusive, reject *unassimilable ideas*" [Italics in original]. Kendall defended only McCarthy's initiatives against *actual* communists and subversives, not unsubstantiated slanders and false prosecutions. See also Kendall student William F. Buckley Jr.'s *McCarthy and His Enemies: The Record and Its*

constitutional text, the American national experience (that is, US heritage and traditions), and (commonsense) political theory.[69] As Kendall understood it, the critical feature of the US Constitution was its foundation in popular sovereignty, as set out in the document's Preamble: the American constitutional order set out a framework of government designed to institute and implement as fundamental law the "deliberate sense" of the American people.[70]

Kendall wrote most extensively about the Constitution during the Warren Court's heyday and, as one would predict, he was no fan of its constitutional understandings. One thing the Court and the contemporaneous American liberals who supported it were getting wrong, in his view, was to overemphasize the role of both rights and (plebiscitary) direct democracy in the constitutional framework, thus seriously distorting the constitutional system.[71] Kendall took the Constitution's Preamble very seriously: he considered the rest of the text that followed a set of mechanisms for achieving the six co-equal goals it lists. But he recognized that the priority accorded to each of these six goals relative to the others would be different at different times. Which would take precedence at a particular time would depend on the deliberate sense of the people, as distilled through the appropriate constitutional forms, which were conducive to serious deliberation.[72] Kendall considered these goals to be the basic "symbols" of American politics (a label he adopted from the political theorist Eric Voegelin). They assumed the august status of symbols because they were "rooted in order of being, of permanent actuality," the portal through which we access and apprehend eternal Truth. For this reason, Kendall considered the American Constitution a sacred text, "perhaps touched by the divine." The high responsibility of subsequent generations of Americans was to preserve this legacy, and live well under it.[73]

Meaning (Chicago: Henry Regnery Co., 1954) (with L. Brent Bozell, Jr.) and Buckley's later novel *The Redhunter: A Novel Based on the Life of Joe McCarthy* (Boston: Little, Brown and Co., 1990), in which Kendall appears as a character.

[69] Hart, *Making of the American Conservative Mind*, 37.

[70] John A. Murley and John A. Alvis, editors, *Willmoore Kendall: Maverick of American Conservatives* (Lanham, MD: Lexington Books, 2002) (foreword by William F. Buckley Jr.). Kendall took the phrase from Federalists 71 and 63: "The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests." (Federalist 71 (Alexander Hamilton)); "Such an institution [the Senate] may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail." (Federalist 63 (Alexander Hamilton or James Madison)).

[71] Hart, *Making of the American Conservative Mind*, 38.

[72] Hart, *Making of the American Conservative Mind*, 167.

[73] Hart, *Making of the American Conservative Mind*, 168–169. Willmoore Kendall and George W. Carey, *The Basic Symbols of The American Political Tradition* (Baton Rouge: Louisiana

Although extensively published in his own right, Kendall's constitutional understandings gained a wider audience through the Dartmouth College English professor and *National Review* editor Jeffrey Hart (b. 1930), who adopted Kendall's understandings in his own journalistic writings on the Constitution and constitutional disputes in *National Review, Human Events*, and other popular movement outlets. Hart elaborated Kendall's theory, explaining that, in a Constitution designed structurally to implement the deliberate sense of the people, Congress was properly understood as the system's preeminent branch. There were two basic ways to frustrate this design: to overdevelop the powers of either of the other two rival branches, the (Article I) president or the (Article III) courts. Modern liberals achieved their policy objectives by doing precisely this, which amounted to imposing their views against the deliberate sense of the American people.

This led to predictable corruptions. "We thus have had the myth of the 'great' Presidents," Hart explained:

> Washington, Jefferson, Lincoln, Roosevelt and Kennedy, perhaps Wilson. In the myth, such Presidents have unique vision into the national essence, and when the incumbent President is prepared to undertake wide liberal initiatives, he is assimilated to the "great men of the myth" . . . When the man in the White House is not especially liberal, then the only way to short-circuit the deliberate sense structure is through the sacred court, whose priest-interpreters find new meaning in the familiar text of the Constitution.[74]

Across the 1970s, Hart explained the disagreements among conservatives over constitutional theory to *National Review*'s readers. In doing so, 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."

State University Press, 1970). See also Willmoore Kendall and George W. Carey, "What Is the American Myth?" *Triumph* 5:10 (December 1970): 11–19; Michael Lawrence, "Pro Multis: There Ought Be a Law," *Triumph* 6:1 (January 1971): 15. The seriousness with which Kendall and Voegelin take symbols echoes some prominent strains of the era's psychology and anthropology – e.g., the work of Carl Jung and Joseph Campbell, *The Hero With a Thousand Faces* (New York: Pantheon, 1949).

[74] Jeffrey Hart, "The Real Meaning Behind Nixon's Court Choices," *Human Events* 31:47 (November 20, 1970): 16. Will Herberg was somewhat critical of the outer reaches of the US civil religion, in which "Washington and Lincoln are . . . raised to superhuman level, as true saints of America's civil religion. They are equipped with the qualities and virtues that, in traditional Christianity, are attributed to Jesus alone – freedom from sin, for example." Will Herberg, "America's Civil Religion: What It Is and Whence it Comes," *Modern Age* 17:3 (Summer 1973): 230.

Hart then explained,

[T]he 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 Gettyburg Address . . . Other key texts are Amendments I thorough X, especially the First and, of course, the "equal protection" clause of the Fourteenth Amendment.[75]

While contemporary readers might be inclined to identify Hart's second tradition with contemporary liberalism, Hart was alluding to the constitutional philosophy of Harry V. Jaffa. In 1979, Charles Kesler, today a government professor at Claremont McKenna College, editor of the *Claremont Review of Books*, and a member of the board of governors of Claremont's Salvatori Center, but then a graduate student at Harvard, stumped for Jaffa in *National Review*. "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 "this 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, "the 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."[76]

Kesler's case for Jaffa was directed against the quite different constitutional visions propounded by other movement intellectuals who, although distinct from Kendall, nevertheless fell on his side of the structuralist/redemptive moralist divide.

[75] Jeffrey Hart, "Peter Berger's 'Paradox'," *National Review* (May 12, 1972): 511–516, 512. See also M. J. Sobran, "Saving the Declaration," *National Review* 30 (51) (December 22, 1978): 1601–1602, 1601. Hart published a history and memoir of his years at the magazine: Jeffrey Hart, *The Making of the American Conservative Mind: National Review and Its Times* (Wilmington, DE: ISI Books, 2006). See also Jeffrey Hart, *The American Dissent: A Decade of Modern Conservatism* (Garden City, NY: Doubleday, 1966).

[76] Charles Kesler, "A Special Meaning of the Declaration of Independence: A Tribute to Harry V. Jaffa," *National Review* (July 6, 1979): 850–859, 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." For an account of the influence of the West Coast Straussian Claremont School on contemporary conservative politics – its denizens, among other things, were passionate supporters of both the Tea Party and Donald Trump – see Steven Teles, "How the Progressives Became the Tea Party's Mortal Enemy: Networks, Movements, and the Political Currency of Ideas," in Skowronek, Engel, and Ackerman, editors, *The Progressives' Century*. See also Hayward, *Patriotism Is Not Enough*.

The neoconservative editor of *The Public Interest*, Irving Kristol, for instance – reacting in significant part against the New Left and the counterculture of the 1960s – had been busy mounting a sustained defense of bourgeois values, a notable reversal from his days as a City College Trotskyist in the 1930s. That defense led him toward an interpretation of the American Revolution as a bourgeois revolution.[77] Kesler asserted, following Jaffa, 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."[78]

Martin Diamond, like his friend Irving Kristol, characterized the Revolution in terms that were too bourgeois and prosaic for Kesler: Diamond, whose theory emphasized constitutional structure rather than the foundational truths of the Declaration, argued that the origins of the constitutional liberties of Americans arose in significant part from the regime's nature as a commercial republic.[79] Bowing respectfully to Diamond, Kesler conceded that "[t]he 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 conceded that Diamond "[a]lmost single-handedly … revived the study of The Federalist as a serious work of political philosophy."[80]

But Jaffa's constitutional philosophy, propounded in *Crisis of the House Divided* (1959), was of an entirely different order.[81] There, as Kessler reminded *National Review* readers, Jaffa recounted how "Lincoln led America through 'a new birth of freedom' – through a spiritual rebirth – because the first birth – the Founding – had been defective. Not merely because of the Constitution's compromises with slavery, but because of what those compromises

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

[78] Kesler, "A Special Meaning of the Declaration of Independence," 851.

[79] See Diamond, "Declaration and the Constitution," 39–55.

[80] Kesler, "A Special Meaning of the Declaration of Independence," 851. This was no small thing for Kesler, who assumed the editorship of one of the most widely sold versions of *The Federalist Papers* after the death of its initial editor, Clinton Rossiter, a suicide in the aftermath of the late 1960s student uprising at Cornell, where his middle-ground views and moderation left him despised by Left and Right alike – politically homeless. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor, 1961) (Clinton Rossiter, editor). See Donald Downs, *Cornell '69: Liberalism on the Crisis of the American University* (Ithaca, NY: Cornell University Press, 1999).

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

represented." Jaffa had 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."[82]

[82] Kesler, "A Special Meaning of the Declaration of Independence," 854. Jaffa's understandings have served as the wellspring of the contemporary conservative constitutional vision some have called "Declarationism." With its intellectual core housed at Claremont McKenna College, in the *Claremont Review of Books*, and at Claremont's Henry Salvatori Center for the Study of Individual Freedom in the Modern World, Declarationism rests on the conviction that the Declaration of Independence is not only an inherent component of the US Constitution, but foundational. Declarationists understand the Declaration to be both philosophically and temporally prior to the Constitution. For, without a prior commitment to the (for many religious conservatives, 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 among many conservative intellectuals serves as a bridge between the Founders and conservative Catholics, Fundamentalist and Evangelical Protestants, and LDS/Mormons in a way that has underwritten what Seth Dowland has called their contemporary "co-belligerence." See Seth Dowland, *Family Values and the Rise of the Christian Right* (Philadelphia: University of Pennsylvania Press, 2015), 85. See, e.g., John Courtney Murray, SJ, *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 David D. Kirkpatrick, "The Right Hand of the Fathers," *The New York Times Magazine* (December 20, 2009), 24. Declarationism has the special virtue to many conservatives of putting them on the "right side" of civil rights: Lincoln is a hero to Declarationists – an affinity that had initially made them anathema to the movement's seemingly vanishing remnant of neo-confederates – who have reemerged in reaction, first, to the election of the nation's first black president Barack Obama, and then with the (liberal/progressive/apostate conservative) backlash against the racist Republican president Donald Trump. And, because of its appeal to natural law as the root of human equality, Martin Luther King Jr.'s "Letter from a Birmingham Jail" (1963) that quotes Thomas Aquinas – has been adopted as a core conservative Declarationist text. In recent years, Princeton's James Madison Program in American Ideals and Institutions, founded and directed Robert P. George, and his freestanding Princeton, New Jersey, think tank, The Witherspoon Institute, which is headed by an Opus Dei cleric, has assumed increasing leadership in the propagation of the Declarationist vision. Operating under a "teach the controversy" rubric, Witherspoon (which leveraged the sponsorship of the George W. Bush administration's National Endowment for the Humanities) 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 countertradition, as represented by Oliver Wendell Holmes Jr. and Hugo Black. See www.nlnrac.org/ (for the initiative's announcement notice, see www.winst.org/ announcements/11_01_17_natural_law .php).

Jaffa himself battled intransigently across much of the postwar period against Diamond's structuralism and institutionalism, which Jaffa traced back to the malign errors made by Willmoore Kendall in *The Basic Symbols of the American Political Tradition* (1970). There, Kendall had claimed that "'[t]he 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, it is worth recalling that, at least prior to the achievements of the civil rights movement in the mid-1960s – the Civil Rights Act of 1964 and the Voting Rights Act of 1965 – perhaps Jaffa's greatest antagonists on the Right were agrarian or neo-confederate traditionalists like M. E. Bradford – discussed at length later – who had, after all, blamed Jaffa's hero Lincoln for having wrecked the Constitution. Arguing on Jaffa's behalf, Kesler noted, "[l]ike 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."[83]

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.[84] "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 continued:

> The danger of traditionalism's reverence for the past is that it is unreasonable, unprincipled … no different from liberalism's unprincipled commitment to the future … It does not acknowledge any objective standards … [that] 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

[83] Kesler, "A Special Meaning of the Declaration of Independence," 855, 858. Kendall and Carey, *Basic Symbols of the American Political Tradition*. Bradford was the pick of Republican traditionalists to head the National Endowment for the Humanities in Ronald Reagan's first term; they were infuriated when he was spurned, largely at the behest of (mostly Jewish) neoconservatives, in favor of William Bennett. See George Hawley, *Right-Wing Critics of American Conservatism* (Lawrence: University Press of Kansas, 2016), 50–51, 56, 183. Taney wrote the majority opinion in *Dred Scott*. The "gnostic force" put-down is an enlistment of Voegelin.

[84] Kesler, "A Special Meaning of the Declaration of Independence," 859. The same spirit issuing from Claremont, it is worth noting, was behind the notorious "Flight 93 Election" article in the *Claremont Review of Books* (Fall 2016) advocating that defenders of the Constitution, in one last ditch move to try to save the republic, cast their votes for Donald Trump for president.

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.[85]

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, American students had long been taught that

> Jefferson departed from Locke in declaring that among man's unalienable rights were life, liberty, and the pursuit of happiness . . . 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 and Locke is not a] defect of the Declaration.[86]

But do contemporary Americans have the faith to avail themselves of their rich heritage? Jaffa reminded readers that in *Natural Right and History* (1953), his teacher Leo Strauss asked one of the most momentous of questions: "'Does this nation in its maturity still cherish the faith in which it was conceived and raised? Does it still hold those 'truths to be self-evident?' . . . Strauss believed those questions ought to have been answered in the affirmative. Until they could be so answered, he did not believe this nation, or the West, could recover its moral health or political vigor." It was the mission of conservative Americans to fight for the triumph of this faith.[87]

Responding to Kesler, M. J. Sobran and Jeffrey Hart answered Jaffa on Kendall's behalf. "Throughout his career," Sobran reported, "Kendall deplored the messianic pretensions . . . of what we may . . . call the Declaration Tradition, with its universalism and stress on individual rights." "Against this," Sobran explained, "he placed the Constitutional Tradition of government by consensus, which tended to mute sharp moral issues and scale down grandiose causes to politically assimilable dimensions."[88]

[85] Kesler, "A Special Meaning of the Declaration of Independence," 859.

[86] Harry V. Jaffa, "Another Look at the Declaration," *National Review* (July 11, 1980): 836–840, 836, 840. In the years before his death in 2015, Jaffa has been arguing for some time that Thomas Aquinas's thought was more important to the American Founding than John Locke's. See Harry V. 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, Princeton, NJ (September 29, 2003).

[87] Jaffa, "Another Look at the Declaration," 840. See Strauss, *Natural Right and History*.

[88] M. J. Sobran, "Saving the Declaration," *National Review* (December 22, 1978): 1601–1602, 1601. Hart's characterization of both Kendall and Strauss suggests that they are progenitors of originalism at least in the sense 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

Hart complained that "the interpretation of these key texts by the avatars of the rival [Declaration] tradition is ... completely unhistorical ... Does the Declaration tell us that it is the task of government to bring about equality of condition, or even equality of opportunity? ... The founders would have ridiculed either goal as preposterous." Plainly, the Declaration stood simply, if importantly, for the proposition that "Men are equal ... in their right to found and organize a government as they see fit."[89]

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.[90] 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 now careering out of control, it was because they had spurned Kendall's go-slow, consensus approach. Hart lamented that "[t]he greatest breaches in the defenses of the 'deliberate sense' conception of government have in fact most recently been made by the Supreme Court, and by the ukases handed down by executive agencies like HEW."[91]

The prominent libertarian Frank S. Meyer also came out swinging against Claremont's Harry Jaffa. Observing that both the deliberate sense and the abstract views had 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.

forms, democratic instincts and experience combined with high political theory." See Hart, *Making of the American Conservative Mind*, 30, 36.

[89] Jeffrey Hart, "Peter Berger's 'Paradox,'" *National Review* (May 12, 1972), 512.

[90] Hart, "Peter Berger's 'Paradox.'" To the consternation of many conservatives, Jeffrey 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) (www.thedailybeast.com/blogs-and-stories/2008-10–31/obama-is-the-true-conservative/).

[91] Hart, "Peter Berger's 'Paradox'," 512–513.

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."[92]

Frank Meyer placed liberty, not equality, at the core of the country's constitutional tradition – and Jaffa's hero, Lincoln, was no friend of liberty. "Professor Jaffa, since he regards the division of power as irrelevant to the 'principle of a free constitution,' [in favor of the view that what is crucial is the recognition that all men have rights which no government should infringe] does not begin to grasp the incalculable damage for which Lincoln is responsible," Meyer protested:

> Jaffa ... chooses to base his critique of American slavery on the proposition that the American polity is in its essence dedicated to equality – and to center his vindication of Lincoln on Lincoln's role as the champion of equality. Nothing ... could be further from the truth ... The freedom of the individual person from government, not the equality of individual persons, is the central theme of our constitutional arrangements ... Freedom and equality are opposites.

Jaffa's Lincoln is the champion of equality, but Meyer's is "the creator of concentrated national power, the President who shattered the constitutional tension." These two Lincolns, Meyer insisted, are "one and the same man."[93]

CONSERVATIVE CONSTITUTIONAL THEORY DEBATES, TAKE TWO: (SOUTHERN) POSITIVISM VERSUS (EQUALITY OF) NATURAL RIGHTS

In recent years, scholars have increasingly held the successes of the mid-twentieth-century's civil rights movement to have occasioned a "Second Reconstruction."[94] If apprehended as such, it is worth noting that some southerners who became modern "conservatives" reacted as badly to the Second Reconstruction as their predecessors had to the first. Through as late as the early 1980s (repudiating a long-standing strain of southern thought that had made its peace with the Civil War's outcome, and even with Lincoln),[95] the conservative movement continued to harbor a strong unreconstructed

[92] Frank S. Meyer, "Again on Lincoln," *National Review* (January 25, 1966): 71–72, 71. On Meyer, see Frank Meyer, *In Defense of Freedom: A Conservative Credo* (Chicago: Henry Regnery Co., 1962); Kevin J. Smant, *Principles and Heresies: Frank S. Meyer and the Shaping of the American Conservative Movement* (Wilmington DE: ISI Books, 2002).

[93] Meyer, "Again on Lincoln," 71, 72.

[94] See, e.g., Richard K. Vallely, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: University of Chicago Press, 2004).

[95] See Merrill D. Peterson, *Lincoln in American Memory* (New York: Oxford University Press, 1994), 49, 252 (noting as evidence of the South's peace with Lincoln both a gentler view of Lincoln in the American South after Reconstruction faded into memory and the Virginia legislature's adoption in 1928 of a resolution in honor of Lincoln's birthday).

element of neo-confederatism on the one hand[96] and formalist, southern-based states' rights conservatism on the other.[97]

Contention over the true "meaning" of the Civil War, constitutionally and politically, began from the moment of Confederate General Robert E. Lee's surrender at Appomattox Court House.[98] Considered over the long term, the ideological valence of the meanings attributed to the war do not track the categories that contemporary political scientists use to distinguish "liberals" from "conservatives." But we can at least distinguish those who read the war narrowly from those who read it broadly and aspirationally. The former believed the war, and the three amendments it occasioned, ended slavery and perhaps guaranteed national enforcement of some basic rights. The latter believed the war effectuated a revolution in the constitutional order that transformed the relations between the national government and the states and provided national guarantees for the broad definition and aggressive enforcement of rights.[99]

"Conservatives," in the contemporary sense, were on both sides of this divide. Conservative, and often southern, defenders of states' rights and opponents of black social, civil, and political equality narrowly interpreted the implications of the war and the resulting constitutional changes. Those we would later recognize as libertarian conservatives, however – pro-market, pro-business, pro-property rights economic conservatives like Supreme Court

[96] See, e.g., M. E. Bradford, "Where We Were Born and Raised: The Southern Conservative Tradition," in *The Reactionary Imperative: Essays Literary and Political* (Peru, IL: Sherwood Sugden, 1990), 115, 115–134; Nancy MacLean, "Neo-Confederacy versus the New Deal: The Regional Utopia of the Modern American Right," in Joseph Crespino and Matthew D. Lassitter, editors, *The Myth of Southern Exceptionalism* (New York: Oxford University Press, 2010), 308, 308–312. It is important to note that, for much of the twentieth century, these conservatives could be found in both political parties; of course, in the first part of that century, most southern conservatives were Democrats.

[97] See, e.g., James Jackson Kilpatrick, *The Sovereign States: Notes of a Citizen of Virginia* (Chicago: Henry Regnery Co., 1957), 255–258.

[98] See, e.g., David W. Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge, MA: Harvard University Press, 2001), 1 (opining that determining the lessons of the Civil War "has been the most contested question in American historical memory since 1863, when Robert E. Lee retreated back into Virginia, Abraham Lincoln went to Gettysburg to explain the meaning of the war, and Frederick Douglass announced 'nation regeneration' as the 'sacred significance' of the war").

[99] See Michael Vorenberg, "Bringing the Constitution Back In: Amendment, Innovation, and Popular Democracy During the Civil War Era," in Meg Jacobs et al., editors, *The Democratic Experiment: New Directions in American Political History* (Princeton: Princeton University Press, 2003); see also Jack M. Balkin, "The Reconstruction Power," *New York University Law Review* 85 (2010): 1801, 1806 ("When we strip away these doctrinal glosses and focus on the original meaning and structural purpose underlying the Reconstruction Amendments, we discover that the Reconstruction Power gives Congress all the authority it needs to pass modern civil rights laws, including the Civil Rights Act of 1964. That was the original point of these amendments, and that should be their proper construction today.").

Justice Stephen J. Field – read the Civil War as having worked a revolution in the constitutional order.[100]

MEL BRADFORD'S LINCOLN

As we move forward to the time in which modern ideological categories became political realities in the post–New Deal era, we can clearly discern a strain of the modern conservative movement that prominently adhered to the narrow understanding of the war's meaning, with all the attendant constitutional and political implications of that position. Melvin E. ("M. E." or "Mel") Bradford,[101] a proud native Texan and literature professor at the University of Dallas, was perhaps the most sophisticated and influential proponent of this neo-confederate current of thought in the second half of the twentieth century.[102] In constitutional matters, he was a strict

[100] See, e.g., *Slaughterhouse Cases*, 83 US (16 Wall.) 36, 94–95 (1873) (Field, J., dissenting) ("The [Fourteenth] amendment was adopted ... to place the common rights of American citizens under the protection of the National government ... A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State."). If the narrower reading of the Court's majority were to hold, the Fourteenth Amendment "was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage ... [I]f the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence ... The privileges and immunities designated are those which of right belong to the citizens of all free governments." Ibid. at 96–97. See also *Munn* v. *Illinois*, 94 US 113, 140–44 (1877) (Field, J., dissenting) (arguing for a liberal construction of the Fourteenth Amendment to prohibit Illinois from regulating the amount a business could charge for use of a grain elevator). See, e.g., M. E. Bradford, *Original Intentions: On the Making and Ratification of the United States Constitution* (Athens: University of Georgia Press, 1993), 104 ("Despite the alteration that they made in the balance of American federalism, the Reconstruction amendments and early civil rights laws did not change the Constitution of the United States into a teleocratic instrument; a law with endlessly unfolding implications in the area of personal rights.").

[101] The account of Harry Jaffa and Mel Bradford, and the Jaffa-Bradford exchange, is drawn, somewhat revised, from Ken I. Kersch, "Beyond Originalism: Conservative Declarationism and Constitutional Redemption," *Maryland Law Review* 71 (2011): 229–282.

[102] James McClellan, "Walking the Levee with Mel Bradford," in Clyde N. Wilson, editor, *A Defender of Southern Conservatism: M.E. Bradford and His Achievements* (Columbia: University of Missouri Press, 1999), 35, 39. Trained by the poet Donald Davidson in the Fugitive and Agrarian literary circle in the Vanderbilt University English Department, Bradford was by trade a William Faulkner specialist. Thomas H. Landess, "The Education of Mel Bradford: The Vanderbilt Years," in Wilson, *Defender of Southern Conservatism*, 7, 8–9. See also McClellan, *Defender of Southern Conservatism*, 35, 39 (Bradford was "equally at home in philosophy, religion, classical studies, politics, and history" and took a special interest in literature of the South and American political rhetoric and thought). Davidson, Bradford's mentor at Vanderbilt, had once pronounced the Lincoln Memorial a brazen affront to southerners. Peterson, *Lincoln in American Memory*, 251.

constructionist, a position he advanced and defended from an expressly southern point of view.[103]

In the postwar period, many conservatives, such as Russell Kirk, left Lincoln off the maps they were drawing of the history of conservative thought.[104] By contrast, Lincoln was very much on Bradford's map as his frequent and perhaps predominant target.[105] Indeed, when President Ronald Reagan nominated Bradford to head the National Endowment for the Humanities, it was Bradford's long paper trail of attacks on Lincoln and Lincoln's constitutionalism that ultimately doomed the appointment.[106] Under a barrage of objections from within the conservative coalition by New York neoconservatives such as Irving Kristol, Norman Podhoretz, and others, Reagan was forced to withdraw the nomination, naming the Brooklyn-born, neoconservative Catholic moralist William J. Bennett in Bradford's place.[107]

Bradford proudly described himself as "an impenitent conservative Southerner."[108] In his many essays on the subject, Bradford described Lincoln as a moral zealot who, in the spirit of Oliver Cromwell, the French Revolutionary Jacobins, and the continental revolutionaries of 1848, sought to impose his moral vision on the United States through the power of an unconstitutionally unrestrained central state.[109] In an article taking its title from Thomas Jefferson's declared alarm at the Compromise of 1820, Bradford traced the history of the North's centralizing efforts, inflamed by "chiliastisic moral imperatives," to lay waste to the terms of the original constitutional compact.[110]

[103] Marshall I. DeRosa, "M. E. Bradford's Constitutional Theory: A Southern Reactionary's Affirmation of the Rule of Law," in Wilson, *Defender of Southern Conservatism*, 92–93 ("The Southernness of Bradford's scholarship was professionally problematical, as is evidenced by the academic ostracism imposed on him due to his Southern, states-rights brand of conservatism.").

[104] Russell Kirk, *The Conservative Mind, From Burke to Santayana* (Chicago: Henry Regnery Co., 1953).

[105] McClellan, *Defender of Southern Conservatism*, 35, 46–47.

[106] See David Gordon, "Southern Cross: The Meaning of the Mel Bradford Moment," *American Conservative* (April 2010): 34.

[107] Gordon, "Southern Cross." Bradford's support for George Wallace's 1972 Democratic presidential campaign was another problem for the nomination. See also Benjamin B. Alexander. "The Man of Letters and the Faithful Heart," in Wilson, editor, *Defender of Southern Conservatism*, 17, 31.

[108] M. E. Bradford, "A Fire Bell in the Night: The Southern Conservative View," *Modern Age* 17 (1973): 9.

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

[110] Bradford, "Fire Bell," 9–10. For an earlier articulation of the view of Lincoln as a centralizing despot who had flagrantly violated the terms of the constitutional compact, see Alexander Stephens, *A Constitutional View of the Late War Between the States: Its Causes, Character, Conduct and Results, Presented in a Series of Colloquies at Liberty Hall*, Volume 2, 34 (1868) (www.archive.oig/dctails/constitutionalviewo2steprich).

Bradford characterized Lincoln's touchstone, the Declaration of Independence, as the nation's "one serious flirtation with the millennial thing."[111] Its legacy was made all the more damaging, he explained, through the influence of those who would read it by the light of "Jacobin 'translations.'"[112] Abraham Lincoln was Exhibit A in this regard, by dint of his "misunderstanding of the Declaration as [conferring] a 'deferred promise' of equality," and the Civil War struggle as having culminated in what amounts to a "second founding." This understanding, Bradford explained, was "fraught with peril and carries with it the prospect of an endless series of turmoils and revolutions, all dedicated to the freshly discovered meanings of equality as a 'proposition' – a juggernaut ... powerful enough to arm and enthrone any self-made Caesar we might imagine." Bradford asserted that Lincoln, who was "very early, touched by a Bonapartist sense of destiny," imagined himself in precisely such a role.[113]

The danger of Lincoln's outsized sense of destiny was heightened by his religiosity, Bradford warned, since men who see themselves as "authorized from on High to reform the world into an imitation of themselves – and to lecture and dragoon all who might object" are frighteningly zealous: "[they] receive regular intimations of the Divine Will through prophets who arise from time to time to recall them to their holy mission."[114] The biblical element in Lincoln's rhetoric grew stronger as his political career progressed, Bradford observed.[115] Lincoln's characteristic and, in Bradford's view, disingenuous method as a moralizer was to demonize his enemies while only grudgingly deigning to recognize their constitutional rights. The political implications of this method over the long term were dire because "should slavery be gone, some new infamy was bound to be discovered by the stern examiners whose power depends upon a regularity in such 'crusades.'"[116]

Bradford contended that there was, in truth, "no worship of the law whatsoever" in Lincoln's political thought, "but instead devotion to perpetually exciting goals, always just beyond our reach." As such, Lincoln was "an enemy of the 'founding'" who became "a scripture in himself," committed to "the attribution of his own opinions to an antinomian revelation of divine will."[117] He regarded himself as a great man, the oracle of a political religion – most famously articulated in his Peoria Speech – and

[111] Bradford, "Fire Bell," 15. [112] Bradford, "Fire Bell," 15.
[113] M. E. Bradford, "The Heresy of Equality: Bradford Replies to Jaffa," *Modern Age* 20 (1976): 62, 69.
[114] Bradford, "Heresy of Equality," 69.
[115] See, e.g., Bradford, "Heresy of Equality," 71. Lincoln's 1858 "House Divided" speech took its titular metaphor from Mark 3:25 [King James Version]: "And if a house be divided against itself, that house cannot stand."
[116] Bradford, "Heresy of Equality," 71. [117] Bradford, "Heresy of Equality," 71–72.

the wellspring of a political theology that would eventually "replace Church with State."[118]

In Lincoln's "House Divided" speech, Bradford explained, the self-dramatizing Lincoln went so far as to cast himself in the role of Old Testament prophet. It was in this high-prophetic mode that he alluded to "the eternal struggle between these two principles – right and wrong – throughout the world." "All that remained of his evolution" at this point, Bradford observed, "was a claim to direct communication with the god of history, of which we hear a great deal once Lincoln got the crisis which he wanted."[119]

In his study of Lincoln's political rhetoric, commenced under the tutelage of Eric Voegelin's *The New Science of Politics,* Bradford limned Lincoln as a "backcountry *philosophe,* as 'secularist intellectual' and 'rational, progressivist superman,'" a politician combining a "gnostic formula [with] a special neo-Puritan twist":[120] "For the stage to come according to [Lincoln's] political eschatology [as set out in his address to the Springfield Young Men's Lyceum (1838)] may augur *either* a final perfection *or* an apocalypse, a complete inversion of the fortunate American unfolding already accomplished. That which comes soon may be either the kingdom or the beast.'" This Lincoln, Bradford argued, seeks "not preservation but change: radical alterations in the basis and organization of American society."[121]

Many, Bradford claimed, have misidentified Lincoln with the freedom of the southern Negro and have been misled by Lincoln's populist, Jacksonian posturing.[122] By temperament, however, the real Lincoln was a maniacal, tax-and-spend Whig, and an ideologist, "a promising young centralist" who saw government as the roaring engine for the advancement of his vision. Whigs like Lincoln, Bradford explained, "were uniformitarians to the core . . . Local feeling and variety were [their] enemies . . . They connected both with the passions; and passion forestalled the evolution of the Union which, in standard progressive

[118] Bradford, "Dividing The House," 13, 17, arguing that, in his Peoria address, Lincoln abandons the foundational political principle of compromise and, in a messianic religious turn, offers apocalypse as a genuine alternative.

[119] Bradford, "Dividing the House," 19–20.

[120] Bradford, "Dividing the House," 11 (internal citations omitted). Among those conversant in conservative political thought, this critique of rationalism in politics would resonate with students of Michael Oakeshott. See Michael Oakeshott, "Rationalism in Politics" [1962], in his *Rationalism in Politics and Other Essays* (Indianapolis, IN: Liberty Fund, 1991), and of the critique of the political philosophy behind the French Revolution as described by, among others, Gertrude Himmelfarb, *The Roads to Modernity: The British, French, and American Enlightenments* (New York: Knopf, 2004); Jaffa, *Crisis of the House Divided,* 228–229.

[121] Bradford, "Dividing the House," 11.

[122] Bradford, "Dividing the House," 16, noting that the trouble with Lincoln devotees "is that they identify his politics with freedom of the Southern Negro . . . [a]nd that belief leads them to misconstrue what was his larger purpose, from the first."

fashion, they defined more by what it could be than by what it was or had been." "[T]he final Lincoln . . . [was] the worst . . . For by him the real is defined in terms of what is yet to come, and the meaning of the present lies only in its pointing thither. This posture, when linked to one of the regnant abstractions of modern politics," Bradford warned, "can have no other result than a totalitarian order."[123] Bradford lamented that in the Civil War's aftermath, the nation might have committed itself to a "second founding" that was "digestible – suited under certain circumstances to accommodation with the first." "Emancipation appeared to have changed nothing substantial in the basic confederal framework," he concluded, "[n]either did it attempt any multiracial miracles." Unfortunately, however, for some, "the connection between blacks and American millennialism [only] intensified" in the postbellum United States, when "Equality (capital 'E')" was placed at the center of their political understandings. With the arrival of the Rights Revolution in the mid-twentieth century, the Civil War moment at last became "the Trojan Horse of our homegrown Jacobinism."[124]

Rights Revolution egalitarianism was founded upon an uncompromising denial of localism, "a hatred of plenitude . . . a denial of the variety of Creation, 'abolishing the constitution of being, with its origin in divine, transcendent being, and replacing it with a world-immanent order of being, the perfection of which lies in the realm of human action [and proceeds from a human dream]."[125] "Pure millennialism of the gnostic sort," Bradford warned, "is . . . ever restless, never satisfied . . . [It] entails the fracturing of

[123] Bradford, "Dividing the House," 13, 16, 21. Furthering his point, Bradford borrows directly from Eric Voegelin's *The New Science of Politics*: "Totalitarianism, defined as the existential rule of Gnostic activists, is the end and form of progressive civilization." Bradford, "Dividing the House," 24 fn. 84 (citing Eric Voegelin, *The New Science of Politics: An Introduction* (Chicago: University of Chicago Press, 1952), 132. Bradford notes, additionally, "This entire essay is in obvious debt to Professor Voegelin's discussion of Richard Hooker's critique of the Puritan mind, *New Science of Politics,* 133–152." Bradford, "Dividing the House," 24, fn. 85. For a similar understanding of Lincoln as a proto-authoritarian/totalitarian, on the model of Bismarck or Lenin, see also Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* (New York: Oxford University Press, 1962), xviii–xix ("Each of these men [referring to Bismarck, Lenin, and Lincoln], through the pressure of the power he found himself exercising, became an uncompromising dictator."). Lest one think Voegelin's ideas are of mere antiquarian interest, the Eric Voegelin Society (EVS) regularly sponsors a large number of panels – wildly disproportionate, one might think, to their numbers – at the annual meeting of the American Political Science Association to this day. The EVS is a discursive community that is highly critical of the menace of the sort of "progressivism" that Voegelin had limned in *The New Science of Politics*. They are, that is, conservatives in the age of Barack Obama and Donald Trump.

[124] Bradford, "Fire Bell," 10. See also Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977), 14.

[125] Bradford, "Fire Bell," 11 (quoting Eric Voegelin, *Science, Politics, and Gnosticism: Two Essays* (Wilmington, DE: ISI Books, 2004) [1968], 99–100 (insertion in original)).

hard won communal bonds in the implementation of someone's private version of the supernal good; and in a pluralistic society, implementation of such visions is usually perceived as moralistic aggression."[126]

"As the South has always recognized," Bradford explained, "patronizing, 'for-the-Negro' millennialism has had its primary meaning and ultimate promise exposed in those other species of Utopian hope for which it broke trail . . . [I]t has been a stalking horse for objectives never able to command national assent – never *except* as they hid behind or within the . . . one 'sacred' cause."' When these are achieved, diversity, culture, and ultimately freedom are lost.[127]

MEL BRADFORD'S JAFFA

Bradford's most immediate targets in setting out these understandings were not left-liberals (who almost certainly would not be listening to him), but fellow movement conservatives – and, specifically, Harry V. Jaffa.[128] Jaffa's insistence on the centrality to the American constitutional tradition of "Equality, with the capital 'E,'" Bradford thundered, "is the antonym of every legitimate conservative principle." "[T]here is no man equal to any other," he insisted, "except perhaps in the special, and politically untranslatable, understanding of the Deity. *Not intellectually or physically or economically or even morally* . . . Such is, of course, the genuinely self-evident proposition."[129] The mistaken commitment to equality, Bradford warned, will lead ineluctably to a demand for the equality of condition, as advanced by an increasingly all-powerful Leviathan, a docile, manipulated populace under the control of an army of

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

[127] Bradford, "Fire Bell," 13.

[128] See Harry V. Jaffa, "Equality as a Conservative Principle," *Loyola of Los Angeles Law Review* 8 (1975) 471, 476 (reviewing Kendall and Carey, *The Basic Symbols of the American Political Tradition*), where Jaffa counterposes, as against Kendall and Carey, that "We believe that the Declaration of Independence is the central document of our political tradition."

[129] Bradford, "Heresy of Equality," 62 (emphasis in original). Jaffa was himself responding to Kendall and Carey's *Basic Symbols of the American Political Tradition*. Jaffa, "Equality," 476. Jaffa rejected the charge that he had any truck with modern utopian egalitarian understandings of equality, which go "far beyond the scope of law, and sometimes were in flat contradiction to the principles of the earlier demands for full equality under law." Jaffa, *Crisis of the House Divided*, 11. Jaffa noted that Lincoln himself had disapproved of the "temper and . . . methods" of radical reformism. Jaffa, *Crisis of the House Divided*, 245.

elites. Far from being conservative, this is nothing more than "the Old Liberalism hidden under a Union battle flag."[130]

Lincoln's distorted understandings of the Declaration of Independence were bad enough. But Bradford believed that the West Coast Straussian Harry Jaffa had only compounded Lincoln's error through "his treatment of the second sentence of that document in abstraction from its whole: indeed, of the first part of that sentence in abstraction from its remainder, to say nothing of the larger text." Jaffa, Bradford observed, "filters the rest of the Declaration (and later expressions of the American political faith) back and forth through the measure of that sentence until he has (or so he imagines) achieved its baptism in the pure waters of higher law." In doing so, he "sets up a false dilemma: we must be . . . 'committed' to Equality or we are 'open to the relativism and historicism that is the theoretical ground of modern totalitarian regimes." Only a firm commitment to that single phrase of the Declaration, Jaffa has oddly concluded, will save us from Hitler and Stalin.[131] "I agree with Professor Jaffa concerning the dangers of relativism," Bradford wrote, "[a] Christian must." But, all the same, "we must resist the tendency to thrust familiar contemporary pseudo-religious notions back into texts where they are unlikely to appear."[132]

As a Straussian, Jaffa had insisted upon treating the "all men are created equal" clause "as one of Lincoln's beloved Euclidian propositions." Jaffa and his ilk "have approached the task of explication as if the Declaration existed, *sui generis,* in a Platonic empyrean." They treat the Founding and the Constitution the same way. But "the Declaration is not implicit in the Constitution except as it made possible free ratification by the independent states. In truth, many rights are secured under the Constitution that are not present in the Declaration, however it be construed."[133]

The sort of unreconstructed neo-confederatism that some have argued serves as the grounding for postwar American conservatism is certainly evident – albeit in a distinctive guise – in the thought of M. E. Bradford. Bradford's rejection of the opening lines of the Declaration of Independence as constitutional touchstones, and of Lincoln as a constitutional vindicator and savior, along with his insistence on narrowly interpreting the meaning of the Civil War as having effectuated no sharp break with the "confederal" antebellum constitutional order, place him squarely within this old conservative tradition. Even so, Bradford's insistence on characterizing Lincoln as a slave to the

[130] Bradford, "Heresy of Equality," 64. The ludicrousness of this all-too-characteristic Straussian move, Bradford observed, demonstrated the problems arising "from the habit of reading legal, poetic, and rhetorical documents as if they were bits of revealed truth or statements of systematic thought." Bradford, "Heresy of Equality," 64.

[131] Bradford, "Heresy of Equality," 64. [132] Bradford, "Heresy of Equality," 65.

[133] Bradford, "Heresy of Equality," 65, 68. See also Kendall and Carey, *Basic Symbols of the American Political Tradition*, 89–90, arguing that it was the Constitution and not the Declaration of Independence that started our nation, and that the Declaration instead had "establish[ed] a baker's dozen of new sovereignties."

Utopian, "uniformitarian," and, ultimately, totalitarian millennial abstractions allegedly characteristic of twentieth-century progressives, demonstrates his decidedly modern concerns. That said, at the time he wrote, Bradford's star was dimming on the postwar Right, and Jaffa's – who stands about as far from neo-confederatism as imaginable – was clearly rising.

HARRY JAFFA'S LINCOLN

Whatever its virtues as a species of political thought considered in the abstract, M. E. Bradford's truculently localist, pro-southern, neo-confederate conservatism was not likely to have much of a political future in the immediate post–civil rights era, when the states' rights position was tied so closely to the lost causes of racism and segregation. President Reagan's withdrawal of Bradford's nomination to head the National Endowment for the Humanities was a clear indication that whatever the standing of such views within the precincts of the out-of-power Old Guard, this vision would not serve within a Right that now controlled the national government and had realistic, long-term hopes of retaining that power. Harry Jaffa's influence, by contrast, was ascendant.[134]

By the 1980s, Jaffa was hardly a new figure on the intellectual Right. Credited with penning the most famous line of Barry Goldwater's speech accepting the Republican nomination for president in 1964,[135] Jaffa first propounded his constitutional theory back in the 1950s in his magisterial interpretation of the Lincoln-Douglas debates, *Crisis of the House Divided,* and subsequently reiterated and evangelized for in countless articles, lectures, and reviews. As law school constitutional theorists became more influential, and conservative academics found their foothold in this new world by hawking their own trademarked theory of textual interpretation – "originalism" – the political scientist Jaffa later recast his views in the prevailing originalist idiom.[136]

The earlier Jaffa was no uncritical worshipper of the American Founding. His writings emphasized its incompleteness, the sad failing arising out of the

[134] The most famous case of the public ascent of the Straussians is that of the University of Chicago political philosopher Allan Bloom, whose *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (New York: Simon and Schuster, 1987) became a conservative cause célèbre.

[135] "Extremism in the defense of liberty is no vice . . . And . . . moderation in the pursuit of justice is no virtue." Barry Goldwater, Speech Accepting the Republican Nomination for President (July 16, 1964). Jaffa was paraphrasing Cicero. See Karl Hess, *Mostly on the Edge: An Autobiography* (Amherst, NY: Prometheus Books, 1999), 168–170.

[136] See Jaffa, *Original Intent and the Framers of the Constitution*; Jaffa, "Equality as a Conservative Principle," 504 ("The principles of the Declaration . . . are present in the very first words of the Constitution as those words were understood by those who drafted and adopted it"); Jaffa, *Crisis of the House Divided*.

compromises the Founders had made with chattel slavery.[137] These compromises, Jaffa argued, represented a more fundamental "inability" or unwillingness on the part of the Founders to commit themselves in the Constitution to the eternal, unchanging, God-given principles that grounded the nation's Declaration of Independence.[138] Jaffa contended that the capacity of the people to govern themselves, democracy, is "demonstrated" when the nation commits itself to living under submission to the natural law ("the Laws of Nature and of Nature's God" referenced in the Declaration), which embodies objective standards of right and wrong.[139] It was Abraham Lincoln who, belatedly, had completed the Constitution by placing the Declaration's commitment to natural rights at its core, redeeming America's (nearly) fatally flawed Founding with "a new birth of freedom."[140]

Like all Straussians, Jaffa read the American constitutional tradition through the lens of classical political philosophy. Tracing the term for "constitution" used in the ancient Greek texts – *politeia* – Jaffa noted that, for Aristotle, a *polis* was a partnership in *politeia,* where *politeia* "is not the laws, but rather the animating principle of the laws, by virtue of which the laws are laws of a certain kind." In finding the "life principle of the nation" in the Declaration, Jaffa explained, Lincoln understood American constitutionalism in precisely the same way. For Lincoln, Jaffa observed, "the relation of the famous proposition to the Constitution and Union corresponded to the relation of soul to body."[141]

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

[137] See, e.g., Jaffa, *Crisis of the House Divided*, 14, which discusses the Founders' acknowledgment that slavery was in conflict with the doctrine of the American Revolution, and their failure to end it despite this.

[138] Jaffa, *Crisis of the House Divided*, 315.

[139] Jaffa, *Crisis of the House Divided*, 314–315.

[140] Lincoln spoke of the nation's "new birth of freedom" in his Gettysburg Address. President Abraham Lincoln, Gettysburg Address (November 19, 1863).

[141] Jaffa, *Crisis of the House Divided*, 330–332. Like many Straussians, Jaffa was trained in ancient classical languages and believed that the wisest and deepest political philosophy had been articulated by the ancient Greeks.

principles of the Declaration, as vindicated by Lincoln) fixed, eternal standards of equality, justice, and truth.[142]

This epic conflict and choice had been publicly argued in its most dramatic and sophisticated form in the Lincoln-Douglas debates, which Jaffa pronounced the world's greatest political and philosophic text. There, Lincoln and Douglas did no less than debate "the universal meaning of the Declaration."[143] "No political contest in history was more exclusively or passionately concerned with the character of the beliefs in which the souls of men were to abide," Jaffa dramatically claimed.[144] He added:

> Neither the differences which divided the Moslem and Christian at the time of the Crusades, nor the differences which divided Protestant and Catholic in sixteenth-century Europe, nor those which arrayed the crowned heads of Europe against the regicides of Revolutionary France were believed by the warring advocates to be more important to their salvation, individually and collectively.[145]

Jaffa found a direct parallel between the position Abraham Lincoln took in those debates and the conception of classical natural right propounded by Jaffa's teacher Leo Strauss in *Natural Right and History* (1953).[146] Considered by Jaffa "the greatest political philosopher of the 20th century,"[147] Strauss had "proved" in *Natural Right and History* that by attempting to replace faith with reason, modern, as opposed to classical, philosophy had "laid the foundation of modern atheistic totalitarianism, the most terrible form of tyranny in human experience." While studying Plato's *Republic* under the tutelage of the master at The New School for Social Research (before Strauss moved to the University of Chicago), Jaffa had "discovered . . . that the issue between Lincoln and Douglas was in substance, and very nearly in form, identical with the issue between Socrates and Thrasymachus." Stephen Douglas's defense of "the golden calf of popular

[142] See Kesler, "Special Meaning," 850, noting Jaffa's commitment to fixed standards of truth and liberty. The mission of the students of Leo Strauss is to commit their lives to the discovery, and propagation, of these truths, and to the idea of the centrality of Truth to politics, and to the American nation. Kersch, "Ecumenicalism Through Constitutionalism," 7. See generally Strauss, *Natural Right and History*. Jaffa wrote in significant part in opposition to the constitutional theory being advanced by other conservatives emphasizing the bourgeois, commercial, middle-class nature of the American Revolution, like Martin Diamond and Irving Kristol, and the structural nature of the constitutional order, as well as to the Burkean, consensus account of US constitutional development propounded by Willmoore Kendall, and, of course, as discussed, of the neo-confederatism of M. E. Bradford. Kesler, "Special Meaning," 851–852, 855, 857–858. See generally Kersch, "Ecumenicalism Through Constitutionalism."

[143] Jaffa, *Crisis of the House Divided*, 308. Jaffa titled the fourteenth chapter of *Crisis of the House Divided* "The Universal Meaning of the Declaration of Independence."

[144] Jaffa, *Crisis of the House Divided*, 308.

[145] Jaffa, *Crisis of the House Divided*, 308.

[146] Jaffa, *Crisis of the House Divided*, 1.

[147] Harry V. Jaffa, "Faith and Reason," *New York Times* (July 3, 2011), at BR 16, reviewing Robert C. Bartlett, *Aristotle's Nichomachean Ethics* (Chicago: University of Chicago Press, 2011) (with Susan D. Collins).

sovereignty" was in essence the position that might makes right – that the majority not only *does* rule but *should,* without any objective standard of wrong and right to serve as its compass. "Lincoln, however, insisted that the case for popular government depended upon a standard of right and wrong independent of mere opinion and one which was not justified merely by the counting of heads": "Hence," Jaffa concluded, "the Lincolnian case for government of the people and by the people always implied that being for the people meant being for a moral purpose that informs the people's being."[148]

Lincoln, for Jaffa, was the world-historical figure who stood fast when the great nation he led was most "tempted to abandon its 'ancient faith.'" Through close readings of a number of Lincoln's speeches presented in the form of "Teachings" concerning foundational principles of politics, Jaffa gave Stephen Douglas his due. Jaffa insisted that Douglas recognized and acknowledged that chattel slavery was morally wrong, notwithstanding his support for popular sovereignty. As a matter of politics, however, Douglas committed himself to value neutrality. He believed that the substantive issues involving slavery were constitutionally consigned to the state and territorial governments, and, as such, slavery was best apprehended constitutionally as "a jurisdictional question."[149] In his study of Lincoln's *Address before a Young Men's Lyceum* (1838), Jaffa explained Lincoln's very different approach. For Lincoln, the question of the capability of the people to govern themselves "was always twofold: it referred both to the viability of popular political institutions and to their moral basis in the individual men who must make those institutions work." Moral institutions could only be made and sustained by individually moral men.[150]

Here, Jefferson's decision in the Declaration of Independence to substitute "the pursuit of happiness" for John Locke's protection for "property" in his similarly worded *Second Treatise on Civil Government* (1689) loomed large for Jaffa. This substitution in phrasing proved to Jaffa that the United States was founded on the principle of the pursuit of moral virtue. While his contemporaneous fellow conservatives Irving Kristol and Martin Diamond were insisting that the American Revolution was essentially a bourgeois enterprise aimed at mitigating worldly evils and providing for the pursuit of worldly pleasures, Jaffa interpreted the philosophical import of the Declaration's opening to have launched a polity committed to the aspirational pursuit of the supreme Good – to "a transcendental affirmation of what it *ought* to be." By advisedly substituting the phrase "pursuit of happiness" for the word "property," in other words, Jefferson had remedied a core theoretical defect in the political philosophy of Hobbes and Locke and committed the new nation to the pursuit of moral perfection, understood by the lights of objective truth. For

[148] Jaffa, *Crisis of the House Divided*, 2–4. [149] Jaffa, *Crisis of the House Divided*, 2, 44.
[150] Jaffa, *Crisis of the House Divided*, 185–186. Abraham Lincoln, Address before a Young Men's Lyceum (January 27, 1838).

Jaffa, this was what the Lincoln-Douglas debates, occasioned by the question of the constitutional status of chattel slavery, were all about.[151]

Jaffa made clear that the issues at stake in those debates are "still the fundamental issues in American politics."[152] He expressed (and long continued to express – until his death in 2015) profound concern about whether contemporary Americans had the faith to avail themselves of their rich constitutional heritage. It was the high responsibility of students of Leo Strauss to fight for this ancient faith, whose preservation would do no less than determine Western civilization's survival.[153]

ROMAN CATHOLIC NATURAL LAW AND ERIC VOEGELIN'S METAPHYSICAL MYSTICISM

Jaffa's reading of the Declaration of Independence as positing a unified supreme Good, with the nature of rights, as with all else, to be understood in light of this Good, harmonized with Thomist Roman Catholic theology. M. E. Bradford had critically observed, on this score, that Jaffa was attempting to understand America through the lenses of systematic philosophy – treating the country as standing for a philosophical "proposition" from which all else followed logically, philosophically, and theologically (which Bradford considered a fundamentally flawed approach to conceptualizing the history and politics of nations). Jaffa, who was Jewish, however, had himself made the connection between his understandings and Roman Catholic theology. Drawing a parallel between the American Founders and seminal Catholic thinkers, Jaffa noted early on that "whatever their differences," Thomas Aquinas and Thomas Jefferson "shared a belief concerning the relationship of political philosophy to political authority that neither shared with the last ten presidents of the American Political Science Association. It seemed to me that both believed it was the task of political philosophy to articulate the principles of political right, and therefore to teach the teachers of legislators, of citizens, and of statesmen the principles in virtue of which political power becomes political authority." Unlike modern social scientists and contemporary relativist, positivist progressive/liberals, both Jefferson and Aquinas were committed to the position that there are objective standards of right and wrong. Both believed, moreover, that democratic politics, properly understood, involved the advancement of the right and the Good: "the laws of nature mentioned in the Declaration."[154]

[151] Harry V. Jaffa, "Another Look at the Declaration," *National Review* 32 (1980): 836, 840. Kesler, "Special Meaning," 851–852. Jaffa, *Crisis of the House Divided*, 321 (emphasis in original).

[152] Jaffa, *Crisis of the House Divided*, 7.

[153] Jaffa, "Faith and Reason"; Jaffa, "Another Look at the Declaration," 836, 840.

[154] Jaffa, *Crisis of the House Divided*, 9, 11.

Catholic theologians took up the matter directly, without any necessary recourse to Leo Strauss. Not all of these were conservatives – but many were, and they published in conservative outlets.[155] The most prominent Catholic natural law theorist writing about the American constitutional order was John Courtney Murray, SJ,[156] a Jesuit theologian at the now defunct Woodstock College (which was absorbed into Georgetown University), and frequent contributor to the Jesuit magazine *America,* who, in his landmark statement of Catholic Declarationism, *We Hold These Truths: Catholic Reflections on the American Proposition* (1960), proposed a synthesis of Catholic natural law and American constitutional law that would place Roman Catholics at the heart of the American political and constitutional tradition.[157]

Murray was not easily classified politically in the early 1960s, just as he is not easily classified politically today. While Murray's thought has many attractions for contemporary conservatives, in his own time Murray's work was not aligned with conservatism: he challenged not only the Church hierarchy, which silenced him for a period, but also the core convictions of the nation's most conservative lay Catholics, who were convinced that American democratic liberalism was hopelessly incompatible with Catholic teaching. As the first major Catholic theologian to argue aggressively for the virtues of religious liberty, pluralism, the "distinction" between church and state, and the secular state, Murray was celebrated in his day by liberals and remains an important touchstone for Catholic liberals today. In time, despite earlier run-ins with the Church's reactionary hierarchy, Murray played a pivotal role in the Vatican II conclave that, in line with the views he had been advancing, modernized the Church's teachings. At the very moment when the United States was electing its first Catholic president, Murray, who was prominent enough to have his picture grace the cover of *Time* magazine, demonstrated through systematic philosophic argument starting with the principles articulated in the opening lines of the Declaration of Independence that good Catholics could be good Americans.[158]

The claim, indeed, went further, in a way that contemporary right-wing Catholics have picked up on aggressively. As the late Peter Augustine Lawler

[155] See, e.g., William J. Ellos, SJ, "Natural Law: A Phenomenological Essay in Defense of a Tradition," *Modern Age* 10:3 (Summer 1966): 261–268, 264. There were, however, a few clerical Straussians, the most prominent being the Boston College theologian Father Ernest L. Fortin (1923–2002).

[156] The discussion of John Courtney Murray, SJ, in this section is drawn, somewhat revised, from Ken I. Kersch, "Beyond Originalism: Conservative Declarationism and Constitutional Redemption," *Maryland Law Review* 71 (2011): 229–282.

[157] John Courtney Murray, SJ, *We Hold These Truths: Catholic Reflections on the American Proposition* (Lanham, MD: Rowman and Littlefield, 2005)[New York: Sheed and Ward, 1960].

[158] *Time* (December 12, 1960). See Peter Augustine Lawler, "John Courtney Murray as Catholic American Conservative," in Ethan Fishman and Kenneth L. Deutsch, editors, *The Dilemmas of American Conservatism* (Lexington: University Press of Kentucky, 2010).

(1951–2017), an influential contemporary Catholic conservative political theorist, noted, it was John Courtney Murray's conviction that "*only* the Catholic community," with its richer and deeper tradition and carefully cultivated systematic philosophy and theology, "could illuminate what was true and good about what our founders accomplished."[159] Who better than a Catholic theologian trained in natural law to explain to Americans the true meaning of the Declaration of Independence, as elaborated by its most profound and fervent proponent, Abraham Lincoln, "our most ambitious and philosophic president?" "If veneration for the true accomplishment of our political Fathers is the standard of citizenship," Lawler argued, "those within the Catholic natural-law community of thought are the least alienated of Americans today." "*Only* a Thomistic or natural-law understanding," Lawler claimed (following John Courtney Murray), "can make sense of our framers' accomplishment."[160]

Lawler argued, moreover, that far from being divisive, the Thomist philosophical method provides a common ground for discussions between Evangelical Protestants, with their emphasis on Revelation, and secular humanists, who prize Reason. Since its animating purpose is to synthesize Reason and Revelation (or, as Straussians put it in one of their animating tropes, "Athens and Jerusalem"), Thomism is the best available framework for appreciating, understanding, and explicating the implications of the American Founding and the US Constitution – or, indeed, of the meaning and creed of the American nation itself.[161]

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

[159] Peter A. Lawler, "Critical Introduction," to Murray, *We Hold These Truths*, 2.

[160] Lawler, "Critical Introduction," 3, 4, 13 [emphasis added]. Similarly, the contemporary conservative intellectual historian Wilfred McClay defiantly, and rightly, concludes, "It would require a monumental misreading of Murray to attribute to him anything like a full-scale capitulation to contemporary American political and cultural life … Murray's Catholicism came first. Rather than trim Catholicism's sails to fit American democratic sensibilities, he argued for the possibility that one could affirm American democratic institutions on a basis entirely faithful to the Catholic distinctives – one that might constitute a deeper and more satisfactory basis for that affirmation and aim not to destroy the founders' work but to fulfill it by addressing its inadequacies." Wilfred McClay, "The Catholic Moment in American Social Thought," in R. Scott Appleby and Kathleen Sprows Cummings, editors, *Catholics in the American Century: Casting Narratives of US History* (Ithaca, NY: Cornell University Press, 2012), 149–151. See Robert A. Orsi, "US Catholics between Memory and Modernity: How Catholics are American," in Appleby and Cummings, *Catholics in the American Century*, 15.

[161] Lawler, "Critical Introduction," 22.

Today, when the serene and often naive certainties of the eighteenth century have crumbled, the self-evidence of truths may legitimately be questioned. What ought not to be questioned, however, is that the American Proposition rests on the forthright assertion of a realist epistemology. The sense of the famous phrase is simply this: "There are truths, and we hold them, and we here lay them down as the basis and inspiration of the American project, this constitutional commonwealth." To our Fathers the political and social life of man did not rest upon such tentative empirical hypotheses as the postitivist might cast up . . . The structure of the state was not ultimately defined in terms of a pragmatic calculus . . . [T]hey thought the life of man in society under government is founded on . . . a certain body of objective truth, universal in its import, accessible to the reason of man, definable, defensible. If this assertion is denied, the American Proposition is . . . eviscerated at one stroke.[162]

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

The next natural question – especially in a vibrant democracy, where all power tends to be claimed by the *demos* – was "Do we hold these truths because they are true, or are these truths true because we hold them?" Murray answered the former: the truths are held because they are true, not simply because (in a democratic, majoritarian, consensus spirit) most people happened to believe them. That the American Proposition is true "is a truth that lies beyond politics; it imparts to politics a fundamental human meaning. I mean the sovereignty of God over nations as well as over individual men."[163]

As a nation firmly anchored in a commitment to God's sovereignty, the nation "was conceived [by its Founders] in the tradition of natural law." This was the case whatever the religion (or lack of religion) of those Founders: as Murray explained, they built better than they knew. This made Saint Thomas Aquinas truly "the first Whig," and natural law "the first structural rib of American constitutionalism." As a consequence, the American tradition of free government pivots on the "profound conviction that only a virtuous people can be free."[164]

It is a commitment to this principle, Murray continued, "that radically distinguishes the conservative Christian tradition of America from the Jacobin laicist tradition of Continental Europe," the latter of which worships the presumed autonomy of man, and his all-powerful individual reason. We know that people are virtuous only when they are "inwardly governed by the recognized imperatives of the universal moral law." This, of course, affects the way that rights are to be understood within the American constitutional tradition. It is a fact that "[t]he American Bill of Rights . . . [is] the product of Christian history . . .. The 'man' whose rights are guaranteed in the face of law

[162] Murray, *We Hold These Truths*, viii–ix. [163] Murray, *We Hold These Truths*, 28.
[164] Murray, *We Hold These Truths*, 28, 31–32, 36, 98, 106–107.

and government is, whether he knows it or not, the Christian man, who had learned to know his own personal dignity in the school of Christian faith."[165] As such, the content of those rights can only be defined and understood in light of the nature of the supreme Good, as set out in universal natural law. This places natural law philosophy at the center of the inquiry into the nature and proper application of the Bill of Rights.

While there is nothing inherently Catholic about natural law, Murray explained that the natural law tradition and, hence, the American constitutional tradition, finds its "intellectual home within the Catholic Church." "Catholic participation in the American consensus," Murray observed proudly, "has been full and free, unreserved and unembarrassed, because the contents of that consensus – the ethical and political principles drawn from the tradition of natural law – approve themselves to the Catholic intelligence and conscience." While mainline Protestantism may have moved away from the old English and American tradition in this regard, its foundations are "native" to Catholics. On the fundamentals, the "Fathers of the Church and the Fathers of the American Republic" were of one mind.[166]

Particularly in the modern context, Catholics had a special role to play as guardians of the foundations of the American Republic. No society without a substantive core can ever long survive, and, in the modern context of pluralism and democracy, the truths set out in the Declaration of Independence, according to Murray, articulate that core. Catholic natural law philosophy helps us understand and appreciate the nature of that core and its indispensability in the deepest possible way.[167]

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

These conservatives emphasize that other nations – most notably, Hitler's Germany and Marxist totalitarian states like the Soviet Union – had no such grounding, with results that led to some of the worst catastrophes in human history. Straussians and the contemporary American Catholic Right suspect that secular progressives, in their denial of the natural law foundations of the American nation and its constitutional traditions, have more in common with America's greatest twentieth-century enemies than with its eighteenth-century Founders, whose principles were set out in the Declaration of Independence's

[165] Murray, *We Hold These Truths*, 39. [166] Murray, *We Hold These Truths*, 39–41, 43.
[167] Murray, *We Hold These Truths*, 42–43, 74–75.

opening lines, or its Constitution, as redeemed by Lincoln through his rededication to the principles of the Declaration.[168]

To many on the Right, the situation is grave indeed, not just for America but also for the world. As the right-wing priest Father James Schall, SJ, a political philosopher at Georgetown University, warned in a review of one of Harry Jaffa's books:

> The American situation ... bears witness to a broader civilizational crisis ... [W]hen a universal civilization doubts that there are universal principles, the civilization built on them largely ceases to exist ... If America has now adopted relativist principles to replace those of its founding, then by retaining its universal sense of mission, it spreads profound disorder throughout the world wherever it may exercise its influence.[169]

On this, Father Schall observed admiringly, "Jaffa ... writes with the vigor and wrath of a prophet." For Schall, a conservative Thomist, it was Jaffa who taught us to see how contemporary liberals and progressives are the legatees of Stephen A. Douglas, while Catholic conservatives and their conservative evangelical and Fundamentalist Christian (and LDS/Mormon) allies were anchored firmly in the principles of unchanging natural law and stand proudly in the shoes of Lincoln.[170]

For his part, Eric Voegelin (1901–1985), a figure many conservatives have considered "a Columbus [of] the realms of the spirit,"[171] insisted similarly, as against the thrust of modern liberalism, that an ontological grounding was indispensible to political theory. Like Leo Strauss, Voegelin was a German émigré scholar, in Voegelin's case fleeing his position on the faculties of Law and Political Science at the University of Vienna one step ahead of the Nazis. A doctoral student of the eminent legal theorist Hans Kelsen, Voegelin's position in Vienna had become increasingly untenable because of his implacable opposition to Nazi racial theories. Voegelin taught for many years at Louisiana State University, returning for a short time to his native Germany

[168] See, e.g., Richard Sherlock, "The Secret of Straussianism," *Modern Age* 48 (2006): 208–211; Media Matters for America, quoting Bill O'Reilly, *The Radio Factor* (Fox News Radio, November 28, 2005) (http://mediamatters.org/mmtv/200511300007) (comparing the modern secular progressive movement to twentieth century totalitarian regimes, and claiming that "[i]n every secular progressive country, they've wiped out religion ... Joseph Stalin, Adolf Hitler, Mao Zedong, Fidel Castro, all of them. That's the first step. Get religion out of there, so that we can impose our big-government progressive agenda").

[169] James J. Schall, SJ, "Original Intent and the Framers of the Constitution: A Disputed Question," *Loyola Law Review* 41 (1995): 77–85, 79 (reviewing Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, DC: Regnery Gateway, 1994)).

[170] Schall, "Original Intent," 81.

[171] Dante Germino, "Eric Voegelin's Contribution to Contemporary Political Theory," *The Review of Politics* 26:3 (July 1964): 378–402, 378. See Voegelin, *New Science of Politics*; Voegelin, *Science, Politics, and Gnosticism*; Eric Voegelin, *Order and History* (Baton Rouge: Louisiana University Press, 1956–1987) (Vols. I–IV).

as Max Weber Professor of Political Science at the University of Munich, before decamping once again for the United States, where he died during his tenure as the Henry Salvatori Distinguished Scholar at Stanford University's Hoover Institution. Like Strauss, Voegelin was preoccupied with what the twentieth-century European catastrophe they fled had revealed about the nature and trajectory of Western civilization and the "crisis of man."[172] And, like Strauss, Voegelin identified the rot at Western civilization's core as stemming from its abandonment of its moral foundations. Like the Straussians, Voegelin found those foundations in ancient political theory – Plato and Aristotle, in particular – but also, more than many Straussians (the issue is disputed), in the West's Christian heritage. As such, while there are many divergences and differences in counterposing Voegelinianism and Straussianism, the two schools have extensive affinities and share core intellectual and political preoccupations. Both are preoccupied with the crisis of the West (with Nazism, European fascism, and totalitarianism more generally as the clarifying, symptomatic evils), and both root that crisis in an abandonment of foundational moral Truths. In doing so, both Voegelinians and Straussians posit an opposition between a well-ordered ancient (and, to a lesser extent, medieval) world and a disordered modern one (the orienting Straussian opposition between "Ancients" and "Moderns") and devote sustained effort to calibrating the appropriate balance between (Human) Reason and (Transcendent) Revelation (for Straussians, "Athens and Jerusalem") in a well-ordered soul and polity. In doing so, moreover, both make a grudging decision to bear the burden of contemplating the ways in which a tragic but likely inevitable modernity can incorporate enough of the classical or Christian heritage in its sinews to instantiate, if not a good, then at least a good-enough society, conducive, to the extent possible, to human flourishing worthy of pride and allegiance.

Voegelin's theories are notoriously abstruse, with their intricacies debated within a redoubtable scholarly literature.[173] The essence of his complex, idiosyncratic, and esoteric theory of politics starts from a positivist empirical inquiry into the nature of "political reality."[174] Given the nature of that

[172] See Mark Greif, *The Age of the Crisis of Man: Thought and Fiction in America, 1933–1973* (Princeton: Princeton University Press, 2016); Lt. Colonel Montgomery C. Erfourth, "The Voegelin Enigma," *The American Interest* (December 10, 2014).

[173] See, e.g., Michael Federici, *Eric Voegelin: The Restoration of Order* (Wilmington, DE: ISI Press, 2002); Ted McAllister, *Revolt Against Modernity: Leo Strauss, Eric Voegelin, and the Search for a Post-Liberal Order* (Lawrence: University Press of Kansas, 1996); Mark Lilla, *The Shipwrecked Mind: On Political Reaction* (New York: New York Review Books, 2016); Gerhart Niemeyer, "Eric Voegelin's Philosophy and the Drama of Mankind," *Modern Age* 20 (Winter 1976); David Walsh, "Eric Voegelin and Our Disordered Spirit," *The Review of Politics* 57 (Winter 1995), 134.

[174] As Voegelin scholars have noted and discussed, the political philosopher's focus on lived reality seems to have been arrived at in part through the influence of the French philosopher Henri Bergson. On Bergson, particularly setting his views against that of the grand ambitions of

reality, the next question is how to live best within it. Voegelin's answer was that, given the nature of things, living well in political society required a core rootedness in "the ground of being" – the divine. In its classical and Christian phases, Western civilization was born and then built on this rock-solid ground of foundational Truths. This groundedness provided the basis for Western civilization's glories and achievements. Somewhere along the path, however, Western civilization had lost its way. A civilization that had once confidently adhered to and professed Truth had been enticed by the allure of "Gnosticism." Gnosticism promised that man could save himself and reach the highest realms of civilizational and personal accomplishment through his own knowledge and ambition (*gnosis* is Greek for "knowledge"). Western man turned from the ground of being and, through secular utopian visions of making a Heaven on Earth for himself, aspired to replace the "divine as the basis of order" by "man as the maker of order" (even conservatives who know little of the intricacies of the Voegelinian philosophy might be familiar with his most famous injunction against civilization-destroying utopian ambitions: "Don't immanetize the eschaton!").[175] Western civilization's emblematic catastrophes that had sought to do just that were Nazism and Communism (more recent Voegelinian writings identify progressivism, egalitarianism, Freudianism, [Millian] civil libertarianism, and feminism as ideological successors to Nazism and Communism).[176] A core, and related, error in the modern science of politics was to remain resolutely positivist, exiling questions of God's higher Truth, Higher Law, and the nature and requirements of the transcendent moral order, which provided indispensible aspirational goals and external constraints on the behavior and aspiration of man (unreliable but ostensible interpretations of the transcendent, Voegelin recognized, were also a problem).[177] And a core problem of a social order based on the modern science of politics is a denial of the truth that "a social order remains stable only to the extent that the bedrock moral and

a purely positivist science (as championed, e.g., by Albert Einstein), see Jimena Canales, *The Physicist and the Philosopher: Einstein, Bergson, and the Debate That Changed the Understanding of Time* (Princeton: Princeton University Press, 2016).

[175] Erfourth, "Voegelin Enigma." This warning against the profound civilizational threat of the Icarian grasp at utopia is a theme that appears repeatedly in different strains of conservatism, whether in the anti-socialist polemics of Voegelin's Viennese compatriot Friedrich von Hayek's *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), Whittaker Chambers's anti-communist testament *Witness* (New York: Random House, 1952), or thousands of statements in conservative public life – including, now, across the internet – that identify the modern American redistributive, administrative social welfare state as "the thin edge of the wedge" of one or the other form of totalitarian catastrophe. See Thomas Hoerber, *Hayek v. Keynes: A Battle of Ideas* (London: Reaktion Books, 2017), 3–11.

[176] Glenn N. Schram, "The New Gnosticism: The Philosopher Eric Voegelin Finds an Old Christian Heresy to Be Very Much Alive," *Crisis Magazine* (November 1, 1990).

[177] This was a major concern of Leo Strauss's as well. See Herbert J. Storing and Leo Strauss, *Essays on the Scientific Study of Politics* (New York: Holt, Rinehart and Winston, 1962).

legal-political traditions of western civilization remain intact."[178] One novel dimension of Voegelin's understanding which is not purely idealistic (in a philosophical sense) is that it takes extensive account of history: Voegelin held that the Truth is represented and conveyed not simply in esoteric texts accessible only to a philosophical elite (as for the Straussians),[179] but rather in a particular culture's political, cultural, and religious traditions. Thus, for Voegelin, "[t]he crisis of western civilization [is manifested in] the steady decay of truth in the symbols of order rooted in philosophic and spiritual traditions."[180] The truths of the "order of being" are represented symbolically in diverse societies in diverse ways, helping to constitute that society's unique consciousness. As such, understanding the science of politics required an acute awareness of existence spanning multiple dimensions of human experience, some of which, crucially, were transcendental, and thus knowable only through faith.[181]

In its insistence on the application of reason in conjunction with faith, in pursuit of the path to the well-ordered individual soul-in-community, Voegelin's project also shared the core preoccupations and approach of Roman Catholic theology. Voegelin's at times mystical work called upon individuals to order their souls according to reason, as discerned through this portal of multidimensional understanding, and for society – what Straussians call "the regime" – to be organized (governed/ruled) in a way that reflected and honored these imperatives.[182] As such, Straussians, conservative Catholics, and Voegelinians cohered into an intellectual community on the Right – debating and disagreeing, certainly – but nevertheless preoccupied with many of the same issues and sharing the same presuppositions.

Eric Voegelin himself, like Straussians and conservative Catholics, worried about the tendency of liberal democracies toward materialism and to relegating

[178] Erfourth, "Voegelin Enigma."

[179] Leo Strauss, *Persecution and the Art of Writing* (Glencoe, IL: The Free Press, 1952). See Arthur M. Meltzer, *Philosophy Between the Lines: The Lost History of Esoteric Writing* (Chicago: University of Chicago Press, 2014). For a highly critical account, notorious to Straussians, see S. B. Drury, "The Esoteric Philosophy of Leo Strauss," *Political Theory* 13 (August 1985): 315–337. See also Michael L. Frazer, "Esotericism Ancient and Modern," *Political Theory* 34 (February 2006): 33–61. See generally, Shadia B. Drury, *The Political Ideas of Leo Strauss* (London: MacMillan Press, 1988); Shadia B. Drury, *Leo Strauss and the American Right* (New York: St. Martin's Press, 1997).

[180] Erfourth, "Voegelin Enigma." This Voegelinian dimension is reflected in the title of Kendall and Carey's *The Basic Symbols of the American Political Tradition*. See generally "The Eric Voegelin-Willmoore Kendall Correspondence," *The Political Science Reviewer* 33 (2004).

[181] J. M. Porter, "Eric Voegelin: A Philosopher's Journey," *The University Bookman* 18 (Summer 1978).

[182] Germino, "Eric Voegelin's Contribution," 378, 379. Voegelin's views were heavily influenced by Bergson's emphasis on a mystical, experiential, intuitive, as opposed to purely analytic, understanding of the world. Far from being necessarily traditionalist in their implications, Bergson's theories helped inform the birth of modern art.

religion to the private sphere. But, nevertheless, like Leo Strauss himself, and most American Straussians, and like John Courtney Murray, SJ, and his followers on the Roman Catholic Right, Eric Voegelin and the Voegelinians decided to become confirmed, and even passionate, if unillusioned, defenders of US-style liberal constitutional democracy. All three groups did so despite the fact that, ultimately, they were not liberals. In fact, as Michael and Catherine Zuckert have detailed at length, the Straussians have become the leading defenders on the Right of US liberal constitutionalism. Most conservative Catholics today understand themselves to be passionate constitutional patriots. And, indeed, Voegelin's short-lived postwar return to Germany after living in the United States was in part motivated by a desire to spread US constitutional values to Germany and Western Europe. Of this too, now, they see themselves as centurions zealously guarding a Truth, in the spirit of righteous mission, aimed at civilizational and constitutional restoration and redemption.[183]

REACTING AGAINST THE WARREN COURT: THE POLITICAL INDETERMINACY OF METHODS AND PROCESS-BASED CONSTITUTIONAL THEORY

Given its focus on the relatively high-level conservative constitutional theory and political thought in the postwar period that, while prominent in movement outlets in both sophisticated and popularized form, has heretofore remained all but invisible to outsiders, this chapter, so far, has scanted on the more concrete, applied constitutional thought prompted by the era's Supreme Court rulings and political constitutional controversies. While the chapters that follow in this book are more concrete than this one, I will discuss more immediate constitutional thought more systematically in the two books that will follow the more abstracted overview of conservative thought, theory, and narrative (stories) presented here. The first of these, as noted, will canvas the conservative constitutionalism of government powers, structures, and institutions. The second will canvas the conservative constitutionalism of civil rights and civil liberties. In closing out this chapter, however, it will perhaps be useful to hover a bit closer to earth by looking at least at the way that some of the movement's big picture theorists reacted to contemporaneous events by invoking their broader constitutional understandings and visions.

The liberal decisions of the Warren Court, of course, hit conservatives – and those who did not then consider themselves conservatives but found themselves reacting in ways that were similar to conservatives – hard, provoking an intense reaction. Writing in *Modern Age*, for instance, the indubitably conservative Willmoore Kendall worried that the Right had been caught flat-footed:

[183] Erfourth, "Voegelin Enigma."

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[T]he prayer decision [*Engel v. Vitale* (1962)] has caught the Conservatives intellectually unprepared – just as, in 1954, the school desegregation decision caught them unprepared intellectually; and just as, hard after the turn of the century, the Liberal attack on the American Political System ... caught them unprepared intellectually. American Conservatism ... seems to be in the *business* of being unprepared intellectually for the next thrust of the Liberal Revolution; the conservatives never do their homework until they have flunked the exam.[184]

Kendell lamented in 1964 that while "[l]iberal intellectuals ... have developed a theoretical base from which, carrying their rank and file with them, they can strike right to the heart of each issue as it presents itself," conservatives "are a movement ... rent not merely by divided counsels, but also by sharply conflicting views of political reality and, above all, of the American political system itself, and the proper role of Conservatives with respect to its proper functioning, its good health, and its preservation."[185]

Kendall especially lamented the state of intellectually serious conservative *constitutional* thought. While conservatives had long been adept at what had once been called "stand pattism" – stonewalling, "planting your feet in the mud and saying to the enemy 'You shall advance no further'" – they were hopeless at the sort of "elaboration and implementation of Conservative solutions ... through [the] skillful and realistic analysis only conservative intellectuals can provide ... if they are good at their job."[186] "We ... must stop frittering away our energies in *argument* with the Supreme Court – whether about the intention of the Framers of the Constitution and the First Amendment ... or about the 'clear meaning' of the words ... Concretely, we must withdraw from the great current debate on the so-called 'broad' interpretation versus the so-called 'narrow' interpretation," he thundered.[187] Conservatives must (in the recent parlance of Robert Post and Reva Siegel) develop a serious, comprehensive substantive vision.

From a contemporary vantage point, it is notable that in surveying the conservative movement's constitutional thought in the mid-1960s, Kendall saw no defining thought at all – just feckless *ad hoc* reaction. For Kendall, at least, originalism ("the intention of the Framers of the Constitution"), textualism ("clear meaning"), and strict constructionism ("the so-called 'narrow' interpretation") neither cohered as a program, nor were they intrinsically "conservative." This is because, as Kendall sagely recognized, pre-Bork, pre-Berger, and pre-Scalia, the prevailing state of constitutional theory was ideologically and intellectually inchoate: none of these postures, methods, and approaches at the time were uniquely claimed by conservatives or, relatedly,

[184] Willmoore Kendall, "American Conservatism and the 'Prayer' Decisions," *Modern Age* 8:3 (Summer 1964): 245–259, 250. *Engel* v. *Vitale*, 370 US 421 (1962).
[185] Kendall, "American Conservatism and the 'Prayer' Decisions," 250.
[186] Kendall, "American Conservatism and the 'Prayer' Decisions," 250.
[187] Kendall, "American Conservatism and the 'Prayer' Decisions," 250–251.

understood as necessarily leading to distinctively conservative results. While this is not the place to survey the era's contemporaneous liberal constitutional theory, given the beginning of its ascendency on the Right as *the* defining – and presumably effective – constitutional theory just a few years later, it is worth recalling that, at the time Kendall wrote, both originalism and textualism were equally claimed by at least some prominent constitutional theorists on the liberal-left. Neither, moreover, was understood to necessarily entail strict or "narrow" as opposed to "broad" constructionism.

As it happens, the first modern academic defense of originalism as an "ism"[188] – that is, as the only legitimate method for interpreting the constitutional text – in the guise of originalist textualism was by the University of Chicago Law School's Professor William Winslow Crosskey, who was not a conservative. Writing during the genesis and aftermath of the New Deal, Crosskey's chief goal was to place *broad* understandings of Congress's powers, particularly the commerce power, on a firm constitutional footing. As early as the 1930s, frustrated with the constitutional resistance being mounted against Franklin Delano Roosevelt's governing program, Crosskey had become convinced that the US Constitution was "the most misunderstood and misconstrued document ever written." A Chicago colleague later recalled, "Bill was quite sure that Congress had the constitutional power to do all the things the administration was backing in those days . . . and he suddenly decided that he would write something to show them how they could do it."[189]

Appearing after an extended period of herculean scholarly labor, the result was the two-volume *Politics and the Constitution* (1953), which Crosskey dedicated "to the Congress of the United States, In the Hope that it May Be Led to Claim and Exercise for the Common Good of the Country the Powers Justly Belonging To It Under the Constitution." The book's opening stated the author's intention to "propound a unitary theory of the Constitution based, in part, upon the antecedent usage of the words in which the document is cast, and based, for the rest, upon certain legal and political ideas of the period in which the Constitution was written."[190]

Reviewing *Politics and the Constitution* the following year, Cornell Law School's William Tucker Dean was gobsmacked by Crosskey's originalist thesis, commenting with patent wonder at "[t]his simple plan, so simple that it is astounding no one pursued it before in the constitutional area."[191]

[188] James Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms* (New York: Oxford University Press, 2015), 3–4.

[189] Charles O. Gregory, "William Winslow Crosskey: As I Remember Him," *University of Chicago Law Review* 35 (Winter 1968): 243–247, 245.

[190] William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953) (2 vols.), 13–14.

[191] William Tucker Dean, "Review of Crosskey, Politics and the Constitution in the History of the United States," *American Bar Association Journal* 40 (1954): 314–316.

Crosskey's student Abe Krash also set out to describe this new animal invented by Crosskey, who "believed the Constitution could properly be understood only in the context of the actual events which preceded it and in light of the politics and economics, the law and the language of the age when it was written. [Crosskey] maintained that the Constitution should be interpreted as it was understood by an intelligent, well informed person in 1787."[192] "The problem he sets out to answer," Krash explained, "is this: How was the Constitution understood by an intelligent, well informed person when the document was drafted in 1787?" To answer this question, the professor "made an exhaustive survey of the eighteenth century American newspapers, pamphlets, public documents, correspondence, and the like ... With painstaking care, Crosskey ... reconstructed the locution of 1787. Applying the word-meanings of that period, he shows that the Constitution was an internally consistent, carefully constructed document."[193]

Krash later described Crosskey as having thrown "down the gauntlet to legal scholars on a number of fronts": "[Crosskey] dismissed the concept of an amorphous 'living' Constitution as a legal absurdity. He maintained that the historical, intended meaning of the Constitution could be demonstrated with a high degree of certainty, a point of view at odds with prevailing theories of documentary interpretation which stress ambiguity."[194] Crosskey, moreover, declared that any departure by judges from the application of original meaning amounted to little more than "politics" and should be considered an "illegitimate" exercise of judicial power (hence the book's title).[195] Over the course of its history, Crosskey lamented, the Court frequently engaged in politics, betraying the Constitution's true, original meaning.[196] While *Politics and the Constitution* was widely noticed, serious historians of the time regarded it as little more than hectoring and dogmatic law office history in which original

[192] Abe Krash, "William Winslow Crosskey," *University of Chicago Law Review* 35 (Winter 1968): 232–237, 234.

[193] Abe Krash, "A More Perfect Union: The Constitutional World of William Winslow Crosskey," *University of Chicago Law Review* 21 (Autumn 1953): 1–23, 2. See also Abe Krash, "The Legacy of William Crosskey," *Yale Law Journal* 93 (1984): 959–980, 962 (noting the relevance of Crosskey's originalist method to contemporary debates over originalism in the legal academy in the mid-1980s).

[194] Abe Krash, "The Legacy of William Crosskey," 978.

[195] See Clement Vose, "Crosskey on Shenanigans v. Science," *Journal of Politics* 17:3 (August 1955): 448–452. One reviewer of Crosskey's book noted that it was abundantly laced with "pejorative epithets" and remarked upon the author's "'no possible doubt' phraseology." R. K. Gooch, Review of *Politics and the Constitution in the History of the United States*, Two Volumes, *American Bar Association Journal* 40 (1954): 313–314.

[196] Crosskey was Robert Bork's constitutional law professor at the University of Chicago Law School. While this might suggest some direct influence on Bork's seminal conservative originalism, sources close to Bork have told me that Bork frequently skipped Crosskey's class and that Crosskey's pedagogical method, which involved hectoring his students incessantly with his fixed, strident point of view, made him anything but influential.

sources were put to willful use to advance what was clearly a contemporary political/ideological vision.[197]

Perhaps the best-known postwar liberal originalist was Hugo Black.[198] As a US senator from Alabama, Black was a vehement New Dealer and FDR supporter – vehement enough, when many other liberals blanched, to have backed FDR's "court packing" plan to ram the New Deal through in the face of the Court's constitutional objections. Black's clearest interpretive commitment as a Supreme Court justice, perhaps, was to textualism – that is, his emphasis on the duty of the judge to apply the plain meaning of the language of the Constitution's text in interpreting and applying the law. Many have conjectured that as a Southern Baptist this textualism came naturally to Black (Sanford Levinson had dubbed this interpretive stance "constitutional Protestantism"). As a judge, Black took the Constitution as his Bible: his job, as he saw it, was to read and apply its patent, literal meaning to the case at hand

[197] In a review in the *American Historical Review* of the posthumously published third volume of Crosskey's masterwork, the eminent historian Lance Banning described *Politics and the Constitution* as "[g]rounded ... on research that ranges widely, though selectively, through contemporary newspapers, legislative records, and superseded editions of collected writings but which systematically dismisses or neglects the most important secondary sources." Banning described the book as "a tour de force of scholarship subordinated to a point of view." "Countervailing evidence is repeatedly ignored or explained away. In passage after passage, contemporary language that might seem clear to any specialist in the history of the Confederation years is tortured into shapes that none will recognize. For all the claims to be recovering an eighteenth-century universe of discourse, the work shows little feeling for the period with which it deals. By ordinary standards of the discipline, it is outrageously bad history. By any test, it is a stunning feat of tendentious argumentation, a clever if exhausting brief for a position that Alexander Hamilton himself did not attempt to argue." Lance Banning, Review of William Crosskey and William Jeffrey, *Politics and the Constitution in the History of the United States*, Volume 3, *The Political Background of the Federal Convention*. *American Historical Review* 86:5 (December 1981): 1147–1148. In a review in the *American Political Science Review*, Charles A. Miller described *Politics and Constitution* as "a work of deliberate constitutional ideology in a historical mode, like that of Louis Boudin." Miller found Crosskey's take "explicitly political." Miller complained that "The Constitution, Crosskey holds, is a perfect document; that is, it describes a logically complete political system. Once its vocabulary is understood ... and once eighteenth century canons of legal construction are employed, the document becomes clear and unmistakable in its meaning." He added, that "Crosskey holds a remarkable view of the nature of history. In place of the complexity, uncertainty, compromise, or even luck, which normally make up political history, Crosskey had discovered a constitutional teleology, a single force that moves through American history in the years preceding the federal convention and knocks aside all other issues." Miller pronounced its originalist method highly idiosyncratic. Charles A. Miller, Review of William Crosskey and William Jeffrey, *Politics and the Constitution in the History of the United* States, Volume 3, *The Political Background of the Federal Convention*, *American Political Science Review* 75: 4 (December 1981): 1036–1038. *Plus ça change* – see Martin Flaherty, "History 'Lite' and Modern American Constitutionalism," *Columbia Law Review* 95 (1995): 523.

[198] See, e.g., Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore: Johns Hopkins University Press, 2005).

(Black was famous for carrying a copy of the Constitution in his breast pocket and pulling it out as necessary to expound upon its clear commands).[199]

Black added an originalist overlay to this textualism in the course of his extended advocacy on the Court for his position in favor of the total incorporation of the Bill of Rights via the due process clause of the Fourteenth Amendment. Section 1 of the Fourteenth Amendment (1868) – one of the Constitution's "Civil War" or "Reconstruction" amendments – provided that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This section of the amendment, arising as it did out of the firm conviction that the national government needed to assume a greater role in policing rights violations by the states (whose violation of fundamental rights, from one perspective, had caused the Civil War), enumerated the categories of violations in the three clauses that follow the "No state shall" language (borrowed from the short but significant list of proscriptions against the states of Article I, Section 10): (1) the privileges and immunities clause, (2) the due process clause, and (3) the equal protection clause. The implications of the first were quickly read out of the picture for most significant purposes by the Supreme Court in the very first case it heard interpreting that clause's meaning, *The Slaughterhouse Cases* (1873) (and the equal protection clause, which eventually proved immensely significant, is a separate subject).[200] As such, by default, the questions involving the new departure in the policing of rights violations by the states were all freighted onto the due process clause. Immediately, of course, a deluge of questions arose about how to interpret this new order. One of them involved the question of *which rights* were so fundamental that violations of them by states were newly proscribed, subject to the enforcement of the national government (whether by Congress – see Section 5 of the Fourteenth Amendment – or perhaps directly by the federal courts). Positions on this question were already being taken during the congressional debates in the Reconstruction Congress that ultimately drafted and proposed the amendment. Contending positions on this question were at the heart of *Slaughterhouse* (where the majority and dissenters disagreed about how narrowly or broadly to interpret this category of rights),

[199] Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988). See also Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (Ithaca, NY: Cornell University Press, 1984).

[200] Recent scholarship – especially on the Right – has questioned the conventional story of *Slaughterhouse* as the turning point in this regard, arguing in favor of the *Cruikshank* case, which involves Second Amendment gun rights, instead. *United States* v. *Cruikshank*, 92 US 542 (1876). See Kurt Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (New York: Cambridge University Press, 2014); Leslie Friedman Goldstein, "The Specter of the Second Amendment: Rereading *Slaughterhouse* and *Cruikshank*," *Studies in American Political Development* 21 (Fall 2007): 131–148.

and they reappeared periodically as the issue was raised in concrete cases across the late nineteenth and early twentieth centuries. Toward the very end of the nineteenth century, the Court held for the first time that one way to answer the question of "which rights" was by looking to the rights that had been protected in the Founding Era in the original Bill of Rights (1791) – an approach known as "incorporation" (early on, it was called "absorption," a term that fell out of use). This immediately presented another question: Did this mean that all of the provisions of the Bill of Rights were incorporated ("total incorporation"); only those provisions that were, in some sense, fundamental ("selective" or "partial incorporation"); all of the provisions of the Bills of Rights, plus any additional rights not set out there that the Court deemed fundamental ("incorporation plus"); or was the determining factor not the enumerated Bill of Rights but the determination that the right was fundamental, *tout court*. As the Rights Revolution in civil liberties and civil rights heated up post–New Deal, these questions became the subject of heated debate, on the Court and off. And given the ultimate textual ambiguity of the Fourteenth Amendment's due process clause, justices and prominent scholars soon moved to questions of what the framers of the Fourteenth Amendment had intended to do in the Reconstruction Congress.

This, of course, was originalism. The issue was vehemently disputed on the Court in a debate between Hugo Black and Felix Frankfurter initiated in the *Adamson* v. *California* (1947) decision.[201] Black's *Adamson* dissent arguing for total incorporation sparked a scholarly donnybrook on the question between William Crosskey and Charles Fairman of Stanford Law School. Without canvassing the details, it is enough to say that Black (and Crosskey) argued for total incorporation, with their argument adducing historical materials enlisted in an argument made on originalist grounds.[202] These debates were prominent both on the Court and in academia, and they had real consequences for the future path of the Court-led Rights Revolution concerning civil liberties. Originalist analysis of the Fourteenth Amendment became even more prominent at mid-century when it was enlisted in defense of, and in opposition to, the Court's landmark application of the equal protection clause to declare racial segregation in public schools unconstitutional in *Brown* v. *Board of Education* (1954).[203] While there were certainly liberals who spurned originalism on civil liberties and civil rights from the 1940s through the 1960s, liberal originalists like Hugo Black were certainly part of the debates, and prominently so.

In an essay on Justice Black in a then liberal (but transitioning) *Commentary* magazine in 1963, the pro–New Deal James Grossman defended the justice's

[201] *Adamson* v. *California*, 332 US 46 (1947).
[202] O'Neill, *Originalism in American Law and Politics*, 67–73.
[203] O'Neill, *Originalism in American Law and Politics*, 73–76. *Brown* v. *Board of Education*, 347 US 483 (1954).

originalist approach against those on the Right seeking to discredit him as "an outright New Dealer . . . as if it were unseemly to uphold the New Deal on the basis of a conviction older and deeper than the newly converted majority's."[204] Noting crescendoing charges that when it came to civil rights, the Warren Court might "be imposing its own views of freedom, its very prejudices, on legislatures, as formerly its predecessors imposed theirs in the field of economics" – the charge of "judicial activism" or "Lochnerism" once hurled by Progressives and New Dealers at conservatives on the bench – Grossman observed that "Black's fundamental tactic has been to get us to accept as old what are really new views, he does not speak of the growth of the law and does not admit that he has any part in making it, as judges who have been teachers are so fond of doing." Rather, the justice holds himself out as "helping [to] restore the law to its original purpose." Of course, Grossman noted, Black was in fact doing no such thing. But, while "[m]ere reason may tell us that this is an absurd doctrinaire attitude," he observed, "it has been amazingly successful as a judicial method, and the vulgar test of success is not a bad one to apply in a field that has so few demonstrable rules as constitutional law."[205]

Not long after the truculently liberal Crosskey and Black began pioneering modern originalism and textualism, a prominent group of liberal, pro–New Deal academics began to recoil in horror at what they considered to be the activist, anti-democratic antics of the liberal Warren Court – and found themselves newly aligned along key dimensions with the era's rising constitutional conservatives like Willmoore Kendall. The most prominent were Philip Kurland of the University of Chicago Law School, Alexander Bickel of Yale Law School, and Raoul Berger of Harvard Law School.[206]

Like many of their colleagues in the postwar legal academy, this group did not want for liberal bona fides. Kurland, like Bickel, had been a law clerk to Supreme Court Justice Felix Frankfurter, who, although an A-list Progressive and New Deal insider (from his perch at Harvard Law School, he had played a major role in staffing the New Deal and had been appointed to the High Court by Franklin Roosevelt), retained his Progressive commitment to judicial deference to legislatures even as the mid-century Warren Court revolutionized

[204] James Grossman, "Justice Black and the Absolute," *Commentary* 36 (September 1963): 244–263, 244.

[205] Grossman, "Justice Black," 246, 248. See O'Neill, *Originalism in American Law and Politics*. Grossmann and O'Neill both give Hugo Black – and not Edwin Meese and, later, The Federalist Society – credit for launching contemporary discussions of originalism.

[206] The label "conservative" had lately been attached to Felix Frankfurter, which the Brandeis protégée, FDR intimate, and Supreme Court appointee – a man with clear progressive/liberal substantive commitments, but a consistent proponent of judicial restraint from the Progressive Era through the Warren years – chafed against strongly. See generally H. N. Hirsch, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981). On Frankfurter's role in staffing the New Deal more generally, see Peter Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1993).

the relationship between progressive politics and an activist judiciary. Kurland joined Raoul Berger in writing and testifying on the constitutional ground rules that shored up the scholarly case for Richard Nixon's impeachment.[207] Although all three legal academics increasingly found themselves lauded by conservatives, they did not fit in with at least some strains of the modern conservative movement.

The cases of Kurland and Bickel were particularly complicated. The founder and editor of the mainstream scholarly *Supreme Court Review* (1960–1988), Kurland disdained dogmas, litmus tests, and ideologies and emphasized ambiguity and complexity. In memorializing Kurland, David Levi, a federal judge and the son of Kurland's former University of Chicago Law School colleague (and US Attorney General) Edward Levi, said that Kurland understood himself to stand "in a tradition of skeptical liberalism beginning with [Oliver Wendell] Holmes [Jr.]," "a tradition born in doubt rather than faith, and maintained by skepticism rather than belief." Kurland's heroes were Frankfurter, Justice Robert Jackson, and Judges Learned Hand and Jerome Frank (for whom he had also clerked).[208] Spotlighting Kurland's appreciation for complexity, and noting his good-natured pessimism, his University of Chicago colleague (constitutional law scholar, and later president of Stanford University) Gerhard Casper testified to Kurland's directness, impatience with cant, and skepticism of grand schemes, adding that Kurland insisted that the Constitution was "a complex system that cannot be reduced to one of its components." Kurland considered

> [m]ajority rule, separation of power within the national government, the system of checks and balances, federalism, the Bill of Rights, and ... the independence of the judiciary ... [not] as separate topic[s] that can be treated in isolation, but as the Framers' interdependent devices for the restraint of brute power, however disguised, within American democracy.[209]

Like many who became neoconservatives, however, Kurland, a New York City (Brooklyn) native, in time became profoundly critical of the effects of the student movement of the late 1960s on the university.[210] He was a champion of

[207] Philip Kurland, *Watergate and the Constitution* (Chicago: University of Chicago Press, 1972); Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge, MA: Harvard University Press, 1972); Raoul Berger, *Executive Privilege: A Constitutional Myth* (Cambridge, MA: Harvard University Press, 1974). See also Raoul Berger, *Federalism: The Founders' Design* (Norman: University of Oklahoma Press, 1987).

[208] David Levi, "In Memoriam Philip B. Kurland," *University of Chicago Law Review* 64 (Winter 1997) 1, 4–5. Levi cited Kurland's article "Justice Robert H. Jackson – Impact on Civil Rights and Civil Liberties," 1977 *University of Illinois Law Forum* 551, 552" as illustrative of the core of Kurland's constitutional disposition.

[209] Gerhard Casper, "In Memoriam Philip B. Kurland," *University of Chicago Law Review* 64 (Winter 1997) 1: 10, 12

[210] See generally Joseph Dorman, *Arguing the World: The New York Intellectuals in Their Own Words* (Chicago: University of Chicago Press, 2001).

"the Founders' Constitution" (he and his colleague Ralph Lerner at Chicago's Committee on Social Thought assembled the important five-volume document compilation on the subject). Yet in 1987, Kurland spoke out against Robert Bork's appointment to the Supreme Court, condemning the federal judge – a pillar and pioneer of modern conservative originalism – as a dissembling opportunist.[211]

Kurland tended to address particular questions and issues on their own terms, as they arose. Despite the high esteem in which he held them, Kurland was never dogmatic about the Founders in a way that led him to deny the relevance of historical change, which he was perfectly comfortable discussing in constitutional terms, even when the change was informal (that is, not via the formal Article V amendment process). Long before the liberal Yale Law School scholars Bruce Ackerman and Akhil Amar became well known for their regime theories of US constitutional development, Kurland had set out the fundamentals of basically the same idea, positing, as Ackerman did later, an American constitutional order characterized by three regimes, the first from the Founding to (roughly) the Civil War, the second from the Civil War to the New Deal, and the third from the aftermath of the New Deal to the present.[212]

All the same, during the heyday of what scholars have called "history's Warren Court" in the mid-1960s, *Human Events* published a speech by Kurland expressing shock and uneasiness that "the justices have wrought more fundamental changes in the political and legal structure of the United States than during any period in our history since Chief Justice Marshall first wrote meanings into the abstractions of the Constitution's language."[213] Kurland set out a taxonomy of the Court's new departures and concluded, based on that assessment, that the Court was transforming the principle of equality into the overarching determinant of its constitutional decision making (a point that had also been made by Martin Diamond). This new departure, Kurland warned, both subordinated, if not destroyed, the federal system, and radically expanded the Article III judiciary's power vis-à-vis the other branches of the federal government.[214]

[211] Philip B. Kurland and Ralph Lerner, editors, *The Founders' Constitution* (Chicago: University of Chicago Press, 1987) (Vols. I–V)[subsequently republished by The Liberty Fund].

[212] Philip Kurland, "American Systems of Laws and Constitutions," in Daniel Boorstin, editor, *American Civilization* (London: Thames and Hudson, 1972). Not to say that this regime framework was not later critiqued by conservatives expressing concern for the integrity of the eighteenth-century Founding. See Lane V. Sunderland, "The Constitutional Analysis of Philip B. Kurland," *The Political Science Reviewer* 12 (Fall 1982): 167–206.

[213] Philip B. Kurland, "How the Supreme Court Is Remaking the United States," *Human Events* (January 23, 1965), 10.

[214] Kurland, "How the Supreme Court Is Remaking the United States." In 1957, in a discussion of the liberal bias of his fellow Supreme Court clerks, a young William Rehnquist (who clerked for Justice Robert Jackson) said, "Some of the tenets of the 'liberal' point of view which commanded the sympathy of a majority of the clerks I knew were: extreme solicitude for the claims of Communists and other criminal defendants, expansion of Federal power at the expense of

Like Kurland, Yale's Alexander Bickel and Harvard's Raoul Berger were similarly taken aback by the Warren Court's activism, the former from the perspective of someone preoccupied with questions of competence and prudence, and the latter from that of someone preoccupied with questions of fidelity. For his part, Bickel was closely associated with the "legal process" movement within legal academia – a movement whose origins were decidedly progressive/liberal but came to be seen as conservative (its members' protests notwithstanding) as the Warren Court Rights Revolution moved in a decidedly different direction (it is no accident that many of its denizens had, like Bickel, been clerks and protégés of Felix Frankfurter). Legal process scholars were liberal supporters of the New Deal, which they believed had instituted important changes in American government crucial for responsibly addressing modern conditions. Like many other New Deal liberals, however, they were concerned that the New Deal state lacked – or had not clearly or effectively articulated – its constitutional or rule of law foundations.[215] The problem in this regard was twofold. First, it presented a problem of justification, raising questions of legitimacy. Second, substantive constitutional values (and functional concerns) were at stake: issues concerning the concentration of power, popular participation, institutional competence, and so forth (the two dimensions, of course, were intertwined). Just as, at about the same time, the Cornell and Harvard political philosopher John Rawls began elaborating a theoretical liberal contractarian justification for the modern American state,[216] the Legal Process scholars proposed a process-oriented functionalism that endeavored to recommit modern liberals to institutional formalities and formal procedures that aimed to discipline the processes of government in service of traditional legal and constitutional ends. The movement rejected chaos, unpredictability, and will in favor of order, regularity, and principle.

Bickel's most influential book *The Least Dangerous Branch* (1962) remains a classic of American constitutional theory.[217] Its focus (as its titular allusion to Federalist 78 suggests) was the role of judges in the American constitutional order. In the book, Bickel defended a limited, albeit crucial, role for the courts in exercising the power of judicial review: he famously characterized the limiting conditions as "the passive virtues." As William Eskridge has emphasized, the

state power, great sympathy toward any government regulation of business – in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren." William H. Rehnquist, "Who Writes Decisions of the Supreme Court?" *US News and World Report* (December 13, 1957).

[215] See Daniel Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (New York: Oxford University Press, 2014); Anne M. Kornhauser, *Debating the American State: Liberal Anxieties and the New Leviathan* (Philadelphia: University of Pennsylvania Press, 2015); Orren and Skowronek, *The Policy State*.

[216] Kornhauser, *Debating the American State*, 175–220.

[217] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, IN: Bobbs-Merrill Co., 1962).

institutions and process-oriented Legal Process project, whose concerns were generated by the rise of the New Deal order in the 1930s and 1940s, was thrown into chaos – or, perhaps more accurately, irrelevance – by the ascendant Rights Revolution of the mid-1950s forward. The reactions by Legal Process thinkers to the unanticipated chain of events launched by *Brown* v. *Board of Education* (1954) and the Montgomery Bus Boycott (1955) ran the gamut: (1) stunned silence (the pioneering Harvard Law School Legal Process scholars Henry Hart and Albert Sacks withheld the publication of their seminal text on the subject, *The Legal Process* (1958), and ultimately never published it);[218] (2) work with it by proposing theories that advocated restraint in judicial review in line with traditional Legal Process convictions, but that nevertheless left room for expanded judicial protection of rights, at least in some core cases (a path taken by Columbia Law School's Herbert Wechsler, Harvard/Stanford Law School's John Hart Ely, and the Alexander Bickel of *The Least Dangerous Branch*;[219] or (3) resist (the path taken, increasingly vehemently as history's 1960s exploded in the mid-to-late 1960s, by Kurland and the later Bickel of *The Supreme Court and the Idea of Progress* (1970)).[220] The legal historian Raoul Berger took a different route: full-throated outrage and opposition to what he characterized as a lawless, hell-bent, out-of-control, federal judiciary. Conservatives, it seemed, liked this reaction best.

A Ukrainian immigrant who settled in Cincinnati and had initially trained (and worked) as a classical violinist, Berger came from outside Legal Process circles – although, as a senior fellow in American Legal History at Harvard, he was certainly immersed in its generative milieu. Like the Legal Process scholars, Berger had been a supporter of the New Deal and had long understood himself as a liberal. His temperament and intellectual orientation, however, diverged sharply from those of the Legal Process practitioners. Berger's charge against the activist egalitarian Court – he fired his cannons against *Brown* – was of heresy and betrayal. The judges were out of control. And he had an answer: in interpreting the Constitution's text, the judges had to strap themselves to the mast of the intentions of the framers (Berger's focus in *Government by Judiciary* (1977) was on the framers of the Fourteenth Amendment, not the 1787 Constitutional Convention at Philadelphia). There was no issue of competence at stake for Berger: the heart of

[218] William M. Eskridge Jr., and Philip Frickey, "The Making of 'The Legal Process,'" *Harvard Law Review* 107 (June 1994): 2031–2055; Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (New York: Foundation Press, 1994 [1958]) (William M. Eskridge Jr. and Philip Frickey, editors).

[219] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (November 1959): 1–35 [critically reacting to *Brown* v. *Board of Education* (1954)]; John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*," *Yale Law Journal* 82 (1973): 920–949 [critically reacting to *Roe* v. *Wade* (1973)]; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

[220] Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970).

the issue was legitimacy – for a judge to do anything other than follow the framers' intent was illegitimate, a betrayal of a judge's duty. While conservatives certainly listened to, respected, and even admired Kurland, and often Bickel, it was Raoul Berger who ignited their passion. While other conservatives like Robert Bork – who was close to Bickel, and co-taught constitutional law with him at Yale Law School – had certainly argued essentially the same thing in a brief *Indiana Law Review* article published a decade earlier (1971), it was Berger's *Government by Judiciary* that launched a fighting faith.

NEOCONSERVATISM'S ERSTWHILE LIBERALS REACT TO THE BIRTH OF ORIGINALISM

Beginning in the late 1960s and early 1970s, what might have been seen as a pluralist discussion began to look more like a trajectory. There were some landmarks along the way. In his 1968 campaign for the presidency, Richard Nixon made a major point of pledging to appoint only "strict constructionists" to the bench.[221] An obscure but influential 1971 *Indiana Law Journal* article by Robert Bork had argued that a non-originalist approach to constitutional interpretation was not misguided or less than ideal, but illegitimate. Raoul Berger's *Government by Judiciary* (1977) appended a stream of exclamation points to that assertion, winning plaudits in the conservative press, which treated *Government by Judiciary* as a landmark manifesto.[222]

Berger's manifesto, however, did not win unanimous acclaim on the Right, at least as that political grouping was continuing to develop in the mid-to-late 1970s. Neoconservatives were perhaps *Government by Judiciary*'s most notable critics. Elliott Abrams – soon to be a controversial figure in the Reagan Era foreign policy establishment who was entangled in the Iran-Contra Affair, but also a Harvard Law School graduate – panned *Government by Judiciary* in *Commentary* magazine, siding in many respects with liberals.[223] Abrams reported incredulously that "[i]n Berger's view, the

[221] See Kevin J. McMahon, *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences* (Chicago: University of Chicago Press, 2011); Teles, *Rise of the Conservative Legal Movement*; Michael Graetz and Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right* (New York: Simon and Schuster, 2016); Earl Maltz, *The Coming of the Nixon Court: The 1972 Term and the Transformation of Constitutional Law* (Lawrence: University Press of Kansas, 2016).

[222] Bork, "Neutral Principles and Some First Amendment Problems," 10. See Robert Post and Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," *Fordham Law Review* 75 (2006–2007): 545–574, 547. "[F]or the first time," Post and Siegel note, "claims about fidelity to originalist interpretive methodology became a vehicle for widespread and sustained mobilization of conservatives," a powerful rallying cry "fus[ing] aroused citizens, government officials, and judges into a dynamic and broad-based political movement."

[223] Elliot Abrams, "The Chains of the Constitution," *Commentary* 64:6 (December 1977): 84–85. See O'Neill, *Originalism in American Law and Politics*, ch. 5 on Berger's role in the "restoration of originalism." Abrams later became better known nationally as undersecretary of state for Latin

sole sources of constitutional law are the historical record and the words of the Constitution itself . . . Any attempt to break out of an ancient interpretation or definition is illicit. Our sole task is to discover the precise meaning the framers gave a passage, the 'original understanding,' and then to enforce it." Abrams was aghast at the implications. "With this view," he observed, "Berger cannot but oppose virtually every modern Court ruling on civil rights and civil liberties." For this reason, Abrams found Berger "as a constitutional theorist . . . utterly inadequate."[224] "In his chronicle of American constitutional history," Abrams complained, Berger "gives us everything except that which is most important – an understanding of the role of the Constitution in our political system." According to Abrams,

> As Robert McCloskey put it in *The American Supreme Court*, "Judicial review in its peculiar American form exists because America set up popular sovereignty and fundamental law as twin ideals and left the logical conflict between them unresolved." This conflict Berger overlooks entirely, or . . . sees as being entirely resolved in the amendment process . . . Yet had the framers had this in mind, one wonders why they made the process so difficult . . . [O]ne is led to [conservative Yale Law professor and future Reagan appointee to the US Court of Appeals for the Second Circuit] Ralph Winter's conclusion . . . "A written constitution with difficult amendment procedures strongly encourages the body politic to add to the document only general declarations on matters of great import, leaving room for growth and change in light of history and the perspective afforded by a deliberate elaboration as experience grows."[225]

If one wanted to find a predecessor for the sort of starched originalism propounded by Berger, Abrams argued, one need look no further than the crucial originalist provisions of Chief Justice Taney's opinion in *Dred Scott*. Abrams approvingly quoted Alexander Bickel's blistering critique of Taney's originalist stance stating, "such views, when they prevail, threaten disaster to government under a written constitution." Abrams concluded that originalism "sees the Constitution as a set of chains, and indeed . . . would make it one."[226]

At about the same time, the emerging neoconservative William J. Bennett (then still a Democrat, but soon to be appointed head of the National Endowment for the Humanities and, subsequently, US Secretary of Education by Ronald Reagan) defended a jurisprudence of original intent in his review of the Straussian political scientist Walter Berns's *The First Amendment and the Future of American Democracy* (1976). Nevertheless, Bennett complained that "when [Berns] urges original understandings that push aside those of Jefferson and Madison, his own argument becomes strained." Originalism properly applied to the freedom of speech, Bennett said, vindicated the position of contemporary liberals, not traditionalist conservatives like Berns. On religion,

America in the Reagan administration, where he was a key figure, and lightning rod, in the Iran-Contra scandal.

[224] Abrams, "Chains of the Constitution," 84–85.

[225] Abrams, "Chains of the Constitution," 85.

[226] Abrams, "Chains of the Constitution," 85.

Bennett criticized Berns for downplaying the significance of Madison's *Memorial and Remonstrance on Religious Assessments* (1785). Bennett insisted on the centrality of "impolite and unwholesome speech" in the Founding Era, rejecting Berns's implication that the toleration of such speech – "license" – was a twentieth-century phenomenon. Furthermore, Bennett explained, not all the Founders were as comfortable as Berns was with the distinction between liberty and license. Bennett concluded, scathingly, "Berns himself, who, in his desire not to 'tolerate the intolerant,' moves uncomfortably close to the doctrine of 'repressive tolerance' enunciated by [New Left hero] Herbert Marcuse."[227]

For his part, the neoconservative Democrat Daniel Patrick Moynihan endorsed an originalism that set a high value on the wisdom of the Founders, and gave due regard to the duty of fidelity, but married both to a pragmatic, anti-dogmatic spirit. Determining the implications of the original meaning of the constitutional text to contemporary problems and questions, Moynihan recognized, was no easy task. After all, "Here was a common enough situation for the courts. They were asked to determine what it is the Constitution decrees with respect to matters that clearly were remote from the thoughts of those who drafted the document, including its various amendments . . . Hence judges have had to interpret as best they could." That said, an interpretive nihilism could cut judges off, dangerously, from important, and relevant, constitutional meanings and commitments.[228]

The Founders' intent, Moynihan explained, was important because they thought hard and brilliantly about critical constitutional issues. When judges used history and got it woefully wrong, however, the consequences could be dire. A case in point for Moynihan was the Court's new "strict separationist" establishment clause jurisprudence. Moynihan favorably cited work by Walter Berns, Michael Malbin, Antonin Scalia, and Philip Kurland holding that jurisprudence to be detrimentally "nonhistorical." "[T]he establishment clause had been held to prevent legislatures from providing various forms of assistance to church-related schools, albeit that the establishment clause had the plain and unambiguous meaning – reflecting the Founders' intention – that Congress will not establish a national religion," Moynihan wrote. But, in time, "the Court's rulings on aid to private schools merely reflected a particular religious point of

[227] William J. Bennett, "The Role of the Court," *Commentary* 63:5 (May 1977): 79–84, 82–83; Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976). See also David Lowenthal, *No Liberty for License: The Forgotten Logic of the First Amendment* (Dallas, TX: Spence Publishing 1997). Like Harry Jaffa, Lowenthal, a political scientist at Boston College, had been an early student of Leo Strauss's at the New School for Social Research. See Herbert Marcuse, "Repressive Tolerance," in Robert Paul Wolff, Barrington Moore Jr., and Herbert Marcuse, editors, *A Critique of Pure Tolerance* (Boston: Beacon Press, 1965).

[228] Daniel Patrick Moynihan, "Social Science and the Courts," *The Public Interest* 52 (Summer 1978): 69–84, 24.

view – i.e., that there is no public interest in the promotion of religion – which reached its peak of intellectual respectability in the 1920s and 1930s, the period in which most of the judges who made the decisions were educated." The resulting establishment clause decisions were "an intellectual scandal." Moynihan understood these as cases in which the justices were imposing their own historically constituted political views on the country, deserving of the same opprobrium that had been heaped by Justice Holmes upon his fellow justices in his famed *Lochner* dissent, where Holmes sharply retorted that "the Constitution does not enforce Mr. Herbert Spencer's *Social Statics*."[229]

These clear and direct reactions by significant figures notwithstanding, it is worth underlining that most neoconservatives who wrote about law and courts before the Reagan years engaged in relatively little theorizing about the proper way to interpret the constitutional text. They were, after all, liberal modernists who were chiefly scholars of public policy and administration: they accepted the New Deal "Constitutional Revolution" as both constitutionally correct and a *fait accompli* and reflected on the wisdom of particular policies of the modern administrative/social welfare state. Neoconservatives were preoccupied with the same broad policy imperatives that liberals were – urban renewal, the alleviation of poverty, civil rights – imperatives with which they repeatedly expressed sympathy. Their yardstick was not fidelity (law), but effectiveness (policy). As highly educated, urban, elite (and, often, Jewish, New York City) intellectuals who were self-conscious about their intellectualism and their status as an intellectual and public policy elite, the neoconservatives accepted the core of the legal pragmatist and realist argument that the best interpretation of the Constitution is one that solves problems and "works." Their primary challenge to liberal interpretations of the constitutional text, and to liberal judicial activism, was that the "living constitutionalism" that had been fashioned by liberals had systematically failed to achieve the functional objectives that it had imagined itself to be serving: constitutional liberalism had failed, not according to some yardstick of fidelity to eighteenth-century commitments, but on its own terms.

INTO THE 1980S: ORIGINALISM AS A DEMAND FOR JUDICIAL RESTRAINT

"A term that excites the imagination of large numbers of people and also helps to organize and discipline them," the political scientist Murray Edelman once observed in his reflections on the role of symbols in politics, "is a potent political instrument, though an uncertain one in its consequences."[230] Such was the case

[229] Moynihan, "Social Science and the Courts," 24–25, 30. See also Daniel Patrick Moynihan, "What Do You Do When the Supreme Court Is Wrong?" *The Public Interest* 57 (Fall 1979): 3–24.

[230] Murray Edelman, *Constructing the Political Spectacle*, 37.

with originalism, and its associated catch-phrase refinements – first, "original intent" and, subsequently, "original [public] meaning."[231]

Since the Progressive Era, first progressives and then, to a lesser extent, New Deal liberals had successfully framed the US Constitution as a flexible, organically developing "living" document, ultimately winning popular acceptance for – or at least acquiescence in – this vision.[232] Conservatives, of course, resisted. But only in the 1970s with the publication of the Raoul Berger's *Government by Judiciary* (1977) did a major public voice gain traction by truculently proposing "original intent" as a direct answer and counter – a polar opposite – to progressive/New Deal liberal living constitutionalism. If this was a voice in the wilderness, it was crying, and was heard, loud and clear.

Soon thereafter, with the election of Ronald Reagan as president, the voice was invited in from the wilderness to assume a place at the high table of political power. In 1982, conservative law students at Yale and the University of Chicago law schools – with the involvement of one of Ronald Reagan's closest advisors, Edwin Meese III, Robert Bork, and others – founded The Federalist Society for Law and Public Policy to build and disseminate originalist understandings in ways that, over time, forged legions of conservative originalist legal scholars, lawyers, and judges.[233] When, a few years later, Meese moved on from the White House to assume the duties of US attorney general (1985–1988), he aggressively marketed the use of the term (his predecessor, William French Smith, had been satisfied with a then more typical, amorphously traditionalist conservatism not anchored in any single, fighting-faith theory of constitutional interpretation). Meese also began using Federalist Society principles, and, in time, membership, to vet candidates for Republican appointments to the federal judiciary. When the powerhouse liberal Supreme Court Justice William Brennan, the preeminent doctrinal architect of the transformatively liberal Warren Court (1953–1969), rose to what he rightly took to be an ascending originalist challenge with a full-throated defense of the living constitution, the circle was complete: the terms of the debate were set, and the fight was

[231] See Sotirios Barber and James Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007).

[232] See Kornhauser, *Debating the American State*, 33–36, 49–50, 222–223. Kornhauser recounts a range of progressive arguments that variously rejected the US Constitution in its entirety, as it then (unamended) structured US institutions, and even constitutionalism itself, to those that called for specific constitutional reforms, to conceptions of the Constitution as mutable and "living." Kornhauser argues that although their liberal successors abandoned their more extreme positions, they never arrived at a satisfactory theoretical position on the status of the Constitution with the establishment of the modern (New Deal) American state, a position that, for a long time, was adequate given the widespread public acquiescence in and acceptance of the operation of that state. See also Orren and Skowronek, *The Policy State*.

[233] Teles, *Rise of the Conservative Legal Movement*; Amanda Hollis-Brusky, *Ideas With Consequences: The Federalist Society and the Conservative Counter-Revolution* (New York: Oxford University Press, 2015).

joined.[234] In Murray Edelman's terms, "[t]he well-established, and therefore ritualistic reaffirmation of the differences institutionalize[d] both rhetorics."[235]

The originalist versus living constitutionalist debate orbited around the judge as its constitutional sun. The question at its core involved the method of interpretation to be employed by a judge in deciding a legal case, making this new version of conservative originalism "a matter of constitutional 'process' and 'role,' rather than constitutional substance."[236] The question was focused on the legitimacy of the judge's act of interpretation, and often presumed, for conservatives and liberals alike, that in a democratic polity, the appointed, life-tenured (federal) judge was in a highly problematic position when exercising the power (especially) of judicial review: that is, the judge was confronted with what Alexander Bickel had famously dubbed "the countermajoritarian difficulty." A judge exercising his power to declare unconstitutional legislation passed by the people's elected representatives in Congress (and signed by (for all intents and purposes) the popularly elected president) was performing an aberrant act: it needed to be justified. Constitutional theory – a theory of interpretation – provided that justification. And Bork, Berger, Meese, and The Federalist Society (1982) offered originalism as the *only* justification that worked. Put otherwise, only originalist judges had applied the law of the Constitution to the case at hand. Any other approach, and the

[234] Berger, *Government by Judiciary*; Edwin Meese III, Speech Before the American Bar Association, Washington, DC (July 9, 1985); and William J. Brennan, Speech at Georgetown University (October 12, 1985), in Jack Rakove, editor, *Interpreting the Constitution: The Debate Over Original Intent* (Boston: Northeastern University Press, 1990). Many take Robert Bork's 1971 *Indiana Law Journal* article setting out an originalist take on the First Amendment's protection for the freedom of speech to be the first significant articulation of modern originalism (as an "ism"). This may well be correct and is significant, although that article was tightly focused on one doctrinal area, highly professionalized and academic, and relatively without public profile. Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1–35. Later, of course, Bork would assume an outsized public profile as a partisan of originalism, and warrior in the battle between liberals and conservatives for the control of constitutional law and the Supreme Court. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990). Interestingly, the highly restrictive "originalist" understanding of the freedom of speech advanced by Bork in this 1971 article – which limits the First Amendment's coverage to political speech – has been all but abandoned by the contemporary originalist Right. See Wayne Batchis, *The Right's First Amendment: The Politics of Free Speech and the Return of Conservative Libertarianism* (Stanford: Stanford University Press, 2016); Adam Liptak, "How Conservatives Weaponized the First Amendment," *New York Times* (June 30, 2018).

[235] Edelman, *Constructing the Political Spectacle*, 18–19. It was only a matter of time before liberals made the next move by appropriating originalism. See, e.g., Jack Balkin, *Liberal Originalism* (Cambridge, MA: Harvard University Press, 2014); Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005); Bruce Ackerman, *We the People*, Vol. 1: *Foundations* (Cambridge, MA: Belknap Press of Harvard University Press, 1991). Outside of intellectual circles, so far, however, the Left-Right framing and ritual seems quite sticky.

[236] Post and Siegel, "Originalism as a Political Practice," 552

living constitutionalist approach most obviously, was doing politics. And the judge had no business doing politics – "legislating from the bench," it was said. As such, originalism's focus as it took flight in the 1980s was on depoliticizing law to (allegedly) maintain the integrity of the democratic process.[237]

Not incidentally, this new world of constitutional theory, which structured debate on these matters from the 1980s until relatively recently, simultaneously professionalized and popularized the originalist stance. It professionalized it because, while certainly present in conservative movement constitutional thought since the mid-1950s, the narrowed focus on the judge and his allegedly "countermajoritarian" position in exercising his judicial review powers did not by any means define that thought, which was much more substantive and varied: it did not limit itself to questions involving judicial role and duty. By moving in this direction, of course, conservatives entered into direct engagement with the main lines of liberal/progressive constitutional theorists, who had been preoccupied with the same question of the relationship between judicial duty and role to interpretive theory since the late nineteenth century (it had been one of the central political issues of the Progressive Era). As theorists and thinkers who had now seriously joined the debate – that is, joined the debate as it had been long defined by legal academy Progressives – originalist conservative constitutional theorists started to be invited (in what it was hoped would be manageable numbers, to be sure) into the legal academy. The process was helped along by the realignment of the nation's party politics beginning in the 1980s toward a movement conservative Republican Party: conservative candidates for academic appointments now accumulated the experience and status markers especially important within the credential- and status-conscious legal academy – they were now both originalists *and* veterans of high-level executive branch appointments in the White House and Justice Department, and many of them had now clerked for the new cadre of conservative federal judges at the very highest levels, including the District of Columbia Circuit and the US Supreme Court. These conservative originalists were now credentialed and pedigreed and joined the constitutional theory debates in ways that liberal legal academics understood and rewarded. This new version of originalism was well on its way to professionalization and institutionalization.

But it was also on its way toward popularization. The call for a return to the Founders' Constitution and original understandings – for originalism – was broadly adopted by the movement as part of its call in the public sphere for the country's broader redemption from liberals and liberalism. The movement conservative Republican Party made the appointment of originalist judges a major part of its *political* campaigns: it became a major front in the cause of

[237] Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five," *Yale Law Journal* 112 (2002): 153. This involves the birth of what James Fleming has called originalism "as an ism." Fleming, *Fidelity to Our Imperfect Constitution*, 3–4.

"taking back the country," or, in the age of Trump, "Making America Great Again."

By the time the Republicans had come to appoint a critical mass, and perhaps even a majority, of federal judges, however, the originalist position was changing yet again to account for recent political developments: it was being reformulated to de-emphasize the "judicial restraint" that had been at the heart of its initial, modern, legal academic formulation – at least to the extent that "restraint" had been defined by a purported duty of judges to, in most cases, as a default rule, defer to democratically elected legislatures. Recognizing that many judges were now conservative, conservative constitutional theorists proved themselves newly ready to defend the aggressive exercise of countermajoritarian judicial review powers by conservative judges to advance substantively conservative ends. The political opportunity was simply too good to pass up. A "new" originalism serviceable to an activist conservative judiciary was born.[238]

CONCLUSION

In a sign of the relative success of conservative legal academics – including Robert Bork, Raoul Berger, Antonin Scalia – since the 1970s, and of the law student organization The Federalist Society (1982), people are perhaps to be forgiven for imagining that, in the postwar period, constitutional theory was constituted all but exclusively by a commitment to originalism, understood as we, and conservative law professors, understand it today. This chapter has made clear, however, that modern conservative originalism, rather than amounting to a static commitment at long last achieved, was actually a developmental phenomenon: it emerged across time in its modern form as a consensus position within a conceptually, and sometimes politically, fractured movement that across events and in reaction to their liberal/progressive counterparts, was working, during its postwar wilderness years, to forge a functional political unity.

The modern conservative movement can certainly be characterized as having been originalist all along, in the sense that following classical understandings of history's shape, it posited a Founding, a growth and flourishing, followed by a hubristic and decadent decline and fall, and a summons to redemption and renewal. But, during its wilderness years, that originalism was much more capacious than its current legal academic version, which focuses largely on the role and duties of judges in interpreting legal texts, at times to the point of (ultra-professionalized) scholasticism. This more capacious constitutional theorizing and thought on the pre–Reagan Right was hardly arcane: it was everywhere on the postwar Right. But because of the liberal regime's dominance in the media,

[238] Keith E. Whittington, "The New Originalism," *Georgetown Journal of Law and Public Policy* 22 (2004): 599–613.

press, and academia, it has remained, to most, hidden in plain sight: serious conservatives have known about it, and ordinary conservatives, perhaps not even consciously, have been influenced by it, but it has been all but invisible to most Americans, including the most serious (liberal) constitutional scholars, and even historians.

During modern conservatism's postwar wilderness years, conservatives engaged in relatively open and, at times, bitter debate about serious matters of constitutional theory, as understood within a broader framework of political theory and philosophy, American political thought, and American history – that is, not as a simple matter of hermeneutics concerning the proper way to read legal texts. One major axis of these debates was between theorists who emphasized the modern foundations of the American polity and modern understandings of human nature as largely self-interested, and, in light of those understandings, held the polity to have been foundationally committed to the "low but solid" objectives of peace, good order, and prosperity and the protection of rights, and those theorists who, by contrast, looked to the American regime as aspiring to classical virtues of justice, virtue, and human flourishing, as enshrined in the American tradition through a redemptive understanding of the Declaration of Independence's professed commitment to the equality of natural rights. Others joined this debate from their own angles. Neo-confederates like Mel Bradford, for instance, took an aggressively legal positivist position against any imputation of natural rights theory to American constitutional law.

These debates were clearly joined in their time on the Right. But they were not static. Things happened, including the ascendency of the civil rights movement and Warren Court liberal judicial activism (the Rights Revolution). Race played a crucial role. Far from remaining a simple redoubt of intransigent racism and neo-confederatism, the Right – in some cases, difficultly and painfully, to be sure – evolved, or changed. Particularly after the passage of the Civil Rights Acts of 1964 and the Voting Rights Act of 1965, Mel Bradford's neo-confederate star fell as Harry Jaffa's redemptive constitutionalism centered on the natural rights language of the Declaration of Independence, the Lincoln-Douglas debates, the fight against chattel slavery, and the Civil War rose. A Murrayist Roman Catholicism closely associated with the Church's Vatican II reforms (1962–1965) posited an assimilationist vision that positioned Roman Catholics as good and full Americans, in significant part because of their commitment to the principle of the equality of natural rights, as set out in the Declaration of Independence (as a group, Roman Catholic conservatives were always more likely to be avowedly antiracist than (white, southern) Fundamentalist and even Evangelical Christians). This Murrayist vision fit well, of course, with the redemptive constitutionalism of the West Coast Straussians. The neoconservatives, a group that originated in the mid-1960s, had been the most liberal on race of all on the ascending Right: more than a few liberals who became neoconservatives had, indeed, personally participated in the civil rights

movement, including Freedom Summer (1964) and the Selma to Montgomery voting rights marches (1965). They could ally with a redemptive constitutionalism in ways that they could never do with Mel Bradford's neo-confederatism (as noted, they were largely responsible for blocking President Reagan's appointment of Bradford to head the National Endowment for the Humanities).

As will be detailed at greater length in the chapters that follow, even southern religious conservatism was changing. Segregationist Fundamentalism began to decline – largely in response to a succession of legislative and judicial defeats – and the relatively more racially progressive (or at least indifferent) Evangelicalism was ascendant. By the mid-1970s, a rising generation of Fundamentalists shifted to new issues – what came to be known as the "culture wars." A new civilizational frame within which to situate constitutional theory on the Right emerged. In the legal academy, a group of liberal legal process scholars like Alexander Bickel and Philip Kurland became increasingly critical of the role that an activist Warren and Burger Courts were playing in crowding out politics in the formulation of public policy. Borrowing from the progressive frame of the courts versus democracy, moreover, an emergent cohort of law school originalists like Robert Bork, Raoul Berger, and Antonin Scalia found themselves making common cause with these anti-judicial activist Legal Process scholars to formulate the philosophy we now know as democracy and judicial restraint promoting conservative originalism. And, given the context at the time, this was a position that, whatever their actually broader and more nuanced views, many conservatives were willing to sign onto – especially with the prospect of political power in their sights. Once the Reagan administration took power, the process of institutionalization began, and we arrive at where I began this concluding section: with the restraintist, legal academy version of originalism understood as the alpha and omega of conservative constitutional theory itself.

In recent years, of course, with many conservative judges on the bench, and a conservative movement that is advancing itself now in significant part through popular, as opposed to legal academic, constitutional theory, the restraintist version of originalism has lost much of its cachet, and an aggressive "new" originalism that licenses the active assertion of judicial review power by conservative judges, guided by substantive understandings of constitutional meaning (as opposed to a general imperative of deference by judges to democratically elected legislatures), is ascendent. In this context, I believe, it was only a matter of time before the conservative movement began to return to the substantive constitutional theory of the postwar period, which took place outside of the law schools, and was not (overly) preoccupied with the judicial role and the duty of restraint, and was more focused on the nature and what they took to be the broader legitimate – and illegitimate – purposes of American constitutional government itself. It is here that, in the years to come, we will find the future of conservative constitutional theory.