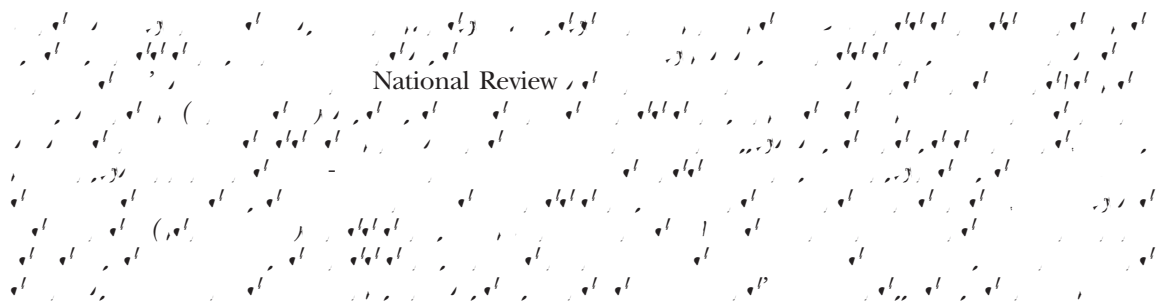




Ken I. Kersch, *Boston College*



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

This article argues that, while the defense of the Constitution was important for conservatives long before the mid-twentieth century, that defense began to assume an ecumenically populist, antielitist, and antijudicial form only beginning in the



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

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

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

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

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

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

## TRADITIONALISM

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

---

Burns, *Conservative Intellectual Movement* (New York: Oxford University Press, 2009).

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

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

16. Wolfe, "Libertarians and the Constitution."

17. *Ibid.*

18. Samuel B. Pettengill, "If I Were King," *Liberty*, 6:9 (September 1956).

19. *Ibid.*

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

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

Another traditionalist journal, though one that also acted more broadly as a clearinghouse for diverse perspectives, was *The American Review*, founded in Washington, D.C., by Frank Hanighen and Felix Morley.<sup>22</sup> Its first issue (February 2, 1944) was published as a newsletter broadsheet and was sent to only a few hundred subscribers. These subscribers, however, became opinion leaders. *The American Review* was incorporated in 1945, with Morley as its president, Hanighen as its vice president, and Henry Regnery as its treasurer. Each contributed \$1,000 of his own money to the venture and received one third of the corporation's stock. Regnery moved the magazine's offices to his base in Chicago and published a series of pamphlets to spotlight issues from the magazine he considered most important. He eventually separated the pamphlet publishing and magazine divisions of *The American Review*. Increasingly preoccupied with disseminating

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

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

## NEOCONSERVATISM

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

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

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

Department, Banfield and Wilson had the advantage of a prestigious academic perch that conferred the professional status that many other conservatives lacked (besides supplying them with a steady stream of brilliant graduate students who would carry their



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

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

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

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

No publisher has been more central to the modern conservative movement—then and now—than

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

---

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

48. See Macdonald, "Masscult and Midcult, I & II," *Public Affairs* 27 (Spring, Fall 1960), 203–33, 589–631; Joan Shelley (ed.), *The Great Books of the Western World* (Chicago: Encyclopaedia Britannica, 1952), 412–413. 49. See Hutchins, *The Great Books of the Western World* (Chicago: Encyclopaedia Britannica, 1952), 412–413. 50. See Hutchins, *The Great Books of the Western World* (Chicago: Encyclopaedia Britannica, 1952), 412–413.

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

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

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

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

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

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

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

---

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

60. Hoplin and Robinson, *William F. Buckley, Jr.*, 71.

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

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

63. In September 1960. See Isaac Kramnick and Theodore J. Lowi, *The American Conservative Movement* (New York:



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

auf ~~673~~ cThe 673 (e) 20.

merely because of the Constitution's compromises with slavery, but because of what those compromises represented. . . ." Jaffa placed the "equality of natural





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

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

Meyer placed liberty, not equality, at the core of the country's constitutional tradition—and Jaffa's hero, Lincoln, was no friend of liberty. "Professor Jaffa, since he regards the division of power as irrelevant to the 'principle of a free constitution,' [in favor of the view that what is crucial is the recognition that all men have rights which no government should infringe] does8351leamJa6thethe'aculabluted,11(e)0(e)]TJdamagleva8r wh2(t)-604.9(Liwh2(ir)-7.6(h32)-5361e)-3esp7.7ible,"v polidd[44

3her(te[(si71(e)0he)-20.4icinco2237.6(a)1]17(0he)aequ—on—a(6)1[(a4ho)-22.(ffa)]TJT(ernmv)24.(

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

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

NR's reactive originalism was typically, and frankly, qualified. In assessing foreign affairs powers as late as 1970, for instance, NR's editors soberly concluded

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

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

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

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

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

## BROWN V. BOARD OF EDUCATION AND CIVIL RIGHTS

Discussion of civil rights in Ki3.7(e)13.7(rights)-4150ld(a)1e

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

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

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

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

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

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

program, *Shelley*, *Swann*, *Keyes*, *DeLoach*, to the political departments."<sup>117</sup>

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

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

In response to the Little Rock schools crisis, NR compared *Brown* to *McCleskey*, contending that both cases demonstrated that controversial constitutional disputes should not be resolved by judicial fiat, but rather incrementally and politically. Otherwise, people are forced to choose sides and fight. Before *McCleskey*, race relations

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

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

These views informed the magazine’s fervent opposition to court-ordered busing, which sought to remedy what conservatives understood as the effects



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

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

On the threshold of Reagan’s election, conservatives were advancing loftier arguments against racial preferences. Terry Eastland and William Bennett—





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

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

and,g7(:5049posiR[A]237.9OUL30-1d:51(GERk16(in)-3)-56fid u4-2230-1daki3

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

A review in



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

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

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

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