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The Right Side of the Sixties

Reexamining Conservatism's Decade of Transformation

Edited by Laura Jane Gifford
and Daniel K. Williams

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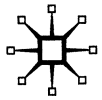

THE RIGHT SIDE OF THE SIXTIES

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CHAPTER 6

The Righteousness of Difference

Orthodox Jews and the Establishment Clause, 1965–71

Robert Daniel Rubin

Jewish Americans played a significant role in the rights revolution of the 1960s. Amid that decade's upheavals, Jews continued the liberal activism that they had carried out throughout the twentieth century. Yet historians ought not to assume that American Jewry acted as a monolith or held uniformly liberal attitudes, even regarding the constitutional politics of church and state. To be sure, the strong majority of Jewish Americans supported the federal courts' recognition of a "wall of separation" between religion and government; indeed, Jewish lawyers and scholars played a prominent role in such efforts. Yet not all Jews supported "strict separationism." Nor did their collective attitude on the matter remain constant. Divergence and change marked the group's stance.

To grasp more fully Jewish Americans' political orientations during the 1960s, historians must consider the actions of a largely neglected subgroup. Orthodox Jews—those complying with the strictest and least modern codes of ritual observance—increasingly acted out of interests distinct from those of their more liberal counterparts. Orthodox Jews' worldview diverged from liberals' over the course of this decade. Whereas non-Orthodox Jews continued to assimilate into mainstream American society and to capitalize on the Constitution's guarantees of full civic and religious inclusivity, the Orthodox cast their lot as outsiders. Before long, Orthodox Jewry formed a cultural enclave.

Through its focus on the constitutional politics of church-state separation in education, this essay addresses crucial fissures within the public life of America in the 1960s, when, somewhat under the radar, conservative religion influenced

society and politics in surprising ways. The differences in constitutional politics between liberal and Orthodox Jews shed light on the gradual-but-certain discrediting of the "melting pot" concept and dissolution of political centrism. By examining right-wing Jews' initial attempts to influence federal case law on schooling and religion, we learn much about how morally orthodox citizens helped undermine the ideological center of American political life. We gain insight as well into the distinctive unfolding of American Jewry, whose recent history registers biting internal divisions. And we glimpse the emergence of an Orthodox subculture, at once modern and antimodern, determined to close itself off from the wider society by trumpeting one of that society's most prized postmodern verities, the righteousness of difference.

Educating for Equality

Jewish Americans have generally throughout modern history held liberal attitudes on the relationship between government and religion. In the decades following World War II, Jewish community leaders campaigned for the most liberal of positions, a "strict separation" between church and state. Rabbis representing the largest Jewish-American denomination, the Reform movement, declared that America's greatness lay in its record of disestablishment—the distance kept between government and religious sects. Jews continued to see their history in America as marked by profound freedom, and freedom, in the Jewish lexicon, denoted freedom from religious compulsion, as well as from the second-class status that had accompanied their struggles against compulsion. A sturdy wall cleaving government from religion has meant nothing less than an opportunity to live openly, without fearing violence or forced exile.[1]

Jewish American support for church-state separation derives from Jews' experience as a minority group. Throughout centuries in diaspora, Jews worldwide assumed their fundamental difference from the ethnic and religious majorities that enveloped them. Historically, they maintained legal and political order within their own communities, constituting semiautonomous enclaves, relatively unassimilated alien entities amid surrounding nations and empires.[2] Minority status in the United States has been accompanied by rather different conditions and opportunities. Here, Jews have happily discovered that fellow Americans offered more than mere tolerance. Since World War II, the United States government has interpreted its charter to require that the nation's public institutions honor the liberty and dignity of those citizens whose minority status disadvantages them politically. To protect religious minorities from mistreatment within public institutions such as schools, the United States Supreme Court applied its civil-rights constitutionalism specifically to religion in a series of rulings from 1947 to 1963, mandating that a sturdy "wall of separation"

cleave church from state. Two of these decisions most fully expressed the court's notion that fairness and neutrality required the secularization of public institutions. In *Engel v. Vitale* (1962), the justices determined that government had no business composing prayers for classroom recitation; a year later, in *Abington v. Schempp*, they declared that devotional Bible reading and recitation of the Lord's Prayer in public schools likewise violated the First Amendment's Establishment Clause. Because most Jews have benefitted from robust protection of the rights of religious minorities, most Jews have sought to preserve, as vital to their interests, the court's doctrine of church-state separation.[3]

Toward their goal of civic equality, Jews have long championed nonsectarian public schools. If religious practices were prohibited from the classroom, they reasoned, then schools could promote the one legitimate public "faith"—Americanism, an ethos of thick religious impartiality and inclusivity. Following World War II, Jews spearheaded a movement to commit courts and legislatures to church-state separationism. This effort was led by the American Jewish Congress and especially by the chief counsel for its Commission on Law and Social Action, Leo Pfeffer, whose numerous amicus briefs looked to ban organized, spoken religious exercises from the public schools. Pfeffer became the civil-libertarian face of American Jewry, crafting a separationist doctrine that found its way, in more-or-less whole cloth, into the court's opinions of the late 1940s through 1970s. At the highest echelons of constitutional law, organized Jewry, with Pfeffer in the lead, realized its vision of an impartial, nonsectarian, universally inclusive classroom.[4]

Pfeffer's briefs in the postwar Establishment Clause cases suggest the centrality of constitutional politics to the era's liberalism. Pfeffer seconded assertions made by the American Civil Liberties Union and the National Association for the Advancement of Colored People in insisting that government not abridge any citizen's right to full membership within public life. This included a citizen's religious rights, which must, Pfeffer believed, be guarded by a strict separationism keeping religion "outside of the cognizance of political government." He acknowledged that implementing the Establishment Clause would remain a political activity, overseen by judges responding to persuasive attorneys, scholars, and government officials. However, Pfeffer insisted, church-state law must never be circumscribed by the potential tyranny of a political majority. The freedom and dignity of unpopular religious minorities needed to be defended against majoritarian suppression. Pfeffer maintained that "there are some areas of man's life that are too important and sacred to be assigned to the coercive arm of the state," most notably "the area of the mind and conscience, and, above all, of man's relationship to God."[5]

To help protect unpopular minorities from coercion and preserve their dignity, Pfeffer and Jewish liberals turned to a powerful government institution—the

public education system—to inculcate citizens with an equal respect for all their fellows. Liberals championed an ostensibly all-inclusive, religiously neutral, secular public sphere. Those who dwelled therein, despite their many differences, would be steeped in open-mindedness and would learn to speak across their differences by recognizing the fundamental worthiness of students from varying backgrounds and with varying beliefs. The ideal of assimilating schoolchildren into a culture based on tolerance sat at the center of Chief Justice Earl Warren's opinion in *Brown v. Board.* The primary value of public education, Warren suggested, was as an "instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment." Like all other students, "children of the minority group" deserved the opportunity to assimilate. Only thereby might they achieve civil equality and overcome any "feeling of inferiority as to their status in the community."[6]

Pfeffer subscribed to the assimilationist ethic behind the civil-rights jurisprudence of the Warren Court. Only public education based on universal citizenship, he suggested, incorporated Jews into American society without requiring that they act as Christians. His views influenced Justice William Brennan, whose concurring opinion in *Abington v. Schempp* offered the court's fullest application of the assimilationist ethic to the question of religion in public schools. Brennan contended that public education could properly acculturate only by remaining religiously neutral. And religious neutrality, in turn, required a thoroughgoing secularism. "It is implicit in the history and character of American public education," Brennan wrote, "that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort." Only such an environment would permit schoolchildren to "assimilate a heritage common to all American groups and religions," a "heritage neither theistic nor atheistic, but simply civic and patriotic." Brennan's opinion signaled that the public-sphere secularism of organized American Jewry had indelibly impacted the nation's fundamental law. Through their constitutional efforts, Jews had secured their legacy as the nation's foremost proponents of the secularized classroom.[7]

Cultural Conservatism and the Court

The rights revolution provoked a bitter reaction among those who considered themselves its nonbeneficiaries—indeed, its victims. Critics charged the court with usurping the rights of individual states and their citizens to fashion laws based on their prejudices. White racism attained "principled" expression in a republican majoritarianism that condemned the federal government, and especially its courts, for trammeling over local opinion. Had this anticourt populism targeted only the justices' desegregation rulings, its appeal would have remained somewhat limited. Instead, the court's critics applied their majoritarian theory

to the full range of minority-rights case law. In their diatribes against judicial activism, issues such as race, religion, crime, and public decency blurred together. The content of their complaints became secondary to the political theory that afforded those complaints nationwide resonance. Thus arose a newly invigorated conservative movement, alarmed at what it considered a court-sponsored ethos of moral laxity and contempt for social tradition.[8]

Central to this emerging movement was religious conservatism. Following World War II, nationalism acquired a strongly religious hue, as conservative Christians looked to the public schools as a primary site at which the nation's citizens and their society could be fortified through a curriculum featuring an explicitly devotional content. The court's religion-in-schools decisions frustrated supporters of school prayer and caused them to redouble their efforts by sponsoring a series of school-prayer amendments. In the quarter century after *Engel,* Congress entertained more than six hundred such amendments. The testimony and public commentary on these bills registered much more than concern for children's moral instruction. Prayer supporters gave voice to a political critique of the court, which they accused of violating democratic principles. As historian Aaron Haberman finds in his study of the school-prayer movement, conservative critiques "accused the Court of subverting the intent of the Founders and taking away a clear right guaranteed to the majority." Numerous proponents of the 1964 Becker Amendment to legalize classroom prayer echoed the witness who warned the House Judiciary Committee that "unless positive action is taken [to restore prayer in schools] it appears likely that in the name of religious freedom the will of the majority may very well be subjected to the will of the minority." Throughout the House testimony, the court was identified as a tyrant forcibly recasting American government.[9]

Congressional sponsors of prayer amendments achieved no success. Frustration only confirmed their suspicion that the public schools, with the help of the Supreme Court, had become factories for inculcating students with an un-American, antireligious worldview. Religious conservatives vilified the schools as hotbeds of "secular humanism," a comprehensive ideology contrary to their own understanding of religion. As the federal courts continued to desegregate and secularize public education, large numbers of white Christian parents moved their children into the largely all-white, conservative Christian private academies that suddenly dotted the nation's landscape in the late 1960s and 1970s. These parents were having nothing of the liberal, assimilationist ethos given the force of law by the Warren Court. If public schools were no longer guided by the clean, "American" values of the alleged majority of citizens, then the God-fearing legions would start their own schools.[10]

The place of American Jews amid these changes is complicated and hard to trace with precision. Largely because of their association with liberal politics, Jews do not appear often in studies on conservative politics—especially those

on the growing popular hostility toward public education and the rights revolution. In scholarly accounts Jewish Americans remain steadfast champions of the church-state separationism that their leaders helped craft. A closer look, in fact, reveals a situation that defies plain categorization. No one ideology describes Jewish Americans from the mid-1960s onward. They cannot be located as a singular bloc, squarely within either the era's anticourt reactionary politics or the clear-cut liberal assimilationism lauded since the 1940s by most prominent Jewish legal activists.[11]

Assimilationism and Its Discontents

While most Jewish intellectuals of the postwar era echoed the liberal positions advanced by the major Jewish organizations, exceptions could gradually be heard. Early on, one notable figure, theologian-sociologist Will Herberg, cautioned that separationism had become a "religion" among Jews and that government could not flourish if shorn of traditional religious content. Herberg depicted separationism as a symptom of liberal Jews' attempt to assimilate into mainstream American culture—to adopt a generalized "American way of life." Like other Americans, he complained, most Jews had sloughed off the demands of prophetic religion and instead adopted a religion of personal adjustment and cultural conformity. This troubled Herberg, who considered American civic culture sufficiently robust to support a true pluralism among differing religious groups—each, in its way, commanded by God. Jews enjoyed a historic opportunity: to be true to their religion and yet full members of their society. Each of the "minorities within the national community," he insisted, could "pursue its own particular concerns without impairing the overall unity of American life." Surely, there was "no need for . . . the anxious search for injuries and grievances that ha[d] characterized so much of the Jewish 'defense' psychology."[12]

Herberg's attack on assimilationism and separationism would resonate with a small but important part of the Jewish community, Orthodox Jews. Committed to a lifestyle that distinguished them from their fellow Americans, Orthodox Jews could hardly have imagined any aspect of their daily routine not steeped in observance to Jewish law. As Herberg recognized, Pfeffer's notion of religious devotion as a private matter made little sense to these Jews. When they began to stake out their own political positions in the 1960s, they traveled down the pathway cleared by Herberg—a pathway diverging from the political trajectory of mainstream American Jewry.[13]

Like morally conservative Christians, Orthodox Jews recoiled at what they considered the decadence and anarchy polluting American culture. In 1962 the Union of Orthodox Jewish Congregations of America (OU) decried "the rising tendency to disregard any standards of decency in the field of publication,

motion pictures, and television" and called on "all responsible forces within American society to join in combating this onslaught upon the moral health of this nation." The OU did not express an isolated sentiment; by middecade, every prominent Orthodox organization stood publically against the moral anarchy supposedly rampaging through society, including liberal Judaism. These groups feared that women's liberation and the youth movement indicated an obscene, licentious culture with which no God-fearing man or woman should have any sustained contact. By middecade Orthodoxy had slid precipitously to the ideological right.[14]

Orthodoxy diverged from mainstream Jewry in another important respect. Whereas the latter retained its historical support for public education, Orthodox Jews became more determined than ever to educate their children in the private Jewish day schools and *yeshivos* proliferating in the northeastern United States. As the Orthodox community turned inward during the 1960s and 1970s, it used its private schools for "contra-acculturation," to purge its young of the mainstream's habits and beliefs. Orthodox leaders sought government funding for their school system; this, in turn, led them to break from the separationist view that would bar government from supporting religion. After years of falling in line with the liberal civic agencies on constitutional matters, the chief Orthodox groups disassociated themselves from the litigation and amicus briefs generated by Leo Pfeffer.[15]

Notwithstanding their revulsion toward the radical 1960s, Orthodox Jews did not adopt the entire agenda of the Christian Right. The Orthodox were a minority within a minority, guarding their antimodern Judaism against an alien society. They rarely invoked the populist rhetoric common among morally conservative non-Jews. The "Silent Majority" may have shared Orthodox Jews' disdain for licentiousness, but it wasn't pressing to have Talmud instruction incorporated into the public-school curricula. Most important, the Orthodox did not wholly oppose the religion-clause activism of the Supreme Court. The legal issue that compelled them—government aid to parochial schools, or "parochaid"—required the court to protect their free-exercise rights, sometimes against state laws supported by electoral majorities. Ultimately, they felt ambivalence toward the rights revolution. They may have loathed the pornographers and criminals whose rights the court guarded, but they would increasingly turn to that same court to protect their own right to difference.[16]

Orthodoxy Finds Its Voice

Although a handful of Orthodox Jews lauded religious exercises in public schools, that issue found little traction overall within the community, whose members cared primarily about education of the traditionally Jewish variety.[17] Only when

Congress and President Kennedy considered including religious academies in a comprehensive attempt to fund all needy schools did Orthodoxy see its own interests at stake. Only with the parochaid debate did the community find its political voice. In March 1961 Rabbi Morris Sherer, director of the ultra-Orthodox Agudath Israel of America, testified affirmatively before Congress, insisting that government ought to treat religious schoolchildren no worse than it treated nonreligious students. Simple fairness required "equal treatment" in the matter, Sherer reasoned. Four years later, he and historian William Brickman gave similar testimony to the House subcommittee that shepherded to passage the Elementary and Secondary Education Act (ESEA), which President Johnson signed into law in April 1965. A new church-state controversy was born.[18]

Organized American Jewry responded to the passage of the ESEA. The new law alerted Jewish liberals, who immediately sought to limit its reach. Pfeffer urged the court to strike down sections of the ESEA, and similar parochaid measures, as assaults on the rights of minorities. Meanwhile, Orthodox scholars and lawyers were galvanized by the act's passage. Orthodoxy had long remained unheard in the politics of church and state; hereafter, it stood independently on such matters. The parochaid issue gave its leaders a newfound confidence in their ability to persuade governmental officials. Its members were learning, in the words of Orthodox constitutional law professor Marvin Schick, that they "could benefit by acting on their own behalf." For the first time, Schick wrote, Orthodox Jewry evinced a "new vigor and confidence . . . as it [went] about its business." No longer, it seemed, would liberal organizations speak for the interests of Orthodox Jews.[19]

In the summer of 1965, Sherer, Schick, and attorney Reuben Gross created a new organization to represent Orthodoxy's constitutional interests. The National Jewish Commission on Law and Public Affairs (COLPA) would speak whenever a consensus appeared to exist within the community. The group set out to counter the liberals—especially Pfeffer—who crowned themselves representatives of all American Jewry. "Sad experience of the past has shown," Sherer complained, "that where Orthodox institutions were not united, the non-Orthodox took advantage of this division to step in and claim rights to represent Yeshivos for whom they have no right to speak." COLPA intended to repair this breach. Schick believed that Pfeffer exerted a pernicious influence within the Jewish community and upon the world of constitutional law. Not only had Pfeffer "attempt[ed] to perpetuate the myth of a monolithic Jewish position on church-state affairs" but, worse, he and his collaborators had led the "the bulk of the organized and articulate Jewish community" into idolatry, Schick charged, as, "robot-like," their minions "invoked the holiness and oneness of the First Amendment and proclaimed their opposition to any 'breach in the wall separating church and state.'"[20]

Notwithstanding its general revulsion toward mainstream society, COLPA was led by professionals expert in understanding American society and government. Among its early members were men accomplished in law and academe, including Schick, a scholar of constitutional law; Brickman, a renowned historian of comparative education; and Jacob Landynski, a political scientist. Also among COLPA's founders was its vice president, Nathan Lewin. One of Washington, DC's most prominent trial lawyers, Lewin had clerked for Justice John Harlan and assisted solicitors general Archibald Cox and Thurgood Marshall. Presently, he served as deputy to the assistant attorney general in charge of the Civil Rights Division of the Justice Department. Lewin's leadership would bring gravitas to COLPA as it set about litigating on behalf of the First Amendment rights of Orthodox Jews.[21]

COLPA aimed to increase governmental deference to the interests of Orthodoxy. According to Sherer, denial of parochaid had effectively cast a *cherem*, or decree of excommunication, on Orthodox children. By obstructing any possible funding for the schools that they attended, separationist doctrine signaled those children's relative unimportance. The recently passed ESEA articulated what Sherer called a "principle of recognition" to *yeshiva* students. Were their education to become as well funded as that of public-school students, they would learn that they, too, mattered. "It is this *principle of recognition* accorded to the Yeshiva student, over and above any immediate financial advantages," Sherer averred, that "makes the President's education bill a document of major importance to the Jewish community." COLPA, it seemed, prioritized its members' civic inclusion as much as their cultural separatism.[22]

Although COLPA promoted its constituents' status in the public sphere, it by no means sought assimilation into the mainstream culture. The group, as Schick explained, was "especially keen on the need to promote Orthodox unity." COLPA walked a fine line: while engaging judges and legislators, it viewed that engagement in instrumental terms, as the cost of doing business in a country not entirely its own. It might solicit government aid, but it would not send its children to state-run schools. Beyond all else, COLPA looked to craft a rabbinic church-state position. While COLPA appealed to the constitutional right of Jews to an affordable education, it understood its *raison d'être* in terms of Jewish obligation to fulfill God's commands. Passage of the ESEA was a gift that obligated COLPA's founders to provide a service for its people. "Dialectically," Schick explained, "success often creates responsibilities that otherwise would not be incurred." And so the group set out to meet what it considered a specifically Jewish responsibility, to ensure that children of the community received a full, high-quality education and that their parents be accorded full recognition under the law, even as they remained relative foreigners settled along society's margin.[23]

COLPA and the Constitution

At its first annual conference in September 1967, COLPA anticipated that the Supreme Court would soon hear arguments in the initial two cases for which the group had written briefs. The cases, *Flast v. Cohen* and *Board of Education v. Allen*, had been launched by a coalition led by Leo Pfeffer, who hoped to disable those sections of the ESEA permitting public funding of religious schools. COLPA opposed Pfeffer's efforts. The papers and comments at its inaugural conference gave voice to a constitutional ideal of citizenship based on religious expression, not one that bracketed or deferred religious expression.[24]

To realize that ideal, COLPA challenged the court's long-standing presumption that religious education needed to be cordoned off from any influence or assistance by the state.[25] The group contended that private religious schools should be eligible for assistance because they served the public function of producing good citizens. Comments made at the conference echoed Herberg's earlier assertion that "the promotion of religion" by schoolteachers fulfilled "a major 'secular' purpose of the state in its furtherance of the common good of the civil order." Brickman painted Orthodox schools as factories for Americanism. Sherer agreed, holding that a school did not need to be stripped of its religious content in order to contribute to society's well-being. "What we are operating in the Yeshiva world are public schools," he averred, schools "not for anyone's private gain." As Sherer saw the matter, the "secular studies programs" in "our Yeshiva public schools" provided as complete of a civic education as the public schools and were therefore "equally entitled to the help received by the humanist [public] schools."[26]

Because its constituents' educational needs differed so profoundly from those of other Americans, its constituents deserved accommodation, COLPA claimed. The state-run schools could not meet the most fundamental needs of the Orthodox community, because those schools were products of a distinctly secular culture with its own narrow worldview. Conference papers and comments suggested that Orthodox schools were no more parochial than the public schools and that all schooling relied on one "religion" or another—including the nontheistic, humanistic variety—to provide the necessary ideological lens through which students understood their world. "Where education is not set in the context of the transcendent *Weltanschauung* of the Jewish-Christian faith," Herberg had written, "it will quite inevitably operate from the standpoint of a secularist-humanist counter-religion." COLPA applied this reasoning to its constituents' situation, arguing that the state was obligated to fund religious private schools so that citizens of faith could freely choose the "religion" into which they wanted their children indoctrinated. Orthodox students had to avoid the fate of the public school student, "guided most of his waking hours, five days a week by professionals in whose eyes religion does not seem to matter." Such a student, according to Landynski, would inevitably understand his or her own religion as trivial, unrelated to citizenship or factual knowledge, possessing the "status of a weekend chore comparable to the mowing of the lawn." The other leaders of COLPA agreed. Entitled to equip their children with their community's worldview, Orthodox parents deserved the same state assistance enjoyed by the parents of public-school students.[27]

Society's interests were also at stake, COLPA maintained. Only by funding religious private schools would government foster the ideological diversity valued by Americans. "In this pluralistic society," Sherer said, there could be no "monolithic educational plant." Instead, "the humanistic-secularistic public schools and the religious-oriented public schools" had to function as "partners, side by side." According to Lewin, the state needed to nurture society's diversity by ascertaining its citizens' legitimate educational needs and aiding in their fulfillment. With its already "enormous range of educational programs," he pointed out, government rightly "eschews conformity and appears evenhandedly to support diverse educational ventures and expressions of view." Could it possibly be appropriate for the state to "stay its hand when what is being taught is religion?" Society's strength was its pluralism, Landynski agreed, and public schools alone could not nurture the full range of that pluralism. "The history of America has been one long chapter of diversity *within* unity," he reminded his colleagues, and "it would be wrong to assume that national unity is in any [more] impaired by religious diversity in education" than by diversity "in any other sphere of life."[28]

Anticipating liberal objections, Lewin averred that state funding of religious academies in no way indicated an establishment of religion. Merely to fund a school was not to establish its preferred worldview, he held—especially if government were to fund all schools regardless of worldview. "One religion or all religions may be considered '*established*' in the constitutional sense only when the government" places "its prestige and authority behind the activity which is affected." The state no more put its imprimatur on religion by funding religious schools than it endorsed the purpose behind every other project to which it awarded a grant. Indeed, by funding the secular-humanist public schools but not those associated with other religions, the state was endorsing one worldview at the expense of its competitors. The state was violating Brennan's requirement that it exhibit genuine neutrality by showing no hostility toward religion.[29]

COLPA soon applied these arguments to its first Supreme Court brief, submitted January 1968 in *Flast*. The group again depicted itself as the protector of rights and secularists as the violators. Although it paid lip service to the majoritarianism of Solicitor General Erwin Griswold, whose brief countered Pfeffer's civil libertarianism by calling on the people's elected representatives—rather

than the courts—to determine expenditures on education, COLPA appealed primarily to the justices' activist tendencies by seeking protection for the rights of its own constituents. Pfeffer, it alleged, offered "no clear statement" about how the ESEA deprived liberals and secularists "of *their* constitutional rights." Pfeffer's only purpose in bringing suit, rather, was to "tarnish a major congressional enactment" intended only "to help hard-pressed local educational systems and educationally disadvantaged children." The civil rights of Orthodox Jews, and not Pfeffer's clients, had been trod upon. COLPA implied that it alone remained "committed to the preservation of constitutional rights for all Americans"; it alone "support[ed] the advancement of educational opportunity for all American children," including the secular education of religious students at private schools. Alongside the language of civil libertarianism, it spoke that of civic republicanism. It quoted *Brown* on "the importance of education . . . in the performance of our most basic public responsibilities" and as "the very foundation of good citizenship." Government's "public responsibility," according to COLPA, "include[d] the obligation to provide quality education," so "that the students develop their fullest potential and thereby maximize their contribution to society." The brief urged the justices not to let "separation of church and state . . . obstruct the state's recognition of its responsibilities to parochial school children who are in need of special educational services."[30]

In *Allen*, six weeks later, COLPA again challenged Pfeffer on his own civil-libertarian ground. Like him, the group declared its resolve "to combat all forms of religious prejudice and discrimination" and to preserve "the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty." Once again, COLPA emphasized its commitment to the rights of minorities and the well-being of the civic sphere. The group appealed to government's "responsibility for the proper education of children," which remained necessary for "develop[ing] their potential" to meet "the needs of our growing society." It was up to the justices to enforce this commitment, just as it was up to them to ensure that government show a "wholesome neutrality" in its dealings with religion, as required by *Schempp*. COLPA implored the state to maintain a genuinely "neutral role in religious affairs by extending public benefits to children attending parochial as well as other private schools in an effort to promote the general welfare and insure full educational opportunity for all schoolchildren." It was Pfeffer, COLPA insisted, who looked to squash society's robust religious diversity—whose "distortion of the separation principle" had "poison[ed] the air of pluralism."[31]

The court's decisions together composed a draw. Pfeffer and his allies scored a victory in *Flast*, while in *Allen*, the court ruled in favor of COLPA's associates. The opposing Jewish groups faced off a third time in *Lemon v. Kurtzman* (1971), the case that would determine parochaid law for the foreseeable future. COLPA's brief was prepared by its leading expert on constitutional law, Nathan Lewin, who aimed to drive a wedge between the enforcement of minority rights and the strict separation of church and state. If the court wished to protect the rights of a marginal minority such as Orthodox Jews, he suggested, then it needed to make good on its own commitment to ensuring "benevolent neutrality" between government and religion—to treating religious institutions no worse than their nonreligious counterparts. The Free Exercise Clause required the court to uphold all "neutral and nondiscriminatory" statutes sanctioning parochaid. Such laws, Lewin opined, "offer[ed] no advantage to religious schools or students on account of their religion," but, rather, cultivated "an equality which is consistent with this Nation's great tradition of voluntarism," while spreading the costs of education more equitably among all families. Meanwhile, to exclude "religiously affiliated institutions" from public assistance, Lewin claimed, would be to "disqualify from public benefits those institutions or individuals who, by reason of religious belief, deem it essential to provide a comprehensive religious education for their children . . . in the same institution and as part of the same school day as is given over to secular training." Nothing could more egregiously transgress benevolent neutrality. Any "statute which explicitly conditioned State aid on an individual's disbelief in thorough and rigorous religious training" surely must "be invalid," Lewin reasoned.[32]

The *Lemon* ruling did not go in COLPA's favor. Nor would COLPA have any success in subsequent parochaid cases, as, over the next decade, the justices would strike down law after law sanctioning government assistance to religious schools. Still, COLPA's amicus briefs left behind examples of the sort of civil-libertarian arguments on which religious conservatives would build successfully from the 1980s onward. Beginning in the mid-1960s, Orthodox Jewish lawyers, rabbis, and intellectuals had organized themselves, contested the strict separationism with which Jewish Americans had been exclusively associated and advanced a concept of minority rights requiring government to treat religious individuals and institutions no worse than it treated their nonreligious counterparts. First Amendment jurisprudence did not change as an immediate result. But future decades would bring greater success for groups such as COLPA.[33]

An Unlikely 1960s Artifact

In opposing the era's church-state jurisprudence, COLPA revealed itself as a product of that era. Orthodox leaders concluded, by the mid-1960s, that the American legal establishment had accorded them inadequate respect. The Warren Court had interpreted the Establishment Clause in ways that diminished the quality of education that they could offer their children, they believed; the

liberal Jewish agencies—claiming to speak for all American Jews—had articulated principles and supported laws that allegedly trampled the needs of the Orthodox community. With no organization promoting their interests, Orthodox leaders formed COLPA. Although the new group contested the strict-separationist interpretation of the First Amendment's religion clauses, it did not oppose "judicial activism" in general or the rights regime to which it had given rise. To the contrary, COLPA, too, advocated for a kind of constitutional activism, one in keeping with the norms advanced within sacred Jewish text.

In traditional Jewish law, rabbis function much as judges function in contemporary American law. Although Jewish law places great significance on the will of the communal majority, rabbis must balance majoritarian impulses against a kind of individual rights, what constitutional theorist David Dow calls "the magisterial notion of human dignity." Every member of the Jewish community, no matter how lacking in influence, inherently deserves to be respected by the rest of the community, and if the majority's will would trample over the dignity of the least powerful person, then the rabbis must intervene on his behalf. It was this notion of rights to which COLPA appealed. Orthodox Jews saw themselves as a minority within a minority, and they turned to the nation's supreme judges to intervene as rabbis might, to provide them a modicum of dignity. Liberal Jews belonged to an American majority unwedded to the commands of the Bible, they believed, while they themselves lurked along society's God-fearing margin—consigned, in Rabbi Sherer's words, to *cherem*, or excommunication, by the "doctrinaire devotees of Church-State separation."[34]

COLPA was a product of the 1960s also in that the group's founding was sparked by Orthodox Jews' revulsion toward the decade. They recoiled from a mainstream culture increasingly divorced from the strict morality normative within their community—a morality on which their free exercise of religion supposedly depended. The Constitution needed primarily to honor God's law, they believed; if First Amendment guarantees meant anything at all, they meant to protect the wisdom of the devout over the impulses of the licentious. Although Jewish law prioritizes a person's dignity, Jewish law does not recognize personal entitlement. The basis of rights under rabbinic law is to help the individual fulfill his or her obligation to God, not to indulge his or her desires. Traditionally, Jews have experienced law heteronomously, as a commandment from a God to whom they are obligated. In this important sense, Orthodox Jews rejected the rights revolution. They appealed to the Free Exercise Clause on "legitimate" grounds: they were seeking assistance in their worship of God, not in their pursuit of comfort. Horrified by the supposed decadence engulfing their community, they separated themselves as never before, their schools serving as islands of purity where they could guide the development of their children and propagate their culture. "Their heightened anxiety about Jewish continuity and integrity," according to sociologist Samuel Heilman, propelled them to take "an antagonistic, powerfully contra-acculturative stance toward contemporary society, its values and lifestyle."[35]

COLPA was a product of the 1960s in still another respect. A deep cultural pluralism accompanied the rights revolution. Ever more diverse, American politics and law accommodated groups such as the Orthodox and efforts such as theirs to remain a subculture apart. Orthodoxy protected its boundaries and asserted its interests with newfound effectiveness in America of the 1960s, whose society was concerned for the dignity and rights of dissenters. America's moral multiplicity may have alarmed Orthodox Jews; it may have compelled them to keep their children far away from public schools. That same moral pluralism also made possible their politicization, including their assault on the assimilationist model of religion-clause jurisprudence. Within American society of the 1960s, historian Haym Soloveitchik points out, "the 'melting pot' now seemed a ploy of cultural hegemony, and was out; difference, even a defiant heterogeneity, was in." However repulsed Orthodoxy was by the surrounding culture's permissiveness and decadence, Orthodoxy benefitted from society's celebration of deep difference. Orthodoxy's increasingly doctrinaire adherence to sacred text marked its difference, which placed it in good stead amid the emerging ethos of cultural fracture. Soloveitchik explains that "for those who sought to be different and had something about which to be genuinely different, the Sixties in America were good years."[36]

When Lewin wrote that "those who are actively erecting the Wall Between Church and State seem to be burying under . . . it the religious minorities it was designed to protect," he did more than espouse rhetoric. Lewin understood that, at its apparent peak, America's culture of assimilation was hemorrhaging credibility. One unintended result of the rights revolution was its sanctioning of defiant right-wing heterogeneity, even at the expense of liberal constitutionalism. In demanding state assistance for their private schools, Orthodox Jews recognized that the vital ideological center no longer held. To opt out was to belong. By simultaneously rejecting mainstream culture and demanding government accommodation, COLPA affirmed its provenance as an artifact of the 1960s, a decade whose precise meaning continues to elude our grasp.[37]

Notes

1. Lance J. Sussman, "Reform Judaism, Minority Rights and the Separation of Church and State," in *Jewish Polity and American Civil Society: Communal Agencies and Religious Movements in the American Public Sphere,* ed. Alan Mittleman, Jonathan D. Sarna, and Robert Licht (Lanham, MD: Rowman and Littlefield, 2002), 261–82; Gregg Ivers, *To Build a Wall: American Jews and the Separation of Church and State* (Charlottesville: University Press of Virginia, 1995).

2. H. H. Ben-Sasson, *A History of the Jewish People,* trans. George Weidenfeld (Cambridge, MA: Harvard University Press, 1976), 388–89, 593–611.
3. Stephen J. Whitfield, "Declarations of Independence: American Jewish Culture in the Twentieth Century," in *Cultures of the Jews: A New History,* ed. David Biale (New York: Schocken, 2002), 1099–1146; Gregg Ivers, "American Jews and the Equal Treatment Principle," in *Equal Treatment of Religion in a Pluralistic Society,* ed. by Stephen V. Monsma and J. Christopher Soper (Grand Rapids, MI: Eerdmans, 1998), 158–78; Ivers, *To Build a Wall,* 1–6; Gregg Ivers, "Religious Organizations as Constitutional Litigants," *Polity* 25 (Winter 1992): 249–51; Everson v. Board of Education, 330 U.S. 1 (1947); McCollum v. Board of Education, 333 U.S. 203 (1948); Engel v. Vitale, 370 U.S. 421 (1962); Abington v. Schempp, 374 U.S. 203 (1963). The Supreme Court first began actively to protect vulnerable minorities with its doctrine of "preferred freedoms," which it first advanced in Palko v. Connecticut, 302 U.S. 319 (1937), 327–28; and United States v. Carolene Products, 304 U.S. 144 (1938), 153 n4.
4. Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (New York: Oxford University Press, 1992), 79–87, 123–24; Marc Dollinger, *Quest for Inclusion: Jews and Liberalism in Modern America* (Princeton, NJ: Princeton University Press, 2000), 129–63; Stuart Svonkin, *Jews against Prejudice: American Jews and the Fight for Civil Liberties* (New York: Columbia University Press, 1997); Frank J. Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State* (Princeton, NJ: Princeton University Press, 1976), 158–62; David G. Dalin, "Introduction," in *American Jews and the Separationist Faith,* ed. David G. Dalin (Washington, DC: Ethics and Public Policy Center, 1993), 1–3; Jonathan D. Sarna, "Church-State Dilemmas of American Jews," in *Jews and the American Public Square: Debating Religion and Republic,* ed. Alan Mittleman, Jonathan D. Sarna, and Robert Licht (Lanham, MD: Rowman and Littlefield, 2002), 57–63; Ivers, *To Build a Wall,* 100–145.
5. Leo Pfeffer, "The Case for Separation," in *Religion in America: Original Essays on Religion in a Free Society,* ed. John Cogley (Cleveland: Meridian, 1958), 92, 94.
6. Brown v. Board of Education, 347 U.S. 483 (1954), 493–94.
7. Pfeffer, "Case for Separation," 54; Synagogue Council of America (SCA) and National Community Relations Advisory Council (NACRAC), *amici curiae* brief, *Vashti McCollum v. Board of Education of School District No. 71, Champaign County, Illinois,* United States Supreme Court, October term 1947, case no. 90 (Oct. 24, 1947), 26; ibid., *Engel v. Vitale,* United States Supreme Court, October term 1961, case no. 468 (Mar. 5, 1962), 9–11, 23. *Abington v. Schempp,* 374 U.S. at 241–42 (Brennan, J., concurring).
8. George H. Nash, *The Conservative Intellectual Movement in America since 1945,* 2nd ed. (Wilmington, DE: ISI, 1996), 185–87, 199–203; Lucas A. Powe, *The Warren Court and American Politics* (Cambridge, MA: Belknap, 2000), 59–60, 187–89, 361–63; John Morton Blum, *Years of Discord: American Politics and Society, 1961–1974* (New York: Norton, 1991), 190–98; Dan Carter, "A World Turned Upside Down: Southern Politics at the End of the Twentieth Century," in *The Southern State of Mind,* ed. Jan Nordby Gretlund (Columbia: University of South Carolina Press, 1999), 57; David Goldfield, *Southern Histories: Public, Personal, and Sacred* (Athens: University of Georgia Press, 2003), 55–58; Allan J. Lichtman, *White Protestant Nation: The Rise of the American Conservative Movement* (New York: Atlantic Monthly, 2008), 278–80.
9. Conrad Cherry, ed., *God's New Israel: Religious Interpretations of American Destiny* (Chapel Hill: University of North Carolina Press, 1998), 303–27; Cohen, *Jews in Christian America,* 131–32, 159–62; Aaron Louis Haberman, "Civil Rights on the Right: The Modern Christian Right and the Crusade for School Prayer, 1962–1996" (PhD diss., University of South Carolina, 2006), 77, 92–94, 61–100, 115–16; Edward Keynes with Randall K. Miller, *The Court vs. Congress: Prayer, Busing, and Abortion* (Durham, NC: Duke University Press, 1989), 174.
10. Keynes with Miller, *Court vs. Congress,* 1, 146, 169–71, 188–89. The spreading of secular humanism was decried in Rousas John Rushdoony, *The Messianic Character of American Education: Studies in the History of the Philosophy of Education* (Vallecito, CA: Ross House, 1963). Rushdoony's critique was later fleshed out in Francis A. Schaeffer, *How Should We Then Live: The Rise and Decline of Western Thought and Culture* (Wheaton, IL: Crossway, 1976); John W. Whitehead and John Conlan, "The Establishment of the Religion of Secular Humanism and Its First Amendment Implications," *Texas Tech Law Review* 10 (Winter 1978), 1–66; Tim LaHaye, *The Battle for the Mind* (Old Tappan, NJ: Revell, 1980); and Francis A. Schaeffer, *A Christian Manifesto* (Wheaton, IL: Crossway, 1981). On the rise of all-white Christian academies, see Peter Skerry, "Christian Schools versus the IRS," *Public Interest* 61 (Fall 1980): 18–41; Godfrey Hodgson, *The World Turned Right Side Up: A History of the Conservative Ascendancy in America* (Boston: Houghton Mifflin, 1996), 170–78; and Joseph Crespino, "Civil Rights and the Religious Right," in *Rightward Bound: Making America Conservative in the 1970s,* ed. Bruce J. Schulman and Julian E. Zelizer (Cambridge, MA: Harvard University Press, 2008), 90–105.
11. Portions of American Jewry are depicted as politically conservative in Jonathan Rieder, *Canarsie: The Jews and Italians of Brooklyn against Liberalism* (Cambridge, MA: Harvard University Press, 1985); and Samuel G. Freedman, *Jew vs. Jew: The Struggle for the Soul of American Jewry* (New York: Simon and Schuster, 2000). On the contradictions plaguing the liberal activism of American Jews, see Dollinger, *Quest for Inclusion*; and Michael E. Staub, *Torn at the Roots: The Crisis of Jewish Liberalism* (New York: Columbia University Press, 2002).
12. Will Herberg, "The Sectarian Conflict over Church and State," *Commentary* 14 (November 1952): 451–61; Will Herberg, "Religious Education and General Education: A Jewish Point of View," *Religious Education* 48 (May/June 1953): 135–39; Will Herberg, "Religion, Democracy, and Public Education," in *Religion in America: Original Essays on Religion in a Free Society,* ed. John Cogley (Cleveland: Meridian, 1958), 118–47; Will Herberg, *Protestant, Catholic, Jew: An Essay in American Religious Sociology* (1955; Garden City, NY: Anchor, 1983), 254–81; David G. Dalin, "Will Herberg in Retrospect," in *From Marxism to Judaism: Collected Essays of Will Herberg,* ed. David G. Dalin (Princeton, NJ: Markus Weiner, 1989), xi–xxv.
13. Herberg, "Sectarian Conflict over Church and State," 457–58. The ascending prominence of Orthodox Jews within American Jewry is discussed in Jonathon Amont, *United Jewish Communities Report Series on the National Jewish Population*

Survey, report 10, *American Jewish Religious Denominations,* February 2005, 5–8, http://www.jewishfederations.org/page.aspx?id=108513. See also Dana Evan Kaplan, *Contemporary American Judaism: Transformation and Renewal* (New York: Columbia University Press, 2009), 141–42.

14. Samuel C. Heilman, *Sliding to the Right: The Contest for the Future of American Jewish Orthodoxy* (Berkeley: University of California Press, 2006), 96–101. The OU is quoted in Lawrence Grossman, "Mainstream Orthodoxy and the American Public Square," in *Jewish Polity and American Civil Society: Communal Agencies and Religious Movements in the American Public Sphere,* ed. Alan Mittleman, Jonathan D. Sarna, and Robert Licht (Lanham, MD: Rowman and Littlefield, 2002), 301.
15. Heilman, *Sliding to the Right,* 78–81, 101–4; Jack Wertheimer, "The Jewish Debate over State Aid to Religious Schools," in *Jews and the American Public Square: Debating Religion and Republic,* ed. Alan Mittleman, Jonathan D. Sarna, and Robert Licht (Lanham, MD: Rowman and Littlefield, 2002), 227. The concept of contra-acculturation is explained in Heilman, *Sliding to the Right,* 11–12.
16. On the "Silent Majority," see David Farber, "The Silent Majority and Talk about Revolution," in *The Sixties: From Memory to History,* ed. David Farber (Chapel Hill: University of North Carolina Press, 1994), 291–316; Jeff Roche, "Political Conservatism in the Sixties: Silent Majority or White Backlash," in *The Columbia Guide to America in the 1960s* (New York: Columbia University Press, 2001), 157–66; and Robert Mason, *Richard Nixon and the Quest for a New Majority* (Chapel Hill: University of North Carolina Press, 2004), 37–76, 82–86, 142–46.
17. Grossman, "Mainstream Orthodoxy and the American Public Square," 299–300; Wertheimer, "Jewish Debate over State Aid to Religious Schools," 218. For examples of Orthodox Jews advocating for nondenominational prayer in the public schools, see Menachem Schneerson, "Letter from the Lubavitcher Rabbi on the Need for Public School Prayer," in *Religion and State in the American Jewish Experience,* ed. Jonathan D. Sarna and David G. Dalin (Notre Dame, IN: University of Notre Dame Press, 1997), 215–16; Michael Wyschogrod, "Second Thoughts on *America*," *Tradition* 5 (Fall 1962): 28–36; and William W. Brickman, "The School and the Church-State Question," *School and Society,* May 6, 1950, 272–82.
18. Agudath Israel of America, *Daring to Dream: Profiles in the Growth of the American Torah Community* (New York: Agudath Israel, 2003), 269; Morris Sherer, "The Great Society and Aid to Religious Schools," *Jewish Observer* 2 (January 1965): 3–5; William W. Brickman, "The New Education Bill and Church-State Relations," *Jewish Life* 47 (May–June 1965): 22–37; Ivers, *To Build a Wall,* 146–51; Sarna and Dalin, eds., *Religion and State in the American Jewish Experience,* 256–59.
19. Ivers, *To Build a Wall,* 152; Grossman, "Mainstream Orthodoxy and the American Public Square," 294–98; Heilman, *Sliding to the Right,* 6–12; Marvin Schick, ed., *Governmental Aid to Parochial Schools: How Far?* (New York: National Jewish Commission on Law and Public Affairs, 1967), 4–6.
20. Schick, ed., *Governmental Aid to Parochial Schools,* 6–8, 11; Sherer, "Great Society and Aid to Religious Schools," 5. COLPA member William Brickman launched an extensive broadside against the American Jewish Congress and its liberal allies. See Brickman, "New Education Bill and Church-State Relations," 28–34.
21. Schick, ed., *Governmental Aid to Parochial Schools,* 4–8; Marvin Schick, "Forty Years Ago," *Cross-Currents,* September 15, 2005, http://www.cross-currents.com/archives/2005/09/15/forty-years-ago; Aryeh Solomon, "William Brickman's Legacy in Jewish Education Worldwide," *European Education* 42 (Summer 2010): 85–101; Jacob W. Landynski, "Governmental Aid to Non-Public Schools: A Proposal for an Experiment," in *Governmental Aid to Parochial Schools,* ed. Schick, 27–43; Nathan Lewin, ""Government Financing' and the Establishment Clause," in *Governmental Aid to Parochial Schools,* ed. Schick, 44–53; Elie Zirkind, "A Lawyer, a Legend—Interview with Nathan Lewin," *What Where When* (Baltimore, MD), November 2009, http://www.wherewhatwhen.com/read_articles.asp?id=626.

22. Sherer, "Great Society and Aid to Religious Schools," 3 (emphasis in original).
23. Schick, ed., *Governmental Aid to Parochial Schools,* 6–7, 17; Grossman, "Mainstream Orthodoxy and the American Public Square," 297–98.
24. Flast v. Cohen, 392 U.S. 83 (1968); Board of Education v. Allen, 392 U.S. 236 (1968). On Pfeffer's role in these two cases, see Ivers, *To Build a Wall,* 146–64.
25. The court indicated the unconstitutionality of direct aid to religious schools in *Everson v. Board,* 15–16. Two concurring opinions by Justice Douglas built on this finding. See *Engel v. Vitale* (Douglas, J. concurring), 437; and *Abington v. Schempp* (Douglas, J. concurring), 229.
26. Will Herberg, "Religion and Public Life," *National Review,* August 13, 1963, 104; Schick, ed., *Governmental Aid to Parochial Schools,* 57–58, 67.
27. Herberg, "Religious Education and General Education," 137–38; Landynski, "Governmental Aid to Non-Public Schools," 37.
28. Schick, ed., *Governmental Aid to Parochial Schools,* 57; Lewin, "'Government Financing' and the Establishment Clause," 50–51; Landynski, "Governmental Aid to Non-Public Schools," 36 (emphasis in the original).
29. Lewin, "'Government Financing' and the Establishment Clause," 49, 50–52 (emphasis in the original); *Abington v. Schempp* (Brennan, J. concurring), 299.
30. Griswold's argument appears in the brief for appellees, *Florence Flast et al. v. John W. Gardner,* United States Supreme Court, October term 1967, case no. 416 (January 29, 1968); National Jewish Commission on Law and Public Affairs (COLPA), *amicus curiae* brief, *ibid.* (January 27, 1968), 9–10, 11, 4, 2, 1, 16, 17, 19 (emphasis in original).
31. National Jewish Commission on Law and Public Affairs, *amicus curiae* brief, *Board of Education of Central School District No. 1 v. James E. Allen Jr.,* United States Supreme Court, October term 1967, case no. 660 (March 29, 1968), 2, 4, 6, 21, 6, 21.
32. Lemon v. Kurtzman, 403 U.S. 602 (1971). National Jewish Commission on Law and Public Affairs, *amicus curiae* brief, *Lemon v. Kurtzman,* United States Supreme Court, October term 1970, case no. 89 (October 27, 1970), 7, 3, 10–11. On the court's own requirement of "benevolent neutrality," see Walz v. Tax Commission, 397 U.S. 664 (1970), 668–69.
33. Ivers, *To Build a Wall,* 179–88. Religious conservatives would effectively utilize civil-libertarian arguments in Widmar v. Vincent, 454 U.S. 263 (1981); Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995); and Good News Club v. Milford Central School, 533 U.S. 98 (2001). A formidable endorsement of privileging benevolent neutrality in Establishment

Clause cases is made in Stephen V. Monsma, *Positive Neutrality: Letting Religious Freedom Ring* (Grand Rapids, MI: Baker, 1993).

34. David R. Dow, "Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem," *Houston Law Review* 29 (Fall 1992): 572–73; Sherer, "Great Society and Aid to Religious Schools," 3.
35. Heilman, *Sliding to the Right,* 80–81, 96–101; Grossman, "Mainstream Orthodoxy and the American Public Square," 301; Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," in *Law, Politics, and Morality in Judaism,* ed. Michael Walzer (Princeton, NJ: Princeton University Press, 2006), 3–6.
36. Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy," *Tradition* 28 (Summer 1994): 77–78.
37. COLPA, *amicus curiae* brief, *Lemon v. Kurtzman,* 7.

CHAPTER 7

Richard Nixon's Religious Right

Catholics, Evangelicals, and the Creation of an Antisecular Alliance

Daniel K. Williams

Evangelical Protestants began and ended the decade of the 1960s by campaigning for Richard Nixon. Sixty percent of evangelicals voted for Nixon in 1960, 69 percent did so in 1968, and 84 percent did in 1972. They considered him a "man of destiny to lead the nation" and a man who was "in God's place," as Billy Graham told Nixon on more than one occasion.[1] But though evangelicals' faith in Nixon never wavered, their reasons for supporting him changed. In 1960 they viewed Nixon as a champion of Protestantism who would save the country from the dangers posed by a Catholic candidate. By the end of the decade, they began to view him not as a sectarian symbol, but as the champion of an antisecular, ecumenical coalition that was broad enough to include Catholics. Nixon's success in positioning himself as a transdenominational moral leader who could reach out to evangelicals without losing the Catholic vote laid the groundwork for the rise of a politically influential Religious Right and transformed the Republican Party. Though Nixon was never fully conscious of the degree of his success in creating an interdenominational religious coalition, it became one of his most enduring political legacies.

While many historians have examined Nixon's use of racial and cultural appeals to create a coalition of Sun Belt suburbanites, rural Southerners, and Northern workers, few scholars have given much attention to his use of religion to unite his denominationally divided supporters in a coalition against secularism. Even fewer have examined Nixon's transition from a representative of Protestantism to a leader of an interreligious coalition that included Catholics.

Laura Jane Gifford is a scholar in residence at George Fox University and the author of *The Center Cannot Hold: The 1960 Presidential Election and the Rise of Modern Conservatism* (Northern Illinois University Press, 2009). She received her PhD in history from the University of California, Los Angeles, in 2006. Her articles and reviews have appeared in publications including the *Journal of Policy History*, *The Journal of American History*, and the edited anthology *Pressing the Fight: Print, Propaganda, and the Cold War* (University of Massachusetts Press, 2010). Her most recent work focuses on progressive Republican Party politics in the 1960s and 1970s.

Seth Offenbach earned his PhD in history from Stony Brook University in 2010 and is now teaching at Bronx Community College. He has taught at Yeshiva University, the City College of New York, Stony Brook University, and Lehman College. He is an editor of the H-Net listerv H-Diplo. His dissertation is titled "The Other Side of Vietnam: The Conservative Movement and the Vietnam War."

Andrew Preston is a senior lecturer in American History and a Fellow of Clare College at Cambridge University. He has previously taught history and international studies at Yale University; the University of Victoria, Canada; and The Graduate Institute of International and Development Studies, Geneva. He is the author of *The War Council: McGeorge Bundy, the NSC, and Vietnam* (Harvard University Press, 2006) and coeditor, with Fredrik Logevall, of *Nixon in the World: American Foreign Relations, 1969–1977* (Oxford University Press, 2008). His most recent book is *Sword of the Spirit, Shield of Faith: Religion in American War and Diplomacy* (Knopf, 2012).

Stephanie R. Rolph received her PhD from Mississippi State University in 2009 and is currently a visiting assistant professor of history at Millsaps College. Her forthcoming book, *Whiting Out the Movement: Organized Resistance to Civil Rights and the Rebirth of Conservative Politics*, is under advance contract with Louisiana State University Press.

Robert Daniel Rubin teaches American Studies at Keene State College. He received his PhD in history and American Studies from Indiana University in 2009 with a dissertation titled "Establish No Religion: Faith, Law, and Public Education in Mobile, Alabama, 1981–1987."

Jason Stahl teaches in the Department of Postsecondary Teaching and Learning at the University of Minnesota. He received his PhD in history from the University of Minnesota in 2008, and in 2009 he was awarded the Jameson Fellowship in American History from the Library of Congress and the American Historical Association. He is currently writing a book titled *Right Moves: The Think Tank in American Political Culture, 1916–Present.*

Daniel K. Williams is an associate professor of history at the University of West Georgia and the author of *God's Own Party: The Making of the Christian Right* (Oxford University Press, 2010). He received his PhD in history from Brown University in 2005 and was a James Madison Program Visiting Fellow at Princeton University in 2011–12. His articles on evangelical religion and conservative politics have appeared in the *Journal of Policy History*, *Reviews in American History*, and several anthologies of scholarship on postwar American politics, including *Ronald Reagan and the 1980s* (Palgrave Macmillan, 2008). He is currently writing a history of the prolife movement.