Tulsa Law Review

Volume 51 | Issue 2

Spring 2016

Modernist Forms of Thinking and Their Critics in Mid-Twentieth Century America

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MODERNIST FORMS OF THINKING AND THEIR CRITICS IN MID-TWENTIETH CENTURY AMERICA

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KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA (BASIC BOOKS 2015). PP. 352. HARDCOVER $ 29.99.

ADAM LAATS, THE OTHER SCHOOL REFORMERS: CONSERVATIVE ACTIVISM IN AMERICAN EDUCATION (HARVARD UNIVERSITY PRESS 2015). PP. 328. HARDCOVER $ 39.95.

REUEL SCHILLER, FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM (CAMBRIDGE UNIVERSITY PRESS 2015). PP. 355. PAPERBACK $ 29.95.

In the last quarter of the twentieth century, the United States experienced a momentous conservative turn. We know its broad outlines: increased levels of religious discourse in public life; attacks on secularism and multiculturalism in the cultural and educational spheres; a weakening commitment to reversing historic patterns of discrimination; the rolling back of welfare programs; a sharp increase in income inequalities; and a massive and punitive incarceration of racial minorities. How did this all of this come about?

Over the past two decades, historians have puzzled mightily over explanations. They have identified origins, mapped ideational worlds, and described patterns of political and legal activity. The three books reviewed in this essay make important contributions to these literatures, although they do so in two distinct ways. Two of them, the books by Kruse and Laats, explain the conservative turn "positively" by focusing on the ideas and activities of conservatives themselves. The third, the book by Schiller, explains the conservative turn "negatively" by exploring instead the failure of conservatism's adversary: liberalism.

This essay is organized as follows. Part I introduces the three books and makes observations specific to each of them. Part II situates the three books within a longer narrative, that of the emergence of anti-foundational thinking and of responses to it in Ameri-

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can intellectual life.

I. TOWARD THE CONSERVATIVE TURN

A. Kruse and Laats: The Labors of Conservatives

Kevin Kruse's *One Nation Under God: How Corporate America Invented Christian America* conveys its argument in its title. Kruse states at the outset: "Like most scholars, I believe the historical record is fairly clear about the founding generation's preference for what Thomas Jefferson memorably described as a wall of separation between church and state, a belief the founders spelled out repeatedly in public statements and private correspondence."[1]

Some might take issue with this observation on the ground that some states continued to fund churches well into the nineteenth century, but that would be beside the point. Kruse's real target is contemporary Americans' stubborn belief that theirs is, and has always been, a Christian country. In order to demolish that belief, Kruse assigns it a precise—and rather recent—historical origin. Doing so proves that it was "invented."[2]

Kruse argues that America's public embrace and performance of its Christian religious identity is a mid-twentieth century phenomenon. However, among the more startling claims of the book is where in mid-century American history it locates that point of origin. Historians before Kruse have argued that, in response to the Cold War struggle against "Godless Communism," Americans in the Eisenhower years began to accord religion an increasingly prominent role in public life and to adopt public mottos and symbols that were overtly religious. Kruse contends, however, that such historians have "misplaced their origins."[3] The rise in overt public religiosity, he argues, was not a function of the Cold War, but had its origins instead in the *domestic* politics of the 1930s and early 1940s. At that time, corporate titans began actively to recruit enterprising clergymen to promote a new political vision embodied in the idea of "freedom under God." This was a kind of Christian libertarianism that identified as its enemy "not the Soviet regime in Moscow, but Franklin D. Roosevelt's New Deal Administration in Washington."[4] In other words, it is corporate opposition to the modern administrative and regulatory state that is the source of America's public religiosity.

When a book makes a point of specifying precise historical origins for a given development, it makes itself vulnerable to having its proffered origin point questioned. At the very beginning of the book, to bolster his claim, Kruse observes that "[t]he percentage of Americans who claimed membership in a church had been fairly low across the nineteenth century, though it had slowly increased from just 16 percent in 1850 to 36 percent in 1900."[5] That percentage remained steady in the early twentieth century, but then shot up to sixty-nine percent by the end of the 1950s.[6] These extraordinary statistics

1. KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA xiii (2015).

2. *Id.* at xiv.

3. *Id.*

4. *Id.*

5. *Id.* at xv.

6. KRUSE, *supra* note 1, at xv.

suggesting that Americans were *more* religious in 1960 than they were in 1860 challenge many received wisdoms about the difference between the nineteenth and twentieth centuries. If they shake up received wisdoms, that is all to the good. But these statistics also raise many questions, not just the obvious ones about the accuracy of the early statistics and their comparability to more recent ones, but also whether "claiming membership in a church" might be the best or most accurate way of measuring religiosity, even public religiosity. Could it not equally be the case that the formal "claiming membership in a church" might be more meaningful in a thoroughly secularized society (the United States in 1960) than in a society in which religious thought and activity was so much the norm as to not bear flagging (the United States in 1860)? Determined to show how corporate America "invented" Christian America, might Kruse also not be underestimating the impact of the Cold War, changing norms of ecclesiastical organization, religious opposition to abortion and contraception, the role of the black church, and the like?

But there is more. In locating corporate opposition to the New Deal as the origin point of America's post-war public embrace of religiosity, Kruse reads the history in a rather specific way. The increased prominence of religion in American public life, in Kruse's rendering, is the product of "politics," the result of organized opposition to the politics of regulation and redistribution that characterized the mid-twentieth century administrative state. As a political explanation, Kruse's book is effective. The book painstakingly maps the web of relationships and organizations that bound politicians, industrialists, businessmen, conservative ideologues, the media, and clergymen. We get a sense of the cast of lively characters and how they interacted with each other. Occasionally, belying the promise of the book's subtitle, the corporate relationship to the public role of religion is somewhat attenuated. This is especially true of the sections dealing with religion in the schools.

However, one might well ask whether an overtly "political" account of the public religiosity of post-war America is the only—or even the best—way to explain the phenomenon. Is Kruse's attempt to specify historical origins and to map networks a good way to grasp the forms and styles and experiences of modern American public religiosity? Does it tell us how Americans in the post-war period thought or felt or experienced religion in relationship to the public sphere? In final analysis, Kruse's is not a book about the public meanings of religion *for* Americans. At the heart of the question lies the following concern: does the unveiling of the origin, the demonstration that something is "invented," reveal the most important or interesting thing we need to know about a particular historical development?

In *The Other School Reformers: Conservative Activism in American Education*, Adam Laats focuses on conservative activism in the realm of education through an examination of four different struggles scattered across the twentieth century: the 1925 Scopes trial in Dayton, Tennessee; the American Legion's and National Association of Manufacturers' attack on progressive textbooks in the late 1930s; the movement against progressive education in post-war Pasadena, California; and the backlash against multicultural textbooks in 1970s West Virginia.[7] According to Laats, these four school battles

7. ADAM LAATS, THE OTHER SCHOOL REFORMERS: CONSERVATIVE ACTIVISM IN AMERICAN EDUCATION (2015).

"raised issues of perennial interest to conservatives everywhere: evolution, science, traditional education, progressive education, . . . sex, youth, delinquency, and the nature of American culture."[8] To say that educational conservatism has been marked by themes of "perennial interest," is not, of course, to suggest that it has not had a history. In the 1920s, educational conservatives were more concerned with evolution than race. Race did not become an explicitly articulated object of concern until after World War II. Laats also argues that, in contradistinction to intellectuals, educational conservatives did not distinguish rigorously among libertarianism, anti-communism, Burkean traditionalism, or religious thinking. At the core, however, seems to have been tradition: "Educational conservatism has been the tradition of defending tradition itself."[9]

Laats's account intersects with Kruse's in interesting ways. Just as Kruse brings to light a humming network of conservative organizing, Laats shows the hard work that went into educational conservatism: protesting, picketing, publishing blacklists, fighting for control over school boards, and so on. In his account, as in Kruse's, conservatives were not merely reacting on the basis of unexamined impulses, but were keen strategists. Laats offers us, however, a different chronology that implicitly raises questions about Kruse's account. Where Kruse would have us see the origin point of "Christian America" in opposition to the New Deal, the fact that Laats begins with the 1920s Scopes trial—itself a very public echo of nineteenth century battles between Christians and Darwinists—suggests that "Christian America" might be a little older than Kruse would have it. But Kruse also might have something to teach Laats. In my view, Laats could do more by way of exploring the genealogy of the "tradition" that (he says) educational conservatives have always sought to defend. If Kruse is correct, the religious symbols that Americans have taken as entirely "traditional" are of shockingly recent vintage, most barely half a century old. Might educational conservatives not have been creating "tradition" in the act of defending it?

Laats's approach to conservatives strikes a different note from Kruse's. Unlike Kruse's overtly "political" account, which keeps conservatives at a critical distance, Laats seeks to understand them. His book begins with an admission of naiveté. As a progressive schoolteacher in the 1990s, Laats believed that "schools should train each new generation to critique and question all received wisdom."[10] He assumed that anyone who disagreed with this position would be "from an eccentric fringe, a collection of kooks who did not understand modern education."[11] Imagine his surprise, then, when a mother who objected to an addition to her child's curriculum revealed herself to be "enormously educated, articulate, caring, and even a little bashful."[12]

As Laats glances back, he finds many precursors who registered a similar surprise upon encountering conservatives. There is a long history, it turns out, of expressing amazement that conservatives are not as benighted and backward as one had previously thought. Thus, when H.L. Mencken headed down to Dayton, Tennessee to report on the

8. *Id.* at 5.
9. *Id.* at 13.
10. *Id.* at 1.
11. *Id.*
12. LAATS, *supra* note 7, at 1.

Scopes trial of 1925, he had expected to find "a squalid Southern village, with . . . inhabitants full of hookworm and malaria," but found instead a "country town full of charm and beauty."[13] Similarly, in mid-century California, when the journalist David Hulburd met the conservative leader Louise Padelford, he was surprised to find an Ivy League-educated woman armed with a Ph.D. in romance languages. Padelford was also physically disarming. She had "clear blue eyes that look out at the world with wide-open frankness; her ear is keen, her wit quick, and her smile enchanting."[14] Finally, Alice Moore, who was at the heart of the conservative attack on multicultural textbooks in 1970s West Virginia defies expectations when she reveals herself to be "witty, engaging, and insightful."[15]

What is one to make of such repeated expressions of surprise, this inveterate tradition of finding conservatives less boorish and more charming than one had expected? In the case of Laats, but also Mencken and Hulburd, the surprise registers on an aesthetic (and also deeply gendered) level that reveals the distance—yet not fully covered—that separates conservatives from those who study them. If scholars are to come to terms with conservatives, we might need to do more to think "with them," I would argue, than we have done to date. Instead of registering surprise that all conservatives are not backward and reactionary, we might try to ask how conservatives' ideas challenge our own.

B. Schiller: The Failure of Liberalism

Where Kruse and Laats focus on the work of conservatives, Reuel Schiller's *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism* gives us an account of liberalism's failures.[16] Beginning around the mid-twentieth century and for about a quarter century following the end of World War II, in a polity dominated by the Democratic Party, American liberals revealed strong commitments to the regulatory and welfare state, on the one hand, and to ending discrimination, on the other. Both were different strategies for reducing inequality, the former resulting in a series of social programs, the latter targeting discrimination based on status. Together, these strategies made the United States a more equal country: by 1973, the country's richest one percent held only eight percent of its wealth.[17]

However, during the last quarter of the twentieth century, Schiller argues, these two strategies had followed sharply different tracks. Social welfare programs came under attack from Republicans and Democrats alike, while formal commitments to ending discrimination and promoting pluralism, while far from perfect, remained in place. Disparities grew enormously. By 2009, the top one percent held eighteen percent of the nation's wealth, the numbers returning to the inequality levels of 1940.[18]

While scholars have offered various explanations for these developments, ranging from the rise of conservatism to the emergence of the global economy to the career of the

13. *Id.* at 2 (internal quotation marks omitted).
14. *Id.* (internal quotation marks omitted).
15. *Id.* at 190.
16. REUEL SCHILLER, FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM (2015).
17. *Id.* at 4.
18. *Id.*

Civil Rights movement, Schiller identifies as the cause the contradictions—what he calls the "structural flaws"—built into the legal regime of postwar liberalism.[19] As he puts it:

> This regime attempted to implement the principles of democratic majoritarianism at the same time that it sought to protect the rights of minorities and individuals. It struggled to do so using both judicial and administrative mechanisms. These mechanisms came to interfere with one another, just as the contradictions between the law's substantive goals came into conflict. The result was a fatal weakening of liberalism.[20]

Schiller's preferred site for exploring these contradictions is what he calls the "two signature legal regimes of postwar liberalism: labor law and fair employment practices law."[21] Although both legal regimes sought to limit employer discretion, they did so in distinct ways that eventually ended up conflicting with each other. Labor law worked by empowering democratic majorities in the form of unions; it operated through the mechanism of the administrative state. Fair employment practices law, on the other hand, was "profoundly antimajoritarian in nature" to the extent that "[t]he desires of the majority of employees in the workplace were irrelevant to implementation of employment discrimination law"; it relied heavily upon courts.[22]

Through a series of skillfully drawn vignettes mostly set in California, Schiller traces the trajectories of these two different legal regimes. He maps the temporary alliances and the eventual breakdown of cooperation between white unions and African American workers. Each side was convinced of the rightness of its position. Acutely aware of how hard it had been to win freedom from the interference of anti-labor courts in the early twentieth century, and jealously guarding the privileges assured them by the New Deal, white unions resented the interference of courts. They saw this as a judicial infringement on democracy, the encroachment of undemocratic "law" upon democratic "politics." African-American workers, on the other hand, were acutely aware that the self-governance of white labor unions had consigned them to the lowest rungs of the labor hierarchy. Democratic majoritarianism had brought them precious little. If they initially (and unsuccessfully) sought to bypass labor unions and bargain directly with employers, by 1970, they had won a powerful set of legal entitlements—embodied in employment discrimination law—that would "cripple American labor, and shatter its relationship with the civil rights movement."[23]

According to Schiller, the consequences of this conflict were devastating. American liberalism, once committed to racial equality *and* economic equality became a different creature in the late twentieth century: "Its commitment to racial egalitarianism had grown, while its mechanism for reducing economic inequality had begun to atrophy."[24]

19. *Id.* at 248.
20. *Id.* at 5.
21. SCHILLER, *supra* note 16, at 7.
22. *Id.* at 8.
23. *Id.* at 11.
24. *Id.*

By the time the American economy hit a wall in the 1970s, Schiller observes, liberalism had lost the ability to overcome the crisis. It had also created wedges between white and black workers. The consequence was the rise of political conservatism, with its resulting losses for workers and racial minorities, in the last quarter of the century.

Schiller's story about "structural flaws" and the way they caused the unraveling of American liberalism works well enough on its own terms. Indeed, the story's tight organization makes for gripping reading. Occasionally, however, it seems rather too neat, too focused on the unfolding of a plot of its own creation, and not attentive enough to the myriad factors—not least those Kruse and Laats and other scholars of conservatism focus on—that might equally have contributed to the undoing of liberalism. This is, of course, a criticism that can be leveled at any historical account that offers a clean narrative thread and is hardly fatal. I suspect that some scholars might also take issue with Schiller's contention that late twentieth century America retained its commitment to anti-discrimination. The rolling back of affirmative action, the attacks on voting rights, the large-scale incarceration of racial minorities, the mass deportations of immigrants that disproportionately affect families of color, and the recent spate of police brutality vis-à-vis African Americans suggest otherwise.

II. READING KRUSE, LAATS, AND SCHILLER AGAINST A LONGER INTELLECTUAL HISTORY

In this part, I attempt to make sense of the books by Kruse, Laats, and Schiller in terms of a longer intellectual history. In reading the books, I was struck by how much all three seem to circle around similar themes, or reveal similar phenomena, that are never made explicit because they are not the central preoccupations of the authors. In order to see these themes, however, we will need to begin in the nineteenth century and move forward into the twentieth.

For much of the nineteenth century (and certainly long before that), American legal, political, and intellectual elites were committed to varieties of what we might loosely call "foundational thinking," by which I mean ways of explaining or accounting for the world in terms of ahistorical foundations. Nineteenth-century America was an overwhelmingly religious society. The belief that a Christian God underlay the political, legal, and social order was pervasive. Religion played a powerful role in multiple realms of life, from the form of the family to the structure of welfare to the institutions of education. It was frequently employed to justify (but also to oppose) existing political, legal, and social arrangements. Even where American thinkers came up with secular alternatives to "God" as explanations for their world (alternatives that traveled under names like "nature," "society," "history," and so on), such alternatives possessed rather "God"-like characteristics. They were frequently assigned the status of unalterable truth and deemed governed by ineluctable and unshakeable laws.

The pervasiveness of foundational thinking limited and constrained the imagined space of democratic decision-making and individual self-making. If the world was subject to unshakeable laws that were not of man's making, were not democratic decision-making and individual self-making cabined by such "laws"? The widespread sense of given constraints could thus block the increasingly energetic claims to full participation

in the polity made by women, racial minorities, and the economically and physically disadvantaged. To take just one example, in *Bradwell v. Illinois* (1873), the U.S. Supreme Court was asked to consider the applicability of the recently enacted Fourteenth Amendment to an Illinois law that barred women from the practice of law. At the time, women activists were already a few decades into their quest to obtain political and other kinds of parity with men. In a concurring opinion upholding the Illinois' law and thus rejecting the claim of the female complainant, Justice Bradley invoked "[t]he law of the Creator" and "the "nature of things" to argue that "it is not every citizen of every age, sex, and condition that is qualified for every calling and profession."[25] "God" and "nature" could thus serve as bars to women's attempts to enter professions. Similar arguments would be made to justify the denial of suffrage to women, racial minorities, and paupers.

However, the widespread sense of given constraints did not only limit the claims of women, racial minorities, and the poor. It also shaped understandings of the legitimate spheres of democratic politics and law. To the extent that the sphere of democratic politics was imagined as restricted by a set of given constraints, non-democratically generated law occupied a large space in the polity. As many scholars have noted, throughout the nineteenth century, an entrenched and largely unelected common law judiciary played a highly significant role in shaping the rules that governed American society. This is not to say that the common law judiciary had no democratically-inclined challengers in nineteenth-century America. But common law thinkers were able to defend themselves quite successfully against such challengers. They repeatedly argued that the common law was far better able than democratically-elected legislatures to instantiate the foundational laws of "nature," "history," or "society." At the same time, insofar as common lawyers claimed continuity with the common law's "immemorial" past, promised to change legal arrangements with great solicitude for precedent, and asserted that only they were well-equipped to declare the customs of the community, common lawyers also promised nineteenth-century Americans a measure of solidarity, a solidarity that bound past, present, and future together in a century of dramatic changes.[26]

Beginning in the late nineteenth century, however, one can detect a broad-based challenge to foundational thinking, both in Europe and the United States, in multiple realms of intellectual, political, social, and cultural life. At the risk of simplification, we might loosely group these challenges under the rubric of "modernism."

"Modernism," the historian Peter Gay argued, "is far easier to exemplify than to define."[27] While it is beyond the scope of this review essay to come to terms with the multiple meanings and manifestations of modernism, it is significant that Gay identifies as the key attributes of modernism "the lure of heresy," on the one hand, and "a commitment to a principled self-scrutiny," on the other.[28] Briefly put, modernism entailed a "heretical" questioning of hitherto un-interrogated foundations (philosophical, religious,

25. Bradwell v. Illinois, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring).

26. I make this argument in KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM (2011).

27. *Id.* at 5.

28. PETER GAY, MODERNISM: THE LURE OF HERESY FROM BAUDELAIRE TO BECKETT AND BEYOND 1, 3-4 (2008).

aesthetic, logical, natural, and so on). Typically, this questioning took the form of subjecting such foundations to the acid bath of history. Once the pretended ahistorical foundations of political, legal, social, or aesthetic arrangements and conventions were shown to have merely temporal origins, and were thus revealed to be entirely historical phenomena, they could be re-imagined. Whether at the level of democratic decision-making or individual self-making, "principled self-scrutiny" in the here and now bespoke openness to new arrangements, a willingness, even a commitment, to experiment and innovate. Nothing exemplified this approach better than the United States' own homegrown, modernist philosophical tradition: pragmatism.

The impact of modernist, anti-foundational thinking bore dramatic implications for the interrelated realms of endeavor that are the subject of the three books under review, namely, the organization of the spheres of law and democratic politics as they related to one another, education, and religion. As we shall see, each was shot through with strains of pragmatist thinking. I discuss each in turn.

Modernist, anti-foundational thinking resulted in a significant expansion of the imagined possible space of democratic deliberation. Simply put, as the older sense that there were given, unshakeable, fixed truths and constraints receded, what was left but to arrive at preferred solutions through democratic deliberation? Beginning in the late nineteenth century and continuing into the mid-twentieth, women, racial minorities, workers and others interrogated the "natural" and other established or fixed hierarchies that had so long subjected them to lesser citizenship and economic exploitation. A range of reformers—from consumer advocates to urban planners—questioned entrenched arrangements, demanded creative new solutions and expressed a willingness to borrow from other countries.

At the same time, modernist anti-foundational ideas resulted in a major redrawing of the boundaries that separated law and democratic politics. A key architect of this rethinking was Oliver Wendell Holmes, Jr., who was part of the first generation of pragmatist thinkers such as William James, Charles Sanders Peirce, and Chauncey Wright. In the celebrated opening lines of Holmes's *The Common Law*, the reader was famously told that "[t]he life of the law has not been logic: it has been experience."[29] The common law could not, Holmes insisted, be shown to embody ahistorical logic or reason.[30] Indeed, Holmes showed that common law doctrine was little more than an agglomeration of inadvertent errors and confusions that had arisen in historical time. It followed, for Holmes, that the common law's antiquity did not entitle it to special regard. In *The Path of the Law*, he put it thus:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and

29. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). I discuss Holmes's historical sensibility in Kunal M. Parker, *The History of Experience: On the Historical Imagination of Oliver Wendell Holmes, Jr.*, 26 POL. & LEGAL ANTHROPOLOGY REV. 60 (2003).

30. *See id.*

> the rule simply persists from blind imitation of the past.[31]

As the twentieth century dawned, the Holmesian critique of the common law began to attract large numbers of adherents. As the United States began to confront the problems of immigration, urbanization, and capital-labor conflict, critics argued the country's entrenched common law sensibilities, especially as instantiated in the pronouncements of a pro-capital and anti-labor federal judiciary, were impeding the search for solutions to urgent social and political problems. The activities of the U.S. Supreme Court lent credence to such critiques. In the infamous case of *Lochner v. New York*, the Court effectively read common law freedoms into the U.S. Constitution's Due Process Clause when it struck down as unconstitutional a New York maximum-hours law intended to regulate working conditions in bakeries on the ground that it interfered with the right to contract.[32]

As decisions such as *Lochner* were handed down, the contemporaneous interrogation of law's foundations allowed Progressive Era critics to read the common law as nothing other than a species of reactionary politics, a usurpation of the legitimate sphere of democratic politics. In order to restore to democratic majorities their rightful role in giving themselves their own laws, there began a long, complex, and contradictory assault on the common law extending all the way to the New Deal. By 1940, in the face of the democratically-sanctioned, scientifically-informed, and result-oriented law represented by the regulatory state, the common law had retreated. Common lawyers would no longer enjoy the prestige and authority they had enjoyed in the nineteenth century.

Modernist, anti-foundational ideas were equally (if not more) influential in the realm of education, where Progressive Era reformers sought to transform the school to produce a new type of citizen. Nobody linked education and democracy more firmly than John Dewey, America's most famous twentieth-century philosopher and the foremost exponent of philosophical pragmatism. From 1896 to 1903, Dewey headed the Laboratory School at the University of Chicago, the name alone conveying the pragmatist turning away from foundations and simultaneous commitment to experiment. While the Laboratory School was not free of hierarchies between teachers and students, it was explicitly conceived as an embryonic democratic society and did more to encourage collective deliberation and decision-making by students than almost all other schools at the time. In the words of the political theorist Amy Gutmann, within the logic of Dewey's educational program "teachers must be sufficiently connected to their communities to understand the commitments that their students bring to school, and sufficiently detached to cultivate among their students the critical distance necessary to reconsider commitments in the face of conflicting ones."[33]

Modernism and pragmatism also came together in the realm of religion, not least in the figure of mid-twentieth century America's most famous theologian, Reinhold Nie-

31. OLIVER WENDELL HOLMES, JR., *The Path of the Law*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 399 (Sheldon Novick ed., 1995).

32. Lochner v. New York, 198 U.S. 45 (1905).

33. AMY GUTMANN, DEMOCRATIC EDUCATION: WITH A NEW PREFACE AND EPILOGUE 77 (1999).

buhr. In his classic text, *The American Evasion of Philosophy: A Genealogy of Pragmatism*, Cornel West explicitly characterizes Niebuhr as a pragmatist, religious liberal deeply committed to the primacy of scientific solutions to social problems and profoundly skeptical of "pre-scientific" and "primitive" thought.[34] For Niebuhr, Biblical eschatology was only "symbolic." He famously stated: "I do not know how it is possible to believe in anything pertaining to God and eternity 'literally.'"[35] He shocked a Catholic interviewer by saying: "Now I don't think that anybody really believes in the resurrection of the body."[36]

Even as modernist, pragmatist, anti-foundational ideas coursed through the realms of law, politics, education, and religion, it is important to remember that many of the figures in the rethinking of these realms saw themselves as dealing with interconnected problems and crossed disciplinary boundaries freely. Thus, John Dewey, America's most famous pragmatist philosopher of education, occasionally thought and wrote about law. In 1941, he wrote a little essay describing his philosophy of law that could be read as a blue-print for the New Deal administrative state. He distinguished sharply between pragmatic approaches to law, on the one hand, and foundational approaches to law resting upon "external sources," on the other. By "external sources," Dewey was referring to sources imagined to be outside history. He listed as examples "the Will or Reason of God, the Law of Nature in medieval theory and in philosophers like Grotius and his successors, the General Will of Rousseau, and the Practical Reason of Kant."[37] In contrast to such metaphysical approaches to law, Dewey argued, pragmatic approaches to law were to emerge from, and be judged in terms of, "experience."[38] This grounding in "experience" demanded that "intelligence, employing the best scientific methods and materials available, be used to investigate, in terms of the context of actual situations, the consequence of legal rules and of proposed legal decisions and acts of legislation."[39]

If America's then most famous philosopher provided a blue-print for the New Deal, the connections between pragmatic, modernist legal thought and pragmatic religious thought are evident in a little exchange between two friends of long-standing, Reinhold Niebuhr and Felix Frankfurter. A Harvard Law School professor, a figure in government, and then a Roosevelt appointee to the U.S. Supreme Court, Frankfurter clearly saw himself as continuing the pragmatist legacy of Holmes and Brandeis. In his reminiscences, he wrote:

> I am very much interested in theological discussions, theological problems, and one of my close friends, one of my esteemed friends is Dr. Reinhold Niebuhr, and he and I have had talks on this subject from time to time. We summered together for some years up in Heath, a small town in Western Massachusetts. Once, a few summers ago, I

34. *See* CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 156 (1989).
35. *Id.* at 157.
36. *Id.*
37. John Dewey, *in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 81 (1941).
38. *See id.*
39. *Id.* at 81, 84.

> went to a community church there, a nondenominational church to which people of the community except the Catholics go, because I had heard that Reinhold Niebuhr was going to deliver the sermon. He did deliver the sermon, a nondenominational sermon, and after the service, I said to him, "Reinie, may a believing unbeliever thank you for your sermon?" He said, "may an unbelieving believer thank you for appreciating it?"[40]

Politics, law, education, and religion, as they were reconceived by a set of influential thinkers in mid-century America, stood at the shadowy boundary between "belief" and "unbelief." The books of Kruse, Laats, and Schiller all concern this boundary, albeit in different ways.

As stated above, Kruse explicitly locates mid-twentieth century America's public embrace of religiosity in political opposition to the New Deal. It is thus the pragmatist mood of early twentieth-century America as instantiated in the form of the New Deal state that conservatives were reacting against. But it is in Laats's book that conservative opposition to pragmatist thinking—specifically, the figure of John Dewey—comes across most pointedly.

In the early 1940s, the National Association of Manufacturers (an organization that also plays a critical role in Kruse's book) published a list of hundreds of school textbooks that it accused of maintaining an "un-American tone." The American Legion also declared its opposition. Among the targets were popular school textbooks written by Harold Rugg, who was part of a self-styled group called "frontier thinkers" based largely at the Columbia Teachers' College. However, the real enemy was the Teachers College itself, an institution particularly influenced by and associated with John Dewey. Laats quotes a Seattle commentator who warned that "John Dewey Groups" at Columbia University were promoting "schemes to overthrow our system of government."[41]

Opposition to the figure of Dewey continued in the post-World War II period. In 1950s California, conservatives were set against the "pragmatic flexibility" that school superintendents sought to bring to the city's school system.[42] The conservative thinker who most influenced California educational conservatives, Allen Zoll, held the "tragic and terrifying" philosophy of John Dewey responsible for the crisis in education.[43] According to Zoll, progressive educators had sought to discredit the American way of life and capitalism through influencing education. But it was Dewey's philosophy that had "eliminated the notion of permanent truths or values."[44]

Laats's last substantive chapter deals with a textbook controversy in Kanawha County, West Virginia that is widely taken to mark the birth of the "New Right." During this period, conservatives shifted from attacking communism to attacking "secular humanism"; their activities gave rise to institutions such as the Heritage Foundation and to

40. FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 291 (Harlan B. Phillips ed., 1960).
41. LAATS, *supra* note 7, at 84 (internal quotation marks omitted).
42. *Id.* at 130.
43. *Id.* at 148.
44. *Id.* at 149.

an explosion in the number of Christian schools. But even in the 1970s, the era's leading educational conservatives, the Gablers, laid the blame for America's schools on the "declared atheist," John Dewey, who had promoted progressive education on the basis of the idea that "there was no absolute transcendental God, Bible, or system of beliefs."[45]

If we are wont to think that American conservatives mobilized in opposition to Communism or Socialism, secularism, or the political demands of women and minorities, both Kruse and Laats, but especially the latter, show us how much conservative opposition in America has been directed against a modernist philosophical tradition that is uniquely the country's own. If American conservatives have long demonized unsavory ideas as foreign imports, they have also demonized the country's own anti-foundational traditions.

But even as conservatives were inveighing against pragmatist approaches, they might in fact have been borrowing from them. What I found most intriguing about Kruse's book was that the religious symbols and slogans that conservatives mobilized in opposition to the anti-foundational, pragmatist New Deal were as "thin," as flattened, as superficial, and as devoid of foundations as they were.

As Kruse observes, the post-war period witnessed the introduction of phrases such as "One Nation Under God" and "In God We Trust."[46] These were slapped onto currency, stamps, pedestals, and podiums, recited at the opening of events, and featured all over public institutions. Even at the time, however, the effort was read as offering up a denuded, thinned out religiosity. In the congressional debate over inscribing "In God We Trust" on coins, Representative Abraham Multer of Brooklyn argued that such efforts ultimately debased God and were entirely ineffectual: "I don't believe it has inspired one single person to be more religious because we have these words on our currency."[47] When the effort to pass a constitutional prayer amendment was under foot, some congressmen ardently in support of the amendment were astonished to learn that that opposition came from religious leaders. But religious leaders recognized that such efforts were attempting to detach something from highly particular traditions and to set it afloat without foundations. "It seems that to many of the proponents [of the school prayer amendment] 'prayer is prayer,'" said Reverend Dean Kelley of the National Council of Churches.[48] "They seem unable to realize that some devoutly religious citizens, at least, care what the content of prayer is, and do not wish to engage in a prayer whose content is so vague or innocuous as to be 'non-sectarian.'"[49] So thin, superficial, and devoid of foundation was the post-war religious symbology, in fact, that contemporary legal scholars argued that there was nothing in it that threatened the constitutionally mandated separation of church and state. This was merely "ceremonial deism," claimed Yale Law School Dean Eugene Rostow, "so conventional and uncontroversial as to be constitutional."[50]

What should one make of the "thin" religiosity that was everywhere in the post-

45. *Id.* at 196 (internal quotation marks omitted).
46. KRUSE, *supra* note 1, at xvi.
47. *Id.* at 119.
48. *Id.* at 218.
49. *Id.*
50. *Id.* at xv (internal quotation marks omitted).

war period? Could this be, perhaps, a particularly modernist response to the erosion of the substantive content and specific eschatalogies of religion under the impact of anti-foundational thinking*? Contra* Kruse, then, could one think of inscriptions on currency as a marker of "Christian America" only if mid-century "Christian America" is understood to be partaking of the "unbelieving belief" of a pragmatist theologian such as Niebuhr? Could the same "thin" tradition be uncovered in the thinking of the educational conservatives who are the subject of Laats's book? Although Laats does not concern himself with this question, I suspect that this might be the case.

Law in relationship to democratic politics underwent a similar "thinning out." This story is hardly unknown, but bears mentioning because it is more or less absent in Schiller's account and complicates it somewhat.

The triumph of democratic majoritarianism that the New Deal represented was not necessarily viewed as such by all concerned. In the 1920s and 1930s, authoritarianism—whether in its German, Italian, or Russian versions—appeared to many to be the way of the future. Authoritarian states seemed able to marshal the resources necessary to mobilize societies and economies in ways that liberal democracies, beset as they were with constitutional restrictions on state power, seemed unable to do. It is not surprising, then, the New Deal regulatory state that emerged in the 1930s, borrowing as it did from the administrative models of the authoritarian states, sparked a great deal of anxiety. If it represented the triumph of democratic majoritarianism to some, it seemed to signal its demise to others.

Conservatives were hardly the only ones concerned. In the 1930s, Harvard Law School's Dean Roscoe Pound, who had been one of the pioneers of Sociological Jurisprudence in the early twentieth century, began to sound more and more like an orthodox common lawyer as he criticized the emerging administrative state. From August 19-21, 1936, Pound convened a "Conference on the Future of the Common Law" at the Harvard Law School at which he hailed the common law as "a taught tradition of voluntary subjection of authority and power to reason whether evidenced by medieval charters or by immemorial custom or by the covenant of a sovereign people to rule according to declared principles of right or justice."[51] Pound criticized the administrative state as follows: "There are those today who would think of everything which is done officially as law. Such is not the common-law teaching. Not administration as law but the requiring of administration to conform to rule and form and reason is the common-law ideal."[52] Vesting too much power in the administrative state, Pound feared, would make the United States approach the Soviet system: "[I]n the socialist state there can be no law but only administrative ordinances and orders."[53]

Pound need not have worried too much. As it turned out, the American administrative state that emerged by 1940—for all its claims to be the triumph of democratic majoritarianism—was in fact hemmed in, shot through, and beset by law. Daniel Ernst has recently written about how common law judges and lawyers compelled the emerging ca-

51. Roscoe Pound, *What is the Common Law*, *in* THE FUTURE OF THE COMMON LAW 1, 10-11 (Peter Smith ed., 1965).

52. *Id.* at 17.

53. *Id.*

dre of administrators to conform to common law norms.[54] While it is beyond the scope of this review essay to discuss the ways in which the administrative state was regulated by law as it emerged, it might be worth emphasizing that Felix Frankfurter, who was such an important intellectual architect of the American administrative state, considered law absolutely central to it. This is what Frankfurter wrote as early as 1913.

> The problems ahead are economic and sociological, and the added adjustments of a government under a written constitution, steeped in legalistic traditions, to the assumption of the right solution of such problems. To an important degree therefore, the problems are problems of jurisprudence—not only the shaping of a jurisprudence to meet the social and industrial needs of the time, but the great procedural problems of administration and legislation, because of the inevitable link between law and legislation, the lawyers' natural relation to these issues, the close connection between all legislation and constitutional law, and the traditional, easily accountable dominance of the lawyer in our public affairs. In the synthesis of thinking that must shape the Great State, the lawyer is in many ways the coordinator, the mediator, between the various social sciences.[55]

Frankfurter's focus on "the great procedural problems of administration and legislation"—and his understanding of the role of the lawyer as "the coordinator, the mediator, between the various social sciences"—suggests the role that law was to play in the new administrative order.[56] It was to specify, or stand for, *process*. This was a "thinning out" of sorts. In a post-foundational world, once law had abandoned its claim to embody logic, reason, morality, the customs of the people, and the accumulated wisdom of the ages, it shrank insofar as it became process, the ability to specify the ways in which the multiple orders of the new state interacted with each other. This was precisely what the Legal Process school, the dominant jurisprudential style of the 1950s, attempted to do.

When Schiller stages the "structural flaws" of post-war liberalism as the clash between democratic majoritarianism (labor law) and anti-majoritarianism (fair employment law), he leaves out two important implications of law's "thinning out" into process. First, the democratic majoritarianism of the administrative state was always shot through with procedural constraints derived from the common law, i.e., the very body of anti-majoritarian law the administrative state was designed to supersede. Second, the mid-twentieth century "thinning out" of law into process created, at least for a while, an *entente* between democratic politics and law. Democratic majorities could govern themselves so long as they respected procedural norms. This *entente* was thrown into crisis somewhat by the Civil Rights movement, of which the "anti-majoritarian" fair employment norms identified by Schiller are a part. It is noteworthy, then, that opposition to the

54. DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014).

55. FRANKFURTER, *supra* note 40, at 81.

56. *Id.* at 81.

Warren Court's anti-discrimination and individual rights jurisprudence from within the legal community came in important part from those who accused it of not respecting the right procedures and who saw in decisions such as *Brown v. Board of Education* (1954), a return to the jurisprudence of the *Lochner* era. Felix Frankfurter, the intellectual architect of the New Deal, became a conservative on the Warren Court. His clerk, Alexander Bickel, who coined the phrase "the counter-majoritarian difficulty" spoke of "passive virtues" (most of them procedural) that he accused the Warren Court of ignoring to its peril.[57] Schiller's account of the "structural flaws" of liberalism, then, does not sufficiently recognize that, on the one hand, democratic majoritarianism was itself thoroughly legal and that, on the other, it was legal thinkers who opposed in important part the "counter-majoritarian" legal norms that were used to check democratic majoritarianism in the 1960s. This could be a valuable addition to his story.

III. CONCLUSION

In situating Kruse, Laats, and Schiller in terms of a longer intellectual history, I have sought to show how mid-twentieth century law, politics, religion, and education were all, in distinct but also related ways, tied up with the broad attack on foundational thinking, on the one hand, and with the various responses to it, on the other. Notions of tradition, religion, and law were all invoked to counteract modernist developments in the realms of education and politics. But in challenging these modernist developments, there would be no easy or uncomplicated return to the world before modernism. Law, religion, and perhaps tradition would endure a "thinning out" of sorts in their attempt to win back a role for themselves. Of course, all I am suggesting is that this was a particular kind of mid-century response to the problems that anti-foundational thinking posed for American thinkers. Nothing here should exhaust the other meanings of law, religion, and tradition in the same period.

In American history, I submit, we need more mappings of the forms that modernist thinking took and of the myriad responses to these forms. The three books reviewed here are part of that process.

57. I discuss Bickel's thought in Kunal M. Parker, *How Law Should Avoid Mistakes: Alexander Bickel's Modernist Jurisprudence of Mood*, *in* LAW'S MISTAKES (Austin Sarat et al., eds., 2016).