

Professor Harry V. Jaffa Divides the House: A Respectful Protest and a Defense Brief

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There are in nature certain fountains of justice, whence all civil laws are derived but as streams.¹

Man's [natural] capacity for justice makes democracy possible, but man's [natural] inclination to injustice makes democracy necessary.²

I. INTRODUCTION

A. *The Context*

Professor Harry V. Jaffa has done it again. His remarkable essay, "What Were the 'Original Intentions' of the Framers of the Constitution of the United States?," together with his related book, *The Crisis of the House Divided*,³ should help "provoke the most profound and far-reaching debate of our generation about American politics."⁴ Both works are required reading for anyone who would know what is this thing called law. Both address the central question in American Constitutional law today, which is the same question over which the Civil War was fought: How should the law be inter-

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1. F. BACON, OF THE PROFICIENCY AND ADVANCEMENT OF LEARNING, DIVINE AND HUMAN, Book II (1605).

2. R. NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE xiii (1944).

3. H. JAFFA, CRISIS OF THE HOUSE DIVIDED (1959).

4.

Harry V. Jaffa's CRISIS OF THE HOUSE DIVIDED is: (1) a political history of the United States through the years preceding the Civil War; (2) an analysis of the political thought of the spokesmen (Abraham Lincoln and Stephen A. Douglas) for two of the alternative courses proposed during those years; and (3) a creative venture in political philosophy that—unless the United States be as sick intellectually as some of us believe it to be—will provoke the most profound and far-reaching debate of our generation about American politics.

W. KENDALL, THE CONSERVATIVE AFFIRMATION 249 (1963).

puted if the Declaration of Independence is correct that it is self-evidently true that all men are created equal?

Science is not egalitarian. In the study of the law there is a natural⁵ hierarchy of the importance of the questions asked and answered. If the law is like a house, the Constitution of 1787 is like the foundation of the house in which we Americans live; statutory law is like the supporting walls; and case law is like the roof. To begin legal education, as do many law schools, with case law is like building a house by starting with the roof. Professor Jaffa demands that we proceed from the ground up. In fact, he goes so far as to look to see what lies under the foundation by exploring the nature of obligation: "[E]very human being has the infeasible right to ask anyone proposing to exercise authority over him, 'Why should I obey [the Constitution or any other law]?'"⁶ We are indebted to Professor Jaffa for a profound if passionate elaboration of the enormous consequences to Constitutional law of the fact that in American positive law the answer to the question of obligation is found in the same document as the doctrine of the equality of all men and an invocation of natural right: In the Declaration of Independence, the first "organic law" in the current edition of the *United States Code*.⁷ Abraham Lincoln

5. "Nature: from *natus*, born; the essential character of a thing; qualities that make something what it is; essence; in-born character; inherent tendencies of a person." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (1974) s.v. "nature". For an explication of the meaning of "nature," see L. STRAUSS, *NATURAL RIGHT AND HISTORY* (1953); J. Klein, *On the Nature of Nature*, in *LECTURES AND ESSAYS* 219-239 (1985); H. Jaffa, "Is Political Freedom Grounded in Natural Law," *Claremont Institute for the Study of Statesmanship and Political Philosophy* (February 1984); H. JAFFA, *THOMISM AND ARISTOTELIANISM* (1952); G. ANASTAPLO, *HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM, AND THE COMMON GOOD* (1975) Ch. IV: "Natural Right and the American Lawyer;" Ch. V, "Liberty and Equality," which is a review of Professor Jaffa's *EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS* (1965); and Ch. VI: "Law and Morality," which is a review of Lord Devlin's *THE ENFORCEMENT OF MORALS* (1965) and Jacob Klein's *A COMMENTARY ON PLATO'S MENO* (1965); and G. Anastaplo, *Introduction, A Conversation with Harry V. Jaffa at Rosary College*, in H. JAFFA, *AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING* (1984): the "minority belief that [is] fundamental to sensible political science and to a decent life as a community is a general respect for natural right and what is known as natural law. This means, among other things, that discrimination based on arbitrary racial categories cannot be defended, especially by a people dedicated to the self-evident truth that 'all men are created equal.' It also means that the family as an institution should be supported."

6. Jaffa, *What Were the 'Original Intentions' of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 363, 367 (1987).

7. 1 U.S. CODE xxxv-xxxvii (1982 ed.). The other "organic laws" include the Northwest Ordinance of 1787 and the Constitution of 1787, with the Bill of Rights. The relevant portion of the Declaration is the second paragraph:

showed that some Supreme Court decisions such as *Dred Scott*⁸, which denies the doctrine of natural equality set forth in the Declaration, are not the supreme law of the land. Furthermore, he argues that this is the case because the question of obligation determines not only what the law should be, but also what the law is in concrete practical cases.⁹

Why is it that virtually all Americans say that they honor and obey the Constitution? Is it because the majority ratified it, and we should honor and obey anything for which the majority voted? If so, why? Is it because the majority outnumbers the minority? If so, is this just another way of saying, "Might makes right?" A majority once voted for Hitler and his political program. Do Nazi laws then have the same status as our laws? On the other hand, do we obey and honor the Constitution not because the majority voted for it, but because it is good—and the majority voted for it because it is good. Both reasons are important, but which is more so? If the Constitution is good, it must be because it is good for human beings. What, then, is a truly human being? If the nature of being human, i.e. human nature, is shaped by history or the environment rather than being fixed, then human nature can be adapted to any constitution, even a Nazi constitution or a cannibal constitution, and we must in principle be indifferent to the kind of constitution we have.

However, if human nature cannot change, then the status of the Constitution, and hence also of all subordinate laws, depends upon whether or not the laws adapt themselves to the requirements of human nature. If a law is adapted to the requirements of human nature, it is naturally right or just. If it is not adapted to the requirements of human nature, it is naturally unjust. That is the doctrine of natural right. And if

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem likely to effect their Safety and Happiness.

1 U.S. CODE xxxv (1982 ed.).

8. *Dred Scott v. Sanford*, 60 U.S. [19 How.] 393, 15 L.Ed. 691 (1857).

9. CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, 3-7, 28-29, 36-37, 77-79, 120, 217-18, 256, 309-11, 328-29, 337-38, 377-78 and 394 (P. Angle ed. 1958); H. JAFFA, CRISIS OF THE HOUSE DIVIDED (1959).

this doctrine is true, then nature or being is the deepest question underlying the science of law—just as it is the deepest question underlying all the other sciences.

Does this doctrine mean that students of the law may not differ on the questions posed by their discipline? Not at all. For an example of the flexibility and undogmatic character of the doctrine of natural right, we should turn to the fullest elaboration of the doctrine in the Anglo-American legal tradition: Not the Declaration, but rather Judge William Blackstone's *Commentaries on the Laws*,¹⁰ the "oracle of the common law." (The Constitution of 1787 does not explicitly mention natural right. But Judge Blackstone's understanding of the common law is incorporated implicitly into the Constitution of 1787 through Article III and the Seventh Amendment's reference to the common law.)¹¹

Judge Blackstone throughout his work compares the common law with the civil or Roman law, showing how these two very different systems of law adapt themselves to the requirements of nature. For example, in the chapter on family law,¹² Judge Blackstone assumes that, because human nature is inviolable, all human societies must provide institutions for the

10. W. BLACKSTONE, COMMENTARIES ON THE LAWS (1st ed. 1765-1769), 4 vols [hereinafter COMMENTARIES]. For a beginning of an interpretation of the COMMENTARIES and for an explanation of why the first edition of 1765-1769 is more authoritative than later American editions for some questions of American Constitutional law, see R. Stone, *Review of Blackstone's Commentaries*, 8 HASTINGS CONST. L.Q. 923 (1981). A few examples of Judge Blackstone's influence on the Framers of the Constitution of 1787 include the following. His advocacy of the doctrine of "separation of powers" is persuasive. His writings on the importance of the writ of habeas corpus and of a free press, and his disavowal of all prior restraints on the press contributed to the establishment of these fundamental constitutional rights on American shores. Similarly, the Framers assumed that the relevant public was generally familiar with Blackstone's discussion of the nature of "the executive power" when they drafted article II. In fact, W. W. Crosskey, in POLITICS AND THE CONSTITUTION (1953), 2 vols., points out that the enumeration of some of the powers of Congress in Article I, Section 8, of the Constitution of 1787 is best understood as, in part, an amendment of the list set forth in the COMMENTARIES, transferring certain powers from the executive to the legislative branch of government. Moreover, Judge Blackstone's elucidation of the principles of sovereign immunity gained wide currency among the various colonies and became part of American law. Of course, Judge Blackstone's doctrine of natural right helped inspire the American Revolution. R. Stone, *id.* at 925.

11. For a compelling elaboration of this thesis, see W.W. CROSSKEY, POLITICS AND THE CONSTITUTION (1953 and 1980), 3 vols. Of course, as T.S. Schrock & R.C. Welsh point out in *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978), none of this means that federal judges are free to make up or create laws.

12. 1 COMMENTARIES *supra* note 10 at 448-450 ch. 17.

care of the young. Beasts do not care for the young of other members even of their own species, because they cannot reason. Also, because human nature is invariable, all civilized societies must provide for legally appointed guardians when the parents are unable to care for their children. Human nature being what it is, the common law does not permit an infant's heir to be also his guardian. (For the same reason, it may be against public policy for a parent to be the beneficiary of a large insurance policy on the life of his child or otherwise to have a direct interest in his child's death.) The common law seeks to protect the life of the child. However, Roman or civil law does permit an heir to be a guardian, because, human nature being what it is, an heir will take much better care of the infant's property than would a disinterested non-heir.

Both approaches, common law and civil law, assume natural self-interest, and both are coherent and sensible—but there are a strictly limited number of such approaches. Thus nature suggests the questions, although it does not dictate one set of answers. Judge Blackstone does not claim that the common law is the only natural law. But any legal arrangement that does not adapt itself both to nurturing of the young and to self-interest would not make sense or be respected. Hence, it would be unnatural and could not endure. Judge Blackstone states the general relationship between positive law and natural right as follows:

This law of nature, being co-eval with mankind and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human [positive] laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.¹³

Therefore, "Aristotle himself has said, speaking of the laws of his own country, that jurisprudence of the knowledge of those laws is the principal and most perfect branch of ethics."¹⁴ However, as mentioned above, the Constitution of 1787 does not mention explicitly natural right. Is it thereby rejected, or is it thereby assumed? As important as this question is, many lawyers today would be hard pressed to answer it. Professor Jaffa provides a most cogent and eloquent reminder that the

13. 1 COMMENTARIES, *supra* note 10 at 41.

14. 1 COMMENTARIES, *supra* note 10 at 27.

foremost American source of natural rights that is recognized as law is the Declaration of Independence.

Professor Jaffa's argument is that the deepest and most characteristic division in American politics is the debate between Abraham Lincoln and John C. Calhoun¹⁵ (Stephen A. Douglas was standing in for Calhoun)¹⁶ on the question of slavery or States' Rights. The earlier debate between Alexander Hamilton and Thomas Jefferson did not represent opposite poles, because they were not as clear in their thought and took both sides of the fundamental question: Is the ground beneath the foundation of our law ultimately morality or force—the natural rights of man or majority rule? (A third possible position, associated with the Critical Legal Studies movement, is that law is basically fraud,¹⁷ but this doctrine is similar to Calhoun's.) In this debate, Lincoln and Calhoun stand in for Aristotle and Machiavelli, respectively. One of the deepest issues at stake in this titanic conflict is the question of the status of nature: Aristotle teaches that the world is naturally so ordered that good men tend to prevail in the end. Machiavelli teaches¹⁸ that force and fraud are justified because the world is naturally so ordered that good men finish last.

Professor Jaffa argues incisively that *Dred Scott*¹⁹ is an application of Calhoun's doctrine to the question of the legal status of slavery in the territories. Calhoun held that the Constitution of 1787 established a government of concurrent

15. See J. CALHOUN, A DISQUISITION ON GOVERNMENT (1853). See also R. Lerner, *Calhoun's New Science of Politics*, 57 AMERICAN POL. SCI. REV. 918-932 (1963).

16. Douglas would take exception to any characterization of him as standing in for Calhoun. His career, as Professor Jaffa points out in *CRISIS OF THE HOUSE DIVIDED*, was devoted to avoiding the Civil War by finding a middle course between Lincoln and Calhoun. He did not agree with Calhoun that slavery is a positive good or that the Constitutional rights of the South were violated by the Missouri Compromise. But Lincoln is right when he saw that, on the question of the natural rights of man, there are only two viable opinions.

17. For one example, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979): "[All] legal thinking . . . has a double motive. On the one hand, it is an effort to discover . . . social justice. On the other, it is an attempt to deny the truth . . . about the actual . . . social world. . . . In its second aspect, it has been . . . an instrument of apology—an attempt to mystify . . . by convincing [us] of the "naturalness," the "freedom" and the "rationality" of a condition of bondage . . . something like chaos." (at 210-211).

18. For an interpretation of the works of Machiavelli that touches the heart of his disagreement with Aristotle, see I. Kristol, *Machiavelli and the Profanation of Politics*, in REFLECTIONS OF A NEO-CONSERVATIVE (1983), discussed in this review *infra* at 499.

19. See *supra* note 8.

majorities composed of the State governments and the federal government, with the States enjoying the rights of veto (or nullification) and secession. Furthermore, Calhoun held, the rights of the Southern States were violated by the Missouri Compromise,²⁰ which excluded slavery from the territories north of 36 degrees 30 minutes. *Dred Scott* held that the Missouri Compromise was unconstitutional because it deprived slaveowners of their property without due process of law. The Missouri Compromise had been replaced by the Kansas-Nebraska Act of 1854,²¹ which was sponsored by Stephen Douglas, and which provided for popular majority sovereignty on the question of slavery in each territory. Lincoln argued that a decision by the majority in a territory to legalize slavery would not have the authority of true law because it violates the natural-rights doctrine of the Declaration. Calhoun's argument at its core is that majority rules, and majority must be the local majority in the area in question and not all men in the world. "Majority rules," if it is the only legal principle, is another way of saying, "Might makes right."²²

Another aspect of Professor Jaffa's argument is more obviously relevant for lawyers today. He points out that the doctrine of "legal realism,"²³ the doctrine that asserts "the law is

20. The Missouri Compromise, effective 1820 and repealed in 1854, comprised two statutes. One provided that Maine would enter the Union as a free State. Act of April 7, 1820, 16th Cong. Sess. 1, ch. 19, 3 *U. S. Statutes at Large* 544. The other statute provided that Missouri would enter as a slave State, with slavery prohibited elsewhere in the Louisiana Purchase north of 36 degrees 30 minutes. Act of March 6, 1820, 16th Cong. Sess. 1, ch. 22, 3 *U.S. Statutes at Large* 545. The Kansas-Nebraska Act, effective May 30, 1854, repealed the Missouri Compromise. Southerners wanted no free territory west of Missouri and so had prevented attempts to organize Kansas and Nebraska as one territory. The Act was sponsored by Stephen A. Douglas and provided for two separate territories, each of which would decide the slavery question for itself according to the principle of "popular sovereignty." The practical result was that both pro- and anti-slavery forces sent money and armed settlers into Kansas to influence the vote by means of force. The results of this "squatter sovereignty" were "bleeding Kansas" and the formation of the Republican Party, which sought to repeal the Act.

21. Act of May 30, 1854, "An Act to Organize the Territories of Nebraska and Kansas," 33d Cong. Sess. 1, ch. 59, 10 *U. S. Statutes at Large*, 277.

22. Cf. A. Lincoln's Address, at Cooper Union, New York (February 27, 1860). "Let us have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it." 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 550 (R. Basler ed. 1953).

23. The origin of legal realism is T. HOBBS, *THE LEVIATHAN* (1651). Before Hobbes, no thinker on the law had dared to take explicitly such an antimoral position. In Plato's *Republic*, legal realism is argued by Thrasymachus, who asserts that justice is the interest of the stronger. But Thrasymachus is shamed into silence by Socrates. In American legal science, the most revered exponent of legal realism, or legal

what the judges say it is,"²⁴ is yet another way of saying, with Calhoun, that "might makes right." And the temporary ascendancy of this doctrine in American law schools²⁵ represents "a victory of Richmond over Washington." Furthermore, Professor Jaffa's most pointed argument is that conservative thinkers, while seeking to defend American law against attempts to purge it of morality, have done this by invoking States' Rights and majority rule. (Conservatives who would rely only on the words of the text of the Constitution would do so because that, not the ideology of activist judges, is what has been ratified by the people. But the principle of majority rule cannot stand alone.) On this fundamental question, Lincoln prevailed over Douglas: There are only two viable positions. Of course, this is not to say that majority rule is not a proper principle, in accord as it is with both natural equality and positive law. Rather, it is to say that the principle of majority rule cannot stand alone because it has no moral content. It is mere procedure without substance. In the words of Thomas Jefferson,

All too will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.²⁶

The problem that Professor Jaffa emphasizes may be found in the work of Willmoore Kendall. In his review of

positivism, is Oliver Wendell Holmes, Jr. "What Marshall had raised, Holmes sought to destroy. The natural constitution behind the written constitution, characteristic of Marshall's jurisprudence and the object of the court's solicitude, was to give way to the will of society and the competitive conditions for its appearance." FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL*. "There is no meaning in the rights of man except what the crowd will fight for." Letter, Holmes to Harold Laski (July 28, 1916), 1 HOLMES-LASKI LETTERS 8 (1953).

24. "We are under a Constitution, but the Constitution is what the judges say it is." Charles Evans Hughes, Speech at Elmira, New York (May 3, 1907). "Just so far as the aid of the public force is given a man, he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity." O. W. HOLMES, JR., *THE COMMON LAW* 169 (M.D. Howe ed. 1963).

25. The doctrine of legal realism is for the most part confined to the law schools. The crucial defect in American Legal Realism is that it stops at the courthouse door. It has no meaning for either an advocate or a judge. The judge trying to decide a case will not be helped by the reflection that the law is anything he says it is, nor will the lawyer serve his clients' cause by arguing it in those terms.

R. RODES, *THE LEGAL ENTERPRISE* 20 (1976).

26. The inaugural address of Thomas Jefferson, quoted by Jaffa, *supra* note 6 at 359.

Jaffa's *Crisis of the House Divided*,²⁷ Mr. Kendall writes that,

it was the Southerners [Calhoun] who were the anti-Caesars of pre-Civil War days, and . . . Lincoln was the Caesar Lincoln claimed to be trying to prevent; and . . . the Caesarism we all need to fear is the contemporary Liberal movement, dedicated like Lincoln to egalitarian reforms sanctioned by mandates emanating from national majorities—a movement which is Lincoln's legitimate offspring.²⁸

And about the meaning of the Equality Clause in the Declaration, Kendall and Carey opine as follows:

Our best guess is that the clause simply asserts the proposition [not truth] that all peoples who identify themselves as one—that is, those who identify themselves as a society, nation, or state for action in history—are equal to others who have likewise identified themselves [E]quality is not listed among those ends to be secured by government That Lincoln held a markedly different conception of the equality clause is beyond dispute That he considered equality a value or goal to be promoted . . . seem clear from the Gettysburg Address. If there be any doubts on this score, the Lincoln-Douglas debates, Lincoln's speech at Springfield, Illinois (June 26, 1857), and, among other items, his Message to Congress in Special Session (July 4, 1861) ought to dispel them.²⁹

There is some evidence that Mr. Kendall, late in life, was won over to Lincoln's position, probably by Professor Jaffa himself, and that he decided that Lincoln was not responsible for the later mistakes (such as the "one person, one vote" rule)³⁰ that were made in the name of the Declaration's Equality Clause. But taking Mr. Kendall's published works as they stand, Mr. Kendall stands convicted under Professor Jaffa's passionate

27. H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* (1959).

28. W. KENDALL, *THE CONSERVATIVE AFFIRMATION* 252 (1963).

29. W. KENDALL AND G. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 155-156 (1970). For a refutation of Kendall and Carey, see H. Jaffa, *Equality as a Conservative Principle*, in *HOW TO THINK ABOUT THE AMERICAN REVOLUTION: A BICENTENNIAL CEREBRATION* 13-48 (1978).

30. "The conception of political equality from the Declaration of Independence . . . can mean only one thing—one person, one vote." Gray v. Sanders, 372 U.S. 368, 381 (1963), which struck down Georgia's county-unit system of voting for State-wide offices. If the principle of this case were correct, the present system of electing United States Senators, in which one vote in Wyoming counts the same as about sixty-five votes in California, would be incompatible with the Declaration.

indictment. Woe to the citizen upon whom this public prosecutor focuses his searingly critical eye.

B. The Indictment Has Three Flaws

In this essay, Professor Jaffa sharply criticizes several prominent thinkers on the law, including Robert H. Bork, Jeane Kirkpatrick, Martin Diamond, and Irving Kristol, all of whom have risked the prosecutor's wrath by agreeing with him that the old and tried is preferable to the new and untried.³¹ Lewis E. Lehrman, in the first paragraph of his Foreword to Professor Jaffa's essay, implies that this prosecutorial indictment lacks "the temperament of a lawyer" and "the profession of a judge." This reviewer will show that Professor Jaffa's method throughout his indictment has three flaws. First, he takes statements of sensible political compromises—such as support for judicial restraint, British traditions, and local self-government—and treats them as if they were philosophical statements. Second, he assembles a composite indictment, which in law is appropriately applied only to an indictment against a proven conspiracy, the existence of which Professor Jaffa has not proved. (If the argument from Machiavelli for slavery had four steps, and each of four authors says one or two of the four steps, it does not follow that any one of the four authors intends the whole argument.) Third, this reviewer will show in detail that each of the statements of the four steps almost certainly was not intended as such by its author. Professor Jaffa's indictment therefore fails to meet its burden of proof. A decent respect to the opinions of mankind requires that I should declare the causes which impel me to these observations. To prove them, let facts be submitted to "our candid countrymen."³²

II. HE HAS REFUSED HIS ASSENT TO THE WORKS OF THE HONORABLE ROBERT H. BORK, WHICH ARE WHOLESOME AND NECESSARY FOR THE PUBLIC GOOD

Professor Jaffa alleges that Judge Bork teaches that there is no general theory of constitutional law, and that this is good

31. "What is conservatism? Is it not adherence to the old and tried, against the new and untried?" A. Lincoln's Address, at Cooper Union, New York (February 27, 1860), 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 537 (R. Basler ed. 1953).

32. Jaffa, *supra* note 6 at 379.

because "our constitutional liberties arose out of historical experience."³³ He alleges that Judge Bork denies that our colonial charters were based on the "immutable laws of nature" and alleges that Judge Bork claims that public opinion and the opinion of the Framers was not antislavery at the time of the writing of the Constitution of 1787.³⁴ All of these allegations are supposed to be evidence that Judge Bork is, whether he knows it or not, like all the other members of "the whole tribe of Conservative publicists," a Calhounian apologist for legal realism, slavery, and States' Rights.³⁵

I have been unable, after a search of Judge Bork's published works, to find any claim that the opinion of the Framers was not antislavery at the time of the founding or that our colonial charters were not based on the immutable laws of nature. This shifts the burden of proof back to the prosecution.

It is true that the phrases quoted by Professor Jaffa, if examined in isolation, do seem to support his allegation that Judge Bork denies natural right. But when the phrases are seen in context, a more evenhanded interpretation suggests itself. Judge Bork's writings on Constitutional law are intended as contributions to the current debate in American law schools and courts on the question of whether federal judges are bound by the text of the Constitution.³⁶ In "The Impossibility of Finding Welfare Rights in the Constitution,"³⁷ Judge Bork argues that we the people in the several states are legally free to increase or decrease charitable payments to the

33. Jaffa, *supra* note 6 at 373.

34. Jaffa, *supra* note 6 at 385, 394.

35. Jaffa, *supra* note 6 at 373, 380, 385, 391. We are dealing here with an entire "legion of present-day Conservative epigones" of Calhoun. Jaffa, *supra* note 6 at 377.

36. Of course, to be bound by a text does not mean that one is not supposed to consider the history of the text and the purpose of the text in context. "Original intention" means original context, and that must include history secondarily. In the words of Judge Bork,

I represent that school of thought which insists that the judiciary invalidate the work of the political branches only in accordance with an inference whose underlying premise is fairly discoverable in the Constitution itself. That leaves room, of course, not only for textual analysis, but also for historical discourse and interpretation according to the Constitution's structure and function. The latter approach is the judicial method of *McCulloch v. Maryland*, for example, and it has been well analyzed by my colleague Professor Charles Black in his book, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* [1969].

37. R. Bork, *Commentary: The Impossibility of Finding Welfare Rights in the Constitution*, (1979) WASH. U. L.Q. 695.

poor. He says that his opponents (certain ultra-liberal teachers at Harvard of the doctrine of "representation-reinforcement")³⁸ argue that we as a community do not have this freedom—that we may increase but not decrease such payments, because to decrease them would, under the First, Fourteenth, and Fifteenth Amendments, abridge the rights of the poor or of Blacks to speak and to vote, and might make them feel "stigmatized." The opponents' argument prevailed to a limited extent in several Supreme Court decisions during the 1960's and 1970's.³⁹

On this and similar questions, Judge Bork is vexed by the tendency of his opponents not to rely on textual or legal arguments but, refusing to abide by the rules laid down, to resort to an "abstract, philosophical style."⁴⁰ Justice Holmes made a similar point in his dissent in *Lochner v. New York*,⁴¹ which held that the people of New York as a community do not have the freedom under the Constitution to prohibit the employment of bakery employees for more than ten hours a day or sixty hours a week. Holmes states what for us is obvious: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."⁴² Does a hostility to saying that the Fourteenth Amendment enacts the Harvard doctrine of representation-reinforcement mean that Judge Bork is hostile to philosophy? Or are such reservations justified because "[t]he consequence of this (so-called) philosophical approach to constitutional law almost certainly would be the destruction of the

38. *Id.* at 700.

39. G. STONE, SEIDMAN, SUNSTEIN, AND TUSHNET, *CONSTITUTIONAL LAW* (1986), assert that the doctrine of representation-reinforcement is, to use a phrase those authors would eschew, the "final cause" of *Roe v. Wade*, 410 U.S. 113 (1973).

40. R. Bork, *supra* note 38 at 701.

41. 198 U.S. 45 (1905).

42. Holmes's opinion bears further quotations:

It is settled . . . that . . . state laws may regulate life in many ways which we as legislators might think as injudicious . . . and which . . . interfere with the liberty to contract Sunday laws and usury laws are ancient examples. A more modern one is the prohibition on lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

198 U.S. at 75. The force of Justice Holmes's dissent is not diminished by recognition that he, unlike Judge Bork, was a "legal realist."

idea of the law.”⁴³ Judge Bork properly refrains from *obiter dicta*—from deciding questions that are not ripe for adjudication. Should a good judge say, “The Harvard doctrine of representation-reinforcement is wrong because, for the following reasons, it is incompatible with the original intention of the Framers,” which is what Judge Bork indicates in other words? Or should he, as Professor Jaffa urges him to do, say that “The Harvard doctrine is wrong because it is incompatible with original intent, and, by the way, I know of another doctrine that is compatible?” For example, from the point of view of the discipline of the Law, one of the many objectionable aspects of *Dred Scott* is that Chief Justice Taney reaches out in a dictum to discuss the Declaration of Independence at all—when the case should have been decided on the narrower ground of the Territory Clause of Article IV, Section 3, parag. 2. If a reluctance to follow Taney’s example is part of what it means to be a judge, then it is not fair to assume that a judge’s silence about the Declaration means either agreement or disagreement. To the extent that the Framers of the Constitution of 1787 were successful and we are bound by their work, the philosophical questions have been settled and do not come before a judge.⁴⁴ This is an indication that the system is working well, not badly. As Judge Bork explains,

What is important about the non-interpretivists is not that they added moral philosophy but that moral philosophy displaces such traditional sources as text and history and renders them unimportant.⁴⁵

Professor Jaffa refers us to Judge Bork’s “Tradition and Morality in Constitutional Law”⁴⁶ as evidence that he teaches that the academic study of Constitutional law has very little theory of its own. Therefore, judges are compelled to turn for guidance, when the text is ambiguous, to “the common sense of

43. R. Bork, *supra* note 37 at 696.

44. “Indeed, in one important respect the American Revolution was so successful as to be almost self-defeating: It turned the attention of thinking men away from politics, which now seemed utterly unproblematic, so that political theory lost its vigor, and even the political thought of the Founding Fathers was not seriously studied.” I. Kristol, *The American Revolution as a Successful Revolution*, AMERICA’S CONTINUING REVOLUTION 9 (1975).

45. R. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 394 (1955).

46. R. Bork, *Tradition and Morality in Constitutional Law*, in VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS 166 (M. Cannon and D. O’Brien Eds.) (1985) (cited by Jaffa, *supra* note 6 at 373).

the community,"⁴⁷ i.e., to "American traditions" or history, which Judge Bork indicates are distinct from "morality." However, according to Professor Jaffa, American "traditions" in 1787 most conspicuously included slavery.⁴⁸ Are these facts evidence that Judge Bork would defend slavery? For example, to apply Judge Bork's method of reliance upon historical context, the same way any lawyer interprets any statute, we seek the answer to the question, "Does the Republican Form of Government Clause forbid slavery in the States?" If I may presume, for the sake of the argument, to speak for Judge Bork, the answer would be, "No, because the Southerners who wrote the Constitution of 1787 believed that their States were republican forms of government in 1787, and in 1787 they had slaves." But this is not the end of the answer. "Therefore, emancipation should have been accomplished by an act of Congress under the Commerce Clause or by amendment."⁴⁹ What is wrong with this argument? Does the fact that Calhoun would have used at least part of it mean that it is wrong? Does the fact that Calhoun would have used part of it mean that Judge Bork is a Calhounian?

Again, the context of Judge Bork's remarks are decisive for understanding them. True, Judge Bork, in "Tradition and Morality in Constitutional Law,"⁵⁰ says that the academic study of Constitutional law has very little theory of its own. But he makes it clear that he deplores this lack of theory and the resultant appeals to mere "tradition" or history. He defends them only as preferable to appeals to "contractarian [libertarian] or utilitarian or what-have-you philosophy rather than . . . to the Constitution"—because such "philosophies" are outside of "our most basic compact."⁵¹

[C]onstitutional law has very little theory of its own and hence is almost pathologically lacking in immune defenses

47. *Id.* at 167.

48. Jaffa, *supra* note 6 at 376.

49. There is no evidence whatsoever that Judge Bork would include slavery in the traditions of Anglo-American law or in the common sense of the community. Judge Bork knows the common law, and Blackstone makes it clear that slavery is wholly incompatible with the common law, that it can exist only by statute, and that judges should restrict it whenever and however possible. The common sense of the community is the common law for most purposes. 1 COMMENTARIES ON THE LAW *supra* note 10, at 412-413 (1st ed. 1765-1769). For another argument that slavery is un-American, see *infra* note 102 of this brief.

50. See *supra* note 46.

51. *Id.* at 169.

against the intellectual fevers of the larger society as well as against the disorders that were generated by its own internal organs.⁵²

It is stubborn refusal of Anglo-American law before the twentieth century to impose upon the people a "philosophy" that does not have the consent of the people in their basic social compact that distinguished the American from the French revolution. And to the extent that judges impose any such external philosophy, no matter how good it be, we are no longer "a free people."⁵³ To read this profound critique of American Constitutional law as taught in most law schools today as a hostility to philosophy in general and an antipathy to natural rights in particular is to go beyond the text.

One of the important truths that Professor Jaffa is asserting is that the legal realists are wrong when they argue that law is basically force or fraud (which are two of the three possible answers to the question, "Why do We Obey the Law?"). Rather, the ground of all positive law is morality. And on this decisive question Judge Bork and Professor Jaffa are in complete agreement. Thus, Judge Bork can endorse the observation that,

Whatever else law may be, it is . . . stubbornly entangled with beliefs about right and wrong. Law that is . . . legitimate is related to the larger universe of moral discourse If law is not . . . a moral enterprise, it is without legitimacy or binding force [i.e., it is not truly a law].⁵⁴

No logically consistent legal realist or Calhounian could indicate that an immoral law is not fully a law. What Judge Bork is doing is showing us why there is a critical need in the science of law for a moral ground⁵⁵ and then why that ground must be found in the texts—and why Constitutional law will

52. *Id.* at 167.

53. *Id.* at 170.

54. *Id.* at 171 (quoting R. NEUHAUS).

55. With regard to moral ground, Professor Jaffa implies that one's position on what used to be called the Negro Question is the litmus test of American politics. Judge Bork, in *CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS* (1972), argues—against some reputable students of the law—that Congress is granted, by section 5 of the Fourteenth Amendment, significant power to regulate the use of busing as a remedy in desegregation decrees. On the other hand, Judge Bork also argues that Congress does *not* have the authority to except all busing cases from the jurisdiction of the Supreme Court, a tactic that Congress was at one time considering to stop busing. Nominations of Joseph T. Sneed to Be Deputy Attorney General and Robert H. Bork to Be Solicitor General: Hearings before the Committee on the

remain "diseased" and "fevered" until such a ground is recognized. It will remain diseased for lack of theory because, "mere tradition carrie[s] no authority."⁵⁶ Judge Bork:

I recall one evening listening to a rather traditional theologian bemoan the intellectual fads that were sweeping his field I remarked with some surprise that his church seemed to have remarkably little doctrine capable of resisting these trends. He was offended and said there had always been tradition. Both of our fields purport to rest upon sacred texts, and it seemed odd that in both the main bulwark against heresy should be only tradition. Law is certainly like that As Alexander Bickel observed, all we ever had was a tradition, and in the last 30 years that has been shattered.

Now we need theory, theory that relates the framers' values to today's world. That is not an impossible task by any means, but it is . . . complex⁵⁷

Now we need theory, theory that relates the Framers' prudence to today's world. That is precisely what Professor Jaffa offers. He and Judge Bork are natural allies.

III. HE HAS REFUSED HIS ASSENT TO THE WORKS OF JEANE KIRKPATRICK, WHICH ARE WHOLESOME AND NECESSARY FOR THE PUBLIC GOOD

Professor Jaffa quotes from the works of Mrs. Kirkpatrick:

The freedom of the American people is based not on the marvelous and inspiring slogans of Thomas Paine but, in fact, on the careful web of restraints, of permission, of interests, of tradition woven by the Founding Fathers into the Constitution and explained in *The Federalist Papers*. And rooted, of course, in our concrete rights as Englishmen.⁵⁸

Then he denies that she believes that one should "look for the principles of the Constitution [in] the Declaration of Indepen-

Judiciary, 93d Cong. 1st Sess. 22-23 (1973) (exchange between Mr. Bork and Senator Hart). Senator Hart responds, "I wish the full committee were here to hear that."

56. Jaffa, *supra* note 6 at 379.

57. See *supra* note 46 at 171.

58. JAFFA, *supra* note 6 at 375, (quoting from an article in the *National Review*.) The same passage appears in book form in a collection of essays. See *The Reagan Phenomenon and the Liberal Tradition*, THE REAGAN PHENOMENON AND OTHER SPEECHES ON FOREIGN POLICY 3-45 (1983).

dence.”⁵⁹ He alleges that she denies the natural rights of man.⁶⁰ He alleges also that she denies that public opinion at the time of the founding was anti-slavery.⁶¹ Further, as with his allegations against Judge Bork, Professor Jaffa argues that these alleged opinions are evidence that the defendant, knowingly or unknowingly, is a Calhounian defender of legal realism and States’ Rights, and thereby slavery.⁶² As in his indictment of Judge Bork, Professor Jaffa provides us with very few quotations, and some of the allegations are unsupported by references to any text, so I will have to refer to works in addition to those cited by the prosecution.

The selection quoted above by Professor Jaffa is from Mrs. Kirkpatrick’s speech, “The Reagan Phenomenon and the Liberal Tradition.”⁶³ Taken alone it could reasonably be interpreted the way Professor Jaffa uses it. But taken in context, a different and more favorable interpretation suggests itself. This passage is used by Professor Jaffa in support of his allegation that Thomas Paine is a surrogate for Thomas Jefferson in the works of Mrs. Kirkpatrick and that she rejects the Declaration⁶⁴ in favor of the “rights of Englishmen.” But this passage, when published later in final, book form, appears within two pages of the following explanation of what these rights are:

The government of the United States was founded squarely and explicitly on the belief that the most basic function of government is to protect the rights of its citizens. Our Declaration of Independence states, “We hold these truths to be self-evident: that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.” It adds, “To protect these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”

These notions—that the individual has rights which are prior to government, that protection of these rights is the

59. Jaffa, *supra* note 6 at 377.

60. Jaffa, *supra* note 6 at 380, 382, 385.

61. Jaffa, *supra* note 6 at 391.

62. Jaffa, *supra* note 6 at 385.

63. *Supra* note 58 at 44.

64. “The truth, however, is that it is Jefferson who is being depreciated in the slighting of Paine. But he [Jefferson] is too large a figure to be attacked directly. And it is not the *Rights of Man*, but the Declaration of Independence, which by indirection is the object of their patronizing condescension.” Jaffa, *supra* note 6 at 375-76.

purpose of the very existence of government, that the just powers of government depend on the consent of the governed—are the core of the American creed. That being the case, we naturally believe that the United Nations has no more important charge than the protection or expansion of the rights of persons.⁶⁵

So the Declaration is the core itself of what America means, and Mrs. Kirkpatrick uses it to interpret not only American law but international law as well. How could Professor Jaffa ask for more? Lest someone allege that she does not understand the implications of natural rights for the attitude of the law to relations among Blacks and Whites, another speech in the same volume, which addresses itself to relations between America and sub-Saharan Africa, leaves no doubt on this question. Mrs. Kirkpatrick rejoices in the advantage in world affairs that America has because of the federal government's uncompromising stance against both public and private "discrimination." America's position as the only large successful multi-racial society in the West with a democratic government gives us a tremendous moral advantage in dealing with African and Asian countries. It is clear that Mrs. Kirkpatrick is proud of our achievements in civil rights and wishes the efforts of the federal government to continue.

How do we reconcile these two apparently contradictory texts? One says that Americanism is the traditional rights of Englishmen, and the other says that Americanism is the rights of man. The simplest way is to suppose that the two are understood to be one. The rights of Englishmen are the rights of Englishmen as understood by the American founding generation; and Jefferson claimed that the Declaration was nothing new but rather represented the common sense on the subject. Mrs. Kirkpatrick is simply correct to identify the rights of Englishmen with the natural rights of man. Judge Blackstone writes that the common law on this question follows "the law of nature and reason":

The three origins of the right of slavery assigned by Justinian, are all of them built upon false foundations. As, first, slavery is held to arise "*jure gentium*," from a state of cap-

65. Statement before the Third Committee of the United Nations General Assembly (November 24, 1981), reprinted in *Human Rights and Wrongs in the United Nations*, in THE REAGAN PHENOMENON AND OTHER SPEECHES ON FOREIGN POLICY 46 (1983).

tivity in war But it is an untrue position . . . that, by the law of nature or nations, a man may kill his enemy: he has only a right to kill . . . for self defense secondly, it is said that slavery may begin "*jure civili*," when one man sells himself to another But, every sale implies a price, a *quid pro quo* . . . : but what equivalent can be given for life, and liberty . . . ? Lastly, we are told, that . . . slaves . . . may also be hereditary . . . , *jure naturae* But this being built on the two former rights must fall together with them.⁶⁶

Blackstone, having demolished on natural-rights grounds the arguments for slavery, goes on to state the absolute rule, and cites the famous *Somerset* case by Lord Mansfield.⁶⁷ In the words of Judge Blackstone,

Upon these principles the law of England abhors, and will not endure the existence of, slavery within this nation: so that when an attempt was made to introduce it, by statute 1 Edw. VI. c.3. which ordained, that all idle vagabonds should be made slaves, and fed upon bread, water, or small drink, and refuse meat; should wear a ring of iron round their necks . . . [etc.]; *the spirit of the nation could not brook this condition, even in the most abandoned rogues; and therefore this statute was repealed in two years afterwards.* And now it is laid down, that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, his liberty, and his property. . . . Hence too it follows, that the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles: it gives liberty⁶⁸ [emphasis added]

In other words, slavery is contrary to the "extensive principles" of natural right, and is incompatible with the spirit of the common law. This means that it can exist only by positive law. If any legislature does legalize it, that statute should be interpreted as narrowly as possible by judges and will soon be repealed. What happened in the colonies was, therefore, an aberration. Professor Jaffa exaggerates the differences

66. 1 COMMENTARIES *supra* note 10 at 411-412.

67. *Somerset v. Stewart*, 20 How. St. Tr. 1, Eastern Term, 12 Geo. 3, K. B. (May 14, 1772).

68. 1 COMMENTARIES *supra* note 10 at 412-413.

between England and New England, and Virginia, when he dives through the surface to deal only with theory. In theory the Parliament *can* do anything that is not naturally impossible. But what the British mean by that is that, of course, it *will* not do anything contrary to natural right. If it tries to do so, the offending statutes will be repealed.

Another difficulty remains with the practice of diving through the surface of the law to deal only with natural law. Even assuming *arguendo* that Mrs. Kirkpatrick and Judge Blackstone are wrong about the "general and extensive" character of the rights of Englishmen, and somehow both secretly reject natural-rights teachings, it still does not follow that they must agree with Chief Justice Taney in *Dred Scott*. There almost always is a narrower ground on which a judge should decide such questions. For example, the Fifth Amendment, when it says that no person shall be deprived of his property (in slaves or in something else) *without* due process of law, necessarily implies thereby that any person may be deprived of his property *with* due process. Therefore, there is nothing in the Constitution of 1787 to prevent Congress from abolishing slavery in all of the territories pursuant to Article IV, Section 3, parag. 2.⁶⁹ We need refer to first principles only when the text is ambiguous. On the question of the broad authority of Congress to regulate property and liberty, there is little ambiguity.⁷⁰ Likewise, hardly ambiguous is Mrs. Kirkpatrick's understanding that the Declaration of Independence is the "core" of not only American law but of the entire "American creed." It is like Blackstone's "spirit of the nation," which is so powerful that it can repeal acts of Parliament within two years time. If this is the case, the difference between Mrs. Kirkpatrick and Professor Jaffa dissolves down to a disagreement over

69. U. S. CONST. Art. 4 section 3, cl. 2 U.S. Code xxxvii (1982): "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States"

70. For a most instructive commentary on the text and context of the Constitution of 1787, see G. Anastaplo, *The United States Constitution of 1787: a Commentary*, 18 LOY. U. OF CHI. L.J. 15 (1986). Cf. *Lochner v. New York*, 198 U.S. 45 (1905), which nullifies a New York statute fixing maximum hours of work for bakers. The Supreme Court, defending liberty from what it conceived as a mere meddlesome interference, asked, "[A]re we all . . . at the mercy of legislative majorities?" 198 U.S. at 59. The correct answer, especially when the majority is in the United States Congress and not the Assembly of New York, is "Yes." R. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1971).

the status of Thomas Paine. And that question is not worth discussing here.

IV. HE HAS REFUSED HIS ASSENT TO THE WORKS OF MARTIN
DIAMOND, WHICH ARE WHOLESOME AND NECESSARY
FOR THE PUBLIC GOOD

Professor Jaffa notices that the late Martin Diamond has written that the Declaration provides "no guidance whatsoever" for the construction of the Constitution of 1787—that the Declaration is "neutral" on this question.⁷¹ This statement is alleged to be evidence that Mr. Diamond, like Judge Bork and Mrs. Kirkpatrick, and like all the other members of the "whole tribe,"⁷² is a Calhounian apologist for legal realism and States' Rights and therefore, slavery.

The passage in question bears consideration at some length:

What wants understanding is precisely how [not whether] our institutions of government sprang from the principle of the Declaration And what more had to be added actually to frame those institutions?⁷³

Mr. Diamond found in Lincoln's 1861 "Speech in Independence Hall"⁷⁴ evidence for a tentative answer to the question of precisely how our institutions of government sprang from the Declaration:

All the political *sentiments* I entertain have been drawn, so far as I have been able to draw them, from the *sentiments* which originated, and were given to the world from this hall in which we stand. I have never had a *feeling* politically that did not spring from the *sentiments* embodied in the Declaration of Independence.⁷⁵

It is interesting to note that the sentiment that Lincoln drew from the Declaration was not equality but liberty:

I have often inquired of myself, what great principle or idea it was that kept this Confederacy so long together. It was not the mere matter of the separation of the colonies from

71. Jaffa, *supra* note 6 at 373, 386.

72. Jaffa, *supra* note 6 at 380, 377.

73. M. DIAMOND, *The Revolution of Sober Expectations*, in AMERICA'S CONTINUING REVOLUTION, 27 (1975).

74. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 240-241 (R. Basler, Ed. 1953).

75. *Id.* at 240 (quoted with emphasis added by Mr. Diamond, *supra* note 74 at 27).

the mother land; but something in the Declaration giving liberty, not alone to the people of this country, but hope to the world for all future time This is the sentiment embodied in that Declaration of Independence.⁷⁶

What is the meaning of this interpretation of the Declaration?
Mr. Diamond:

We must take careful heed of Lincoln's remarkable stress, throughout this speech from which we are quoting, on the words feeling and sentiment. He carefully limits his indebtedness to the Declaration only to certain sentiments and feelings, that is, to the spirit of liberty within which he conceives American government and its institutions. Indeed, he could not have done otherwise . . .⁷⁷

Mr. Diamond reminds us that, according to the Declaration, equality is not said to be an inalienable right. Rather it is a truth which precedes the rights and may be the logical precondition for the three inalienable rights listed: life, liberty, and the pursuit of happiness:

. . . for there is nothing in the Declaration which goes beyond that sentiment of liberty [N]oble document that the Declaration is, indispensable source of the feelings and sentiments of Americans and of the spirit of liberty in which their institutions were conceived, the Declaration is devoid of guidance as to what those institutions should be.⁷⁸

Mr. Diamond then quotes from a letter from James Madison to Thomas Jefferson which assumes that the works of John Locke, from which Jefferson drew the Declaration, are likewise insufficient guides to interpret the Constitution.⁷⁹

There is no doubt that Mr. Diamond in the above passage has made himself vulnerable to Professor Jaffa's allegations. Professor Jaffa has an instinct for the jugular. But should not the advocate distinguish between the holding of a case and mere *obiter dictum*, by examining not the rhetorical flourish ("devoid of guidance") but the facts of the concrete case at hand? The concrete questions that Mr. Diamond is addressing are the following: If the American people, by means of the

76. *Id.*

77. M. DIAMOND, *supra* note 74 at 27.

78. *Id.* at 27-28.

79. Letter, James Madison to Thomas Jefferson, February 8, 1825, 9 THE WRITINGS OF JAMES MADISON 218-219 (G. Hunt ed. 1900), discussed in M. DIAMOND, *supra* note 74 at 28-30.

procedures set forth in the Constitution of 1787, were to amend the Constitution to provide for an hereditary executive office and a House of Lords, would that be unconstitutional because of the Declaration of Independence?⁸⁰ And, did the Declaration make property qualifications for the franchise unconstitutional?⁸¹ Mr. Diamond's answer to both questions is, "No." I believe that Mr. Diamond is right.

Is it not true that the Declaration attacks tyranny—not monarchy? If it is only "a Prince whose Character is thus marked by every act which may define a tyrant" who is "unfit to be the Ruler of a free People," the implication is that a Prince whose character is not so marked would be fit to rule a free people. Why would not a Whig monarchy, like England today, in which the form of government is very democratic, in which the hereditary executive is merely another public servant serving at the pleasure of parliament, be consistent with the Declaration? Professor Jaffa says that the

American Whigs were willing to pretend that the monarchical . . . features of the British constitution were compatible with their natural rights, as a concession that any people might prudently make "while evils are sufferable," rather than "abolishing the forms to which they are accustomed." But when evils were no longer sufferable and revolution became necessary, prudence no longer dictated restraint to Americans in making their institutions wholly republican.⁸²

However, the Declaration says that it is the right of the people to institute their government, laying its foundations on such principles, and organizing its powers not in republican form but in whatever form, as to them shall seem most likely to effect their safety and happiness. Again and again during the Federal Convention, when the Framers were speaking in private and when the pre-Revolutionary fear of persecution was long past, several leading Framers warmly described the British government as "the best in the world."⁸³ In accordance with Judge Bork's method of inference from historical context, can we not agree with Mr. Diamond that it is unlikely that the founding generation would have signed and subscribed to a

80. M. Diamond, *supra* note 74 at 31-36.

81. *Id.* at 37-38.

82. Jaffa, *supra* note 6 at 387.

83. See, e.g., (A. Hamilton) J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 134 (Ohio University Press ed. 1966).

Declaration of Independence that is incompatible with the best government in the world? If so, slavery may be an untypical case—one of the few institutions that cannot be reconciled with the Declaration. If the Declaration is open even to constitutional monarchy, would it not then be open to almost any other institution that is likely to come before the courts—provided that the institution in question has the consent of the people?

With regard to the question of property qualifications on the franchise, the purpose of Mr. Diamond's argument is to show that such qualifications by the States could be compatible with the Constitution and the Declaration—if they are reasonable and mild and have the consent of the people. Mr. Diamond recognizes, of course, that such qualifications are abhorrent to American law today. However, he asserts that the present situation is caused more by the Constitution of 1787 than by the Declaration of Independence. The Constitution of 1787 is the more democratic of the two documents because it is the one that specifies our democratic institutions.⁸⁴ This thesis is intended as a salutary refutation of those who argue that the Constitution of 1787 is conservative while the Declaration is liberal, hence the Constitution represents the Revolution betrayed:

These are the two great charters of our national existence, representing the beginning of our founding and its consummation; in them are incarnated the two principles—liberty and democracy—upon the basis of which our political order was established, and upon the understanding of which in each generation our political life in some important way depends.⁸⁵

This then is the "holding" of Mr. Diamond's essay. The dictum is "devoid of guidance," but the holding is that, just as Professor Jaffa would say, our entire "political life," which must include all of our laws, "depends" on the Declaration. The "democratic" "sentiment" of the Declaration works on the law

84. "Article I, Section 2 . . . establishes the then broadest possible democratic franchise as the basis of the federal election To this may be added the total absence of any property qualifications, contrary to existing state practices, for any federal office, and also the clause barring the introduction of any titles of nobility. Finally, we may note the provision for payment of salaries to federal officeholders" M. DIAMOND, *supra* note 74 at 38.

85. M. DIAMOND, *The Declaration and the Constitution: Liberty, Democracy, and the Founders*, in *THE AMERICAN COMMONWEALTH* 39, 45-46 (1976).

to prohibit property qualifications on the franchise, and it does this by working through a Constitution that does not specifically forbid such qualifications.

What then is the difference between the teachings of Professor Jaffa and of Mr. Diamond? It seems that they agree that the Declaration is the core of the American creed, that it means what it says that all men are created equal, that the positive laws somehow "depend" upon it, that Lincoln interpreted the Declaration correctly, and that Lincoln's political project of emancipation was correct because it was naturally right. They disagree only as to how the Declaration acts upon the positive law.

On two crucial occasions the Supreme Court has directly invoked the Declaration to invalidate positive law. In *Dred Scott* it held that Negroes are not "men."⁸⁶ In *Gray v. Sanders* (1963) it held that "The conception of political equality from the Declaration of Independence . . . can mean only one thing—one person, one vote."⁸⁷ There can be no doubt that the method specified in the Constitution for electing United States Senators does not square with the "one person, one vote" approach. It is not obvious why, if the Declaration can serve as the basis for striking down the State statute in *Gray v. Sanders*, it cannot also operate to nullify the provision in Article I, Section 3, that the Senate of the United States shall be composed of two senators from each State, regardless of the number of voters in each State. Since it is obvious that this result was not intended by the Framers of the Constitution, is it not correct to say that the result in *Gray v. Sanders* cannot rest upon the Declaration directly but requires an act of Congress to enforce the Declaration (under the Republican Form of Government Clause,⁸⁸ as Justice Frankfurter suggested in *Baker v. Carr*)⁸⁹—just as emancipation of the slaves required either a Constitutional amendment or a statute? The obvious fact that slavery is incompatible with the Declaration does not mean that slavery was illegal prior to 1865. It merely means that Congress was authorized to outlaw it when it saw fit. Mr.

86. 15 L.Ed. at 703 "[I]t is too clear for dispute, that the enslaved African race were not intended to be included [in] this Declaration."

87. 372 U.S. 368, 381 (1963).

88. U. S. CONST., art. IV, § 4: "The United States shall guarantee to every state in this union a Republican form of government, and shall protect each of them against invasion"

89. 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting, joined by Harlan, J.).

Diamond seems correct in arguing that the Declaration works only indirectly upon American law.

But what of Professor Jaffa's remaining allegation, that Mr. Diamond is a legal realist? In all his writings, Mr. Diamond, like Professor Jaffa, keeps before his readers the "philosophical question of what human nature is."⁹⁰ But we should let the defendant speak for himself:

The modern idea of human nature is democratic. No difference among us can reach so far as to alter our naturally equal humanness, and *that* is the crucial fact Now a democracy derived, so to speak, from the natural equality in depravity (or at least mediocrity) of all mankind is obviously a democracy in need of moderation And the means for achieving this moderation, obviously, would have to be drawn from that same human nature, the universal fallibility of which had justified democracy in the first place. The scheme . . . is nowhere stated more thoughtfully, nor more chillingly, than by James Madison in *Federalist* 51 . . . using one person's passion or interest to check another's [and] to emancipate acquisitiveness to a degree never contemplated by traditional political thought.⁹¹

In summary, Mr. Diamond's account of the significance of the Declaration of Independence shows the "chilling" necessity of the relationship between the Declaration and the Constitution and is thoroughly compatible (with the possibly minor exception of whether the Declaration operates directly or indirectly upon the positive law) with the account provided us by Professor Jaffa. One would expect such a compatibility, because these men are intellectual brothers who openly acknowledge their indebtedness to their intellectual father, Leo Strauss.⁹²

V. HE HAS REFUSED HIS ASSENT TO THE WORKS OF IRVING KRISTOL, WHICH ARE WHOLESOME AND NECESSARY FOR THE PUBLIC GOOD

Professor Jaffa quotes from the works of Irving Kristol:

90. This is the opening phrase of Mr. Diamond's essay, *The American Idea of Man: The View from the Founding*, *THE AMERICANS: AN INQUIRY INTO FUNDAMENTAL CONCEPTS OF MAN UNDERLYING VARIOUS U. S. INSTITUTIONS* (I. Kristol and P. Weaver eds. 1976).

91. *Id.* at 7-14.

92. L. STRAUSS, *NATURAL RIGHT AND HISTORY* (1953), remains the definitive study of the modern natural-right doctrine of Hobbes and Locke.

To perceive the true purposes of the American Revolution it is wise to ignore some of the more grandiloquent declamations of the moment⁹³

In the heat of debate, people do say all kinds of things. According to Mr. Kristol, one should ignore especially the excesses of Thomas Paine:

Tom Paine, an English radical who never really understood America, is especially worth ignoring . . . [L]ook [instead] at the kinds of political activity the Revolution unleashed. This activity took the form of constitution-making, above all. In the months and years immediately following the Declaration of Independence, all of our states drew up constitutions. These constitutions are terribly interesting in three respects. First, they involved relatively few basic changes in existing political institutions and almost no change at all in legal, social, or economic institutions; they were, for the most part, merely revisions of the preexisting charters. Second, most of the changes that were instituted had the evident aim of weakening the power of government, especially of the executive; it was these changes—and especially the strict separation of powers—that dismayed [the French revolutionaries], who understood revolution as an expression of the people's will-to-power rather than as an attempt to circumscribe political authority. Thirdly, in no case did any of these state constitutions tamper with the traditional system of local self-government. Indeed, they could not, since it was this traditional system of local self-government which created and legitimized the constitutional conventions themselves.⁹⁴

Reservations about Tom Paine have been discussed in Section III above with regard to Mrs. Kirkpatrick.⁹⁵ The nub of this question is whether the texts that Professor Jaffa quotes support his allegation that criticisms of Tom Paine are intended as veiled attacks on the Declaration of Independence—which Mrs. Kirkpatrick and Mr. Kristol allegedly do not dare to attack openly. Likewise, the advantages of the method of reliance on historical context to discern the original intent of a law—notwithstanding Chief Justice Taney's misuse of the method in *Dred Scott*—are discussed above in Section II on

93. I. Kristol, *The American Revolution as a Successful Revolution*, in *AMERICA'S CONTINUING REVOLUTION* 1, 13 (1975).

94. I. KRISTOL, *supra* note 94 at 13-14, quoted at Jaffa, *supra* note 6 at 373, 375-376, 380, 386.

95. See *infra* at 485-488.

Judge Bork. Mr. Kristol's contribution to the debate is the thesis of the continuity of the colonial institutions and charters with the Declaration. Is his point that the Declaration is thereby rendered less democratic, or that the preceding institutions are seen as more democratic?

In short, the Revolution reshaped our political institutions in such a way as to make them more responsive to popular opinion and less capable of encroaching upon the personal liberties of the citizen—liberties which long antedated the new constitutions and which in no way could be regarded as the creation or consequence of revolution. Which is to say that the purpose of this Revolution was to bring our political institutions into a more perfect correspondence with an actual "American way of life" which no one even dreamed of challenging.⁹⁶

What is the essence of that "American way of life which no one even dreamed of challenging"? Does Mr. Kristol say that it included slavery, or does he say that it included "local self-government"? Does defense of "local self-government" represent a covert defense of slavery?

Professor Jaffa's second allegation against Mr. Kristol is that the above passage indicates that he rejects the natural-right teaching of the Declaration in favor of the traditions of the American people:

What these pristine documents of the Revolution assert is in direct contradiction of Calhoun, as it is of Kristol, Bork, Kirkpatrick, and the whole tribe of present-day Conservative publicists . . . in reading the Declaration of Independence—and its reasoned teaching of equal and universal natural and human rights—out of the American political tradition.⁹⁷

The third allegation against Mr. Kristol is that the thesis of the continuity of the colonial and Revolutionary institutions reveals this defendant as a Calhounian defender of legal realism and States' Rights and thereby slavery.

To believe what Kristol believes about this unquestioned American way of life, one would have to read the documents of the period—including the Constitution—the same way

96. I. KRISTOL, *supra* note 94 at 14.

97. Jaffa, *supra* note 6 at 380.

Chief Justice Taney did in *Dred Scott*.⁹⁸

The second and third allegations both rest upon the first. The decisive question, then, with regard to the allegations against Mr. Kristol, is whether defense of "the American way of life," seen essentially as a deep commitment to "local self-government," necessarily implies rejection of universal rights and a defense of slavery.

Mr. Kristol's thesis that the Americans were a self-governing, free people from the beginning, and that as such they were fundamentally different from the Europeans who remained in Europe, is not a new thesis. Alexis de Tocqueville⁹⁹ made the same point:

America, as Marx observed in the same spirit as Tocqueville, did not have a "feudal alp" pressing down upon the brow of the living. During one hundred and seventy years of colonial life the *stuff* of American life was thus quietly being prepared in the direction of democracy.¹⁰⁰

The context of Mr. Kristol's remarks is an attempt to distinguish the American from the French revolution. It is obvious that the one succeeded and the other failed to perpetuate itself in law.¹⁰¹ What accounts for this difference? Are not de Tocqueville and Kristol correct to point to the centuries-old tradition of self-government in America? The success of the American Revolution, then, is because it is a much easier task to remove a monarchical lid on underlying democracy than it is to impose democracy upon a people that have never had it? It is impossible here to decide this historical question.

But even a cursory reading of "A Coppie of the Liberties of the Massachusets Colonie in New England," reproduced for the convenience of the readers as an Appendix, indicates that the burden of proof remains upon Professor Jaffa to show that de Tocqueville and Kristol are wrong. If we look to the famous Virginia Bill of Rights of 1776, the continuity with both

98. Jaffa, *supra* note 6 at 376.

99. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (G. Lawrence trans. 1969).

100. M. Diamond, *The Revolution of Sober Expectations*, *AMERICA'S CONTINUING REVOLUTION* 23, 36 (1975) 36.

101. The laws of the American Revolution are still in force more than two centuries after the Declaration. And they are in force not merely on paper but in the hearts and minds of Americans. The laws of the French revolution, which had been purchased at the enormous cost of the Terror, endured only fifteen years until Bonaparte restored the absolute executive. And France became a democratic republic only about eighty years after the French Revolution.

the Declaration and the Bill of Rights of 1791 is obvious. But the Massachusetts Body of Liberties is the most difficult case from Mr. Kristol's point of view. This document was the earliest New England code of laws and was adopted in 1641, forty-seven years before the Glorious Revolution and one hundred and thirty-five years before the Declaration of Independence. It was adopted by the General Court of the Colony of Massachusetts Bay after having been considered by the freemen of the several towns and then revised and voted by the General Court. There are numerous parallels to the Magna Carta and the English common law. If the thesis that the colonial charters and the Declaration are in essence alike, and that all are intended primarily to protect local self-government and civil liberties, is correct, then Professor Jaffa surely does not want to argue that this thesis is Calhounian. Does he mean to argue that defense of local self-government necessarily implies defense of "squatter sovereignty" and hence defense of slavery and/or segregation?

There is evidence in Professor Jaffa's text that he would concede the above argument. He does admit that Mr. Kristol's thesis "may be regarded as true—if somewhat hyperbolic"—but only if "the American way of life" is understood to mean not what Americans *did* in practice (which included slavery)¹⁰² but what they *said* in the Declaration and the colonial charters.¹⁰³ But this is exactly what Mr. Kristol indicates in the passage quoted above by Professor Jaffa. This is precisely why Mr. Kristol refers us to the colonial charters and to the Revolutionary constitutions in the thirteen States.

102. It is by no means settled that the American way of life . . . in 1776 and 1787" included slavery. JAFFA, *supra* note 6 at 376. Cf. Jaffa, *supra* note 6 at 364, (where he describes slavery as an anomaly.) Few New Englanders or Pennsylvania Quakers would have agreed with him. Americans at the Feast of Thanksgiving, their most characteristic holy day, stubbornly persist in revering as their ancestors the Pilgrims of what soon became Massachusetts, not the dashing, wealthy cavaliers that settled Jamestown in Virginia—in spite of the embarrassing facts that Jamestown was settled earlier, that the first thanksgiving was celebrated at Jamestown, and that Governor Bradford's famous diary is silent about the supposed first thanksgiving at Plymouth. A plausible explanation for this apparent anomaly is that Americans have for centuries seen themselves as the belonging to Massachusetts and not to Virginia. Massachusetts was the leader in the Revolution and the leader in agitation for emancipation. It is no accident that Thanksgiving was instituted as a national holiday by Abraham Lincoln during the Civil War. The Virginian way of life, including slavery and the oligarchic traditions it made possible, was correctly perceived as being un-American—for the reasons Professor Jaffa and Mr. Kristol point out. R. STONE, CIVIC EDUCATION, HOLIDAYS, AND THE UNITED STATES' REGIME 358-380 (1986).

103. Jaffa, *supra* note 6 at 389.

If Professor Jaffa then admits that Mr. Kristol's thesis "may be regarded as true—if somewhat hyperbolic," then one should wonder what all the passion is about. Perhaps there is evidence that Mr. Kristol is influenced by the teachings of Machiavelli, whose works like those of his student, Thomas Hobbes, are "justly decried"? In his Appendix A, Professor Jaffa tells us that one's position on the works of Machiavelli is a litmus test of whether one believes in the natural-right doctrine of the Declaration.¹⁰⁴ It is much to Mr. Kristol's credit that he has published an excellent essay, "Machiavelli and the Profanation of Politics,"¹⁰⁵ on just this question. Here Mr. Kristol rejects the legal-realist argument that Machiavelli simply tells it as it is, or in the words of Francis Bacon,

We are much beholden to Machiavel and others, that write what men do, and not what they ought to do.¹⁰⁶

Mr. Kristol touches the heart of the difference between the followers of Aristotle on the one hand and the followers of Machiavelli and Hobbes on the other hand, with regard to politics and the law. Aristotle, Mr. Kristol tells us, teaches that the world is naturally ordered in such a way that truly good men tend to prevail in the long run.¹⁰⁷ Machiavelli teaches:

If you watch the ways of men, you will see that those who obtain great wealth and power do so either by force or fraud, and having got them they conceal under some honest name the foulness of their deeds. Whilst those who through lack of wisdom, or from simplicity, do not employ these methods are always stifled in slavery or poverty. Faithful slaves always remain slaves, and good men are always poor men. Men will never escape from slavery unless they are unfaithful and bold, nor from poverty unless they are rapacious and fraudulent, because both God and Nature have placed the fortunes of men in such a position that they are reached rather by robbery than industry, and by evil rather than by honest skill.¹⁰⁸

104. Jaffa, *supra* note 6 at Appendix A, p.398.

105. I. KRISTOL, *Machiavelli and the Profanation of Politics*, REFLECTIONS OF A NEOCONSERVATIVE 123 (1983).

106. 2 F. BACON, OF THE PROFICIENCE AND ADVANCEMENT OF LEARNING, DIVINE AND HUMAN, (1605).

107. I. KRISTOL, *supra* note 106 at 123-125, citing Aquinas: "Eventus sequens non facit actum malum qui erat bonus, nec bonum qui erat malus."

108. N. MACHIAVELLI, HISTORY OF FORENCE AND OF THE AFFAIRS OF ITALY FROM THE EARLIEST TIMES TO THE DEATH OF LORENZO THE MAGNIFICENT (1532), (quoted in I. KRISTOL, *supra* note 106 at 129).

Mr. Kristol then classes Machiavelli not with the scientific teachers of politics as it really is but with Nietzsche and de Sade, the teachers of immorality.¹⁰⁹ Mr. Kristol leaves no doubt which teacher he believes is the better, more effective, guide for rulers (or for lawyers). And there can be no doubt which teacher presents the traditional doctrine of natural law.

VI. CONCLUSION

For the reasons state above, this reviewer respectfully submits that Professor Jaffa has failed to meet his burden of proof. We have appealed to Professor Jaffa's native justice and magnanimity. We conjure him by the ties of his common kindred with his intellectual brethren to disavow the terms of this debate, which would inevitably interrupt our connections and correspondence. It remains to be seen what his response will be to the voice of justice and of consanguinity.

109. I. KRISTOL, *supra* note 106 at 134.

APPENDIX

A COPPIE OF THE LIBERTIES OF THE MASSACHUSETS
COLONIE IN NEW ENGLAND*

The free fruition of such liberties Immunities and priveledges as humanitie, Civilitie, and Christianitie call for as due to every man in his place and proportion [every man is created equal]; without impeachment and Infringement hath ever bene and ever will be the tranquillitie and Stabilitie of Churches and Commonwealths. And the deniall or deprivall thereof, the disturbance if not the ruine of both [and what distinguished tyrannical from free government].

We hould it therefore our dutie and safetie whilst we are about the further establishing of this Government to collect and expresse all such freedoms as for present we foresee may concerne us, and our posteritie after us, And to ratify them with our sollemne consent ["consent of the governed"].

We do therefore this day religiously and unanimously decree and confime these following Rites, liberties, and priveledges concerning our Churches, and Civill State to be respectivly impartiallie and inviolably enjoyed and observed throughout our Jurisdiction for ever.

1. [Due-process clause] No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembred, nor any wayes punished, no man shall be deprived of his wife or children, no mans good or estaite shall be taken away from him, nor any way indammaged under Coulor of law, or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published, or in case of the defect of a law in any particular case by the word of god

....

2. [Equal-protection clause] Every person within this Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, which

* Source: "The Body of Liberties," *Old South Leaflets No. 164* (Directors of the Old South Work, Old South Meeting House, n.d.). The Massachusetts Body of Liberties was adopted in 1641 by the General Court of the Colony of Massachusetts Bay. It had been revised by the General Court from a draft by Nathaniel Ward (who had studied the English common law), was next considered by the freemen of the several towns, again revised and voted by the General Court. Comments in brackets are added by this reviewer.

we constitute and execute one towards another, without partialitie or delay.

18. [Fifth and Eighth Amendments] No person shall be restrained or imprisoned by by Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securitie, bayle, or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it.

29. [Seventh Amendment] In all Actions at law it shall be the libertie of the plaintife and defendant by mutual consent to choose whether they will be tryed by the Bench or by a Jurie, unlesse it be where the law upon just reason hath otherwise determined. The like libertie shall be granted to all persons in Criminall cases.

42. [Fifth Amendment] No man shall be twice sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.

48. [Freedom of Information Act] Every Inhabitant of the Counrtie shall have free libertie to search and veewe any Rooles, Records, or Regesters of any Court or office except the Councell, And to have a transcript or exemplification thereof written examined, and signed by the hand of the officer of the office paying the appointed fees therefore.

LIBERTIES OF FORREINERS AND STRANGERS

89. If any people of other Nations professing the true Christian Religion shall flee to us from the Tiranny or oppression of their persecutors, or from famyne, warres, or the like necessary and compulsarie cause, They shall be entertayned and succoured amongst us, according to that power and prudence god shall give us.

91. [Thirteenth Amendment] There shall never be any bond slaverie villinage or Captivitie amongst us, unles it by lawful Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of god established in Israell concerning such persons doeth morally require. This exempts none from servitude who shall be Judged thereto by Authoritie.

95.2 [First Amendment] Every Church hath full libertie

to exercise all the ordinances of god, according to the rules of Scripture

95.6 Every Church of Christ hath freedome to celebrate days of fasting and prayer, and of thanksgiveing according to the word of god.

96. [Privileges and Immunities Clause] How so ever these above specified rites, freedoms, Immunities, Authorities and priveledges, both Civill and Ecclesiasticall are expressed onely under the name and title of Liberties, and not in the exact forme of Laws, or Statutes, yet we do with one consent fullie Authorise, and earnestly intreate all that are and shall be in Authoritie to consider them as laws, and not to faile to inflict condigne and proportionable punishments upon every man impartiallie, that shall infringe or violate any of them.