FRAMERS' INTENT: AN EXCHANGE

On Jaffa, Lincoln, Marshall, and Original Intent

A Foreword by
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If it should be said that Abraham Lincoln was one of the framers of the post-Civil War Constitution, then it may also be said that Professor Harry V. Jaffa is Lincoln's John Marshall. For in Jaffa's evangelization of Lincoln one discovers not the temperament of a lawyer but of a lawgiver, not the profession of a judge, but a prophet of first principles of jurisprudence. One need not agree with Jaffa, the philosopher and apologist of Lincoln, to declare him indispensable to the American republic. Indeed, if Harry Jaffa did not exist, I would want to invent him, if only to recover for Conservatives the first principles of the American Founding—the true meaning of the Declaration of Independence. This I would do because the future of the world depends in no small measure upon the future of America—and, therefore, upon American constitutional principles.

In the ongoing debate over the authentic Constitution, consider only several unresolved but fundamental issues: Are the legal positivists and legal realists, heirs of Justice Oliver Wendell Holmes, Jr., and Charles Evans Hughes, right when they declare constitutional law to be whatever the highest legislators or Supreme Court Justices say it to be? And is it then unappealable, even if such "law" plainly violates the fundamental law by which the nation was founded? Moreover, is the original intent, the meaning of the Framers, undiscover-

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able in the four corners of the Constitution itself, or in its history? And further, are these considerations irrelevant, as the "non-interpretists" imply, when finding and applying the fundamental law of the land?

On the other hand, and above all, are Jefferson, Madison, Washington, Adams, and Lincoln right when, according to "the laws of nature and of nature's God," they "hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator" with the unalienable rights to life, to liberty, and to the pursuit of happiness? And do the Framers thus not correctly hold that any legislation or judgment of a court fundamentally in violation of *these unalienable rights* is by its nature, obnoxious to the Constitution? Is it not obnoxious because according to the very words of the Declaration of Independence, "to secure *these rights*,[1] governments are instituted among men," so "that whenever any form of government becomes destructive of these ends [namely, securing the unalienable rights to life, liberty, and the pursuit of happiness] it is the right of the people to alter or abolish it and to institute new government. . . ." It is true that in the Constitution of 1787 a number of guarantees were provided to the institution of chattel slavery, as it had grown up and become deeply rooted before independence, when the Crown forbade the colonists to interfere with the importation of slaves from Africa. And chattel slavery, considered in itself, was assuredly a complete violation of the right to liberty of each person. But the Framers of the Constitution acted, in Lincoln's words, on the maxim that it is better to "consent to any great evil, to avoid a greater one."[2] The more perfect Union of 1787 could not have been formed without the concessions to slavery: but the Union thus formed was committed more strongly than heretofore to the ultimate extinction of slavery. Only the stronger Union, created by the Constitution of 1787, was strong enough to oppose the expansion of slavery and meet the crisis of the Union in 1861. Thus, by Lincoln's statesmanship—by his unswerving commitment to the principles of the Declaration of Independence, as the principles of the Constitution—was the prudential wisdom of the Framers vindicated, and slavery itself destroyed. The "just powers of government" are thus, in the long run, derived not only from the consent of the governed,

1. Emphasis added.

2. R. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 308-09 (1946).

but from that consent which is consciously directed to securing the natural rights with which all men are endowed by their Creator.

The principles laid down at the birth of the republic on July 4, 1776, are manifestly what the Framers meant to implement, since Madison himself, the Father of the Constitution, held that the Declaration was "the fundamental act of union"[3] of the States. That is to say, it was the first lawful instrument by which to illuminate the constitutional principles of the American union. The implications of the fundamental law of the union are too often ignored by constitutional scholars who, nevertheless, cannot deny that the Declaration is placed at the head of the statutes at large of the United States Code, and is described therein as one of the "organic" laws of the United States. Therefore, I would argue that, just as the fourteenth amendment may have incorporated certain of the first ten amendments into the state constitutions, so too has the original intent of the Founders and the United States Code incorporated the Declaration of Independence into the Constitution of the United States.

The durable issue of our age, with great consequences for future generations, is the current debate over how to interpret the American Constitution. The issue is now joined also within the Conservative movement. Shall the meaning of the Constitution itself—the original intent of the Framers of the Constitution—as revealed in the document and in its history, prevail in the Supreme Court? Or, is this intent, the meaning of the Framers, too imprecise and thus unknowable, leading inevitably to the conclusion of the legal positivists that the law can only be what the judges and legislators say it is; or more plausibly yet, what the "sovereign" people vote it to be—no matter if judges, legislators, and even the people decide and vote, say, for slavery or legislated murder? From such an outcome, is there no appeal under the Constitution? In this struggle between the natural law (the Declaration of Independence) and legal positivism (judge-made law), Americans will soon have to choose—in Presidential and Congressional elections. There is no more important choice before us as a people.

Professor Jaffa makes his case in his following essay well enough without help from me. He is one of the most persuasive advocates of what Professor Edward S. Corwin called the

3. IX THE WRITINGS OF JAMES MADISON 219-221 (G. Hunt ed. 1910).

"higher law" doctrine of the Constitution; namely, that the first principles of the American regime, according to which the positive law of the Constitution must be interpreted in ambiguous cases, are codified in the natural law doctrine of the Declaration of Independence, the Magna Carta of the Founding. Jaffa's view, however, is a minority view, confronting as it does a prevailing and contrary consensus in the Supreme Court and among legislators and law schools. The consensus may best be summed up in the words of my friend Professor Benno Schmidt, former Dean of Columbia Law School and now President of Yale, who in discussing this issue with me said, "American constitutional law is positive law, and the Declaration of Independence has no standing in constitutional interpretation whatsoever."

There are two main schools of constitutional theories. But, ironically, both legal philosophies are ways by which to decide constitutional intent by reference to authorities *outside* the four corners of the Constitution. Attorney General Meese, in his Dickinson College speech (quoted at length in Appendix A herein) agrees with Jaffa (not to mention Jefferson, Madison, Marshall, and Lincoln!) that "there exists in the nature of things a natural standard for judging whether governments are legitimate or not."[4] That extrinsic authority—the standard of the Constitution—one finds in the Declaration of Independence. In the other case, as with Professor Schmidt or Justice Harry Blackmun,[5] the extrinsic authority one can find in the supervening extra-constitutional opinion of the Supreme Court Justice.

But while Jaffa does not explicitly consider it, and the Supreme Court today all but ignores it, there is another authoritative way to discover original intent, as Professor Christopher Wolfe shows in his book *The Rise of Modern Judicial Review*.[6] That way was the work of Chief Justice John Marshall, whose authority has been claimed not only by traditionalists, who hold that the Supreme Court Justice must always find the meaning of the law in the original intent of the Framers, but also by judicial supremacists who hold that the judge must and should legislate himself. But let us hear Chief Justice Marshall himself on the issue: "[J]udicial power is

4. E. Meese, Speech at Dickinson College (Sept. 17, 1985).

5. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

6. C. WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (1985).

never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the law"[7] made by the legislator. And further, "we [judges] must never forget that it is a Constitution we are expounding,"[8] not the legislative opinions of judges. And in *Marbury v. Madison* he declares, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[9] But (from *McCullough v. Maryland*) he emphasizes that "where the law is not prohibitive," for judges "to undertake here to inquire into the degree of [the law's] necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground."[10] Moreover, Marshall's legal reasoning and opinion show that the original intent of the Framers and of the Constitution can generally be discovered intrinsically, that is, by analysis of the *full* text of the document itself—by carefully applying rational rules of legal construction that depend primarily upon the plain meaning of the words themselves, the full context of the words, the subject matter with which the words of the law deal, and the obvious spirit or cause that gave rise to the law. That the law itself must do justice in all cases, whatever the rule of construction, is Marshall's first principle of jurisprudence. This he makes clear in *Marbury v. Madison* by asking the simple question: "[C]an it be imagined that the law furnishes to the injured party no remedy?"[11] To this Marshall rejoins, "[i]t is not believed that any person whatever would attempt to maintain such a proposition."[12] Moreover, these principles of natural justice, argued Marshall in *Ogden v. Saunders*, were the very principles of "the [F]ramers of our Constitution" who "were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion. . . ."[13] The meaning of the phrase "obligation of contracts" in the Constitution, Marshall declared, was that of "an original intrinsic obligation."[14] In this case Marshall plainly affirms that the meaning of the Con-

7. Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).
8. McCullough v. Maryland, 17 U.S. (4 Wheat.) 159, 207 (1819).
9. Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1802).
10. *McCullough*, 17 U.S. at 200.
11. *Marbury*, 5 U.S. at 165.
12. *Id.*
13. Ogden v. Saunders, 25 U.S. (12 Wheat.) 212, 213 (1827).
14. *Id.*

stitution is to be found in its incorporation of the natural law into the positive law. "We must suppose that the [F]ramers of our Constitution took the same view of the subject [viz., as the "wise and learned men" who wrote the "treatises on the laws of nature"] Marshall concluded, "and the language they have used confirms this opinion. . . ."[15] In short, the judge cannot know in such a case what the positive law of the Constitution is unless he knows what the natural law is.

Thus Marshall found it simple, if painstaking, to decide whether a law, or act, or judicial decision was unconstitutional; and he enshrined his reasoning in the *Marbury* decision, one of the most important judicial opinions of Supreme Court history. In this opinion, often cited by both judicial supremacists and legal positivists who reject natural law, Marshall considers "the question, whether an act, repugnant to the Constitution, can become the law of the land. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it."[16] And by what *principle* shall it be decided? To which Marshall had an unequivocal answer: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is *the basis* on which the whole American fabric is erected." "The principles, therefore, so established, are deemed fundamental."[17] But why or how is Marshall so absolutely sure of "the basis" and "the principles" deemed fundamental to the Constitution—to the "whole American fabric?" Because, in fact, Marshall draws the very words of this part of his opinion almost exactly from the Declaration of Independence itself—from the second paragraph, which reads "it is the right of the people . . . to institute new government laying its foundation on such principles . . . as to them shall seem most likely to effect their safety and happiness."[18]

Thus the basis of the American Republic is found by Marshall in the Declaration of Independence. But, echoing Marshall, one must then ask: can it be supposed that the Declaration, the fundamental act of union, which provides the basis, the original right of the people to establish fundamental

15. *Id.*

16. *Marbury*, 5 U.S. at 176.

17. *Id.* (emphasis added).

18. The Declaration of Independence ¶ 2 (U.S. 1776).

principles of government—can it truly be supposed that this great charter of American liberties is to be ignored by Supreme Court Justices, members of Congress, Presidents, Attorneys General, and law school professors—to be set aside in favor of judicial supremacy, narrow positivist doctrine and "result oriented" jurisprudence, whether of the Right or of the Left? Shall it truly be supposed that both legal positivists and judicial supremacists, even advocates of original and strict construction, all of whom cite Marshall, may properly abandon the Declaration of Independence as the source of those fundamental rights and principles by which the inevitable ambiguities of constitutional interpretation should be decided—when Chief Justice Marshall himself finds that "the[se] principles . . . are deemed fundamental,"[19] because they stem from the Declaration?

Surely, "[i]t is not believed that any person whatever would attempt to maintain such a proposition."[20]

Thus, too, does Harry Jaffa hold for the Declaration.

And so, for his love of truth, for his luminous intellect, for the light of the world he shines on the philosophy of law, we read and honor Harry Jaffa.

19. *Marbury*, 5 U.S. at 176.
20. *Id.* at 165.