

What Were the "Original Intentions" of The Framers of the Constitution of the United States?†

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I. INTRODUCTION

The following letter to the Editor of *Policy Review* was published in the spring 1986 issue of that journal:¹

Attorney General Meese, writing in the winter 1986 *Policy Review*,² defends a constitutional jurisprudence of "original intent." It is one that, he says, seeks fidelity to the Constitution, and not one that seeks political results from the decisions of the Supreme Court. The judges, he says, should uphold the law and not seek to enact their own personal or political preferences.³

As the leading exhibit of the evils that result from a departure from these principles, Mr. Meese offers us the following:

In the 1850's, the Supreme Court under Chief Justice Roger B. Taney read blacks out of the constitution in order to invalidate Congress' attempt to limit the spread of slavery. The Dred Scott decision, famously described as a judicial "self-infliction wound," helped bring on the Civil War. There is a lesson in such history. There is danger in seeing the Constitution as an empty vessel into which each generation may pour its passion and prejudice.⁴

Unfortunately for Mr. Meese's argument, no one, on or off the Court, has ever expounded the theory of original

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1. Letter from Harry V. Jaffa to the Editor, *POL'Y REV.*, Spring 1986, at 84 (footnotes added) [hereinafter Letter from Harry V. Jaffa].

2. Meese, *The Battle For the Constitution*, *POL'Y REV.*, Winter 1986, at 32.

3. Letter from Harry V. Jaffa, *supra* note 1, at 84.

4. *Id.*

intent with greater eloquence or conviction than Chief Justice Taney in the case of *Dred Scott*.⁵ In considering whether negroes might have standing to sue in United States courts, or whether slave property might be afforded less protection than any other kind of property, the Chief Justice wrote:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes.⁶

Never has the judicial doctrine of original intent been stated with greater perspicuity. Never has a judge, in giving judgment, been more clearly committed in his own mind to repudiating the "passion and prejudice" of his own "generation" than Chief Justice Taney in *Dred Scott*.

Taney decided that Dred Scott, as a member of an inferior and degraded race (inferior and degraded, that is, by the law of the Constitution), was not and could not become a citizen of the United States.⁷ But Taney also decided that

5. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

6. *Id.* at 426.

7. *Id.* at 404-05.

under the Constitution, there was no ground upon which Congress could discriminate between slave property and other forms of property. Here is the Chief Justice, speaking again.

It seems, however, to be supposed, that there is a difference between property in a slave and other property And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States . . . has a right to draw such a distinction [T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. . . . The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed [sic] . . . in every State that might desire it, for twenty years. . . . And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description.⁸

The Chief Justice was then very far, in his own mind, from attempting to "read blacks out of the Constitution in order to invalidate Congress' attempt to limit the spread of slavery."⁹ It was the attempt of others to read blacks *into* the Constitution to which Taney objected. Opinion, he said, (quite erroneously) had become more "liberal" in the intervening years since the adoption of the Constitution. But he denied that such "liberal" opinion ought to govern him as a judge, so long as the words of the constitution remained unamended. (What sentiment could be more gratifying to Mr. Meese than that!) And looking at the words of the Constitution what he saw was that the slave was regarded as "an ordinary article of merchandise."¹⁰ Because of this, the only constitutional power of Congress over slavery in the Territo-

8. *Id.* at 451-52.

9. There was no such attempt by Congress in the 1850's as Mr. Meese supposes. Congress repealed the Missouri Compromise restriction of slavery in 1854 and no bill to restore it passed either House before the Civil War. Taney's opinion in *Dred Scott* did not invalidate any attempted action of the Congress, but rather attempted to invalidate the principal political goal of the Republican Party, whose platform in 1856 had called for the restoration of the Missouri Compromise. It was, whether intentionally or not, an intervention in the political, not the legislative, process. Mr. Meese, like Justice Rehnquist, has rewritten American history in the interests of his polemic against judicial activism.

10. 60 U.S. at 451.

ries was "the power, coupled with the duty, of guarding and protecting the owner in his rights."¹¹

Whatever is wrong with this opinion, it is not because the Chief Justice did not hold to the doctrine of original intent. It is not because he thought for a moment that the Constitution was an empty vessel "into which [his own generation [might] pour its passion and prejudice." What he said was exactly the opposite. The Attorney General has a long way to go to make the doctrine of original intent intellectually defensible.

Since the publication of the foregoing letter there has been no response from the Attorney General, or from any one of his staff, explaining how the doctrine of original intent might be defended as the basis for interpreting the Constitution. I am well aware of how little time these busy men have to answer mere pedants. My intention in writing the letter, however, was not to rebuff these adherents of the doctrine of original intent. It was, rather, to demonstrate that subscribing to the doctrine of original intent does not tell us *what the original intent was*. The Civil War was fought by two sides, both of whom believed (as did Chief Justice Taney in *Dred Scott*) that they were defending the Constitution of the United States, and that they understood the Constitution as it had been originally intended to be understood.

The deepest political differences in American history have always been differences concerning the meaning of the Constitution, whether as originally intended, or as amended. Since the Civil War, the debate has often taken the form of a dispute over whether or not the Civil War amendments, notably the fourteenth, have changed the way in which the whole Constitution, and not only the amended parts, is read or interpreted. Does not the abolition of slavery and the extension of United States' citizenship to "all persons" born and residing in the United States—of whatever race or color—change the substantive understanding of all the rights that the Constitution functionally or purposefully secures? How could this be otherwise, if in the original Constitution some of those referred to as "persons" were elsewhere considered to be chattels, and some of these same persons were also counted as three-fifths of a person? If legally a person can be three-fifths of a person, does this not mean that "personality" and all constitutional

11. *Id.* at 452.

rights to life, liberty, and property have their origin solely in positive law? For surely in nature there cannot be three-fifths of a person, any more than there could be half a child to settle the claims of each of the two women who came before King Solomon.¹²

Mr. Meese has attacked the "incorporation" doctrine recently, a doctrine that applies certain of the first ten amendments to the states, no less than to the United States. Whether right or wrong, he took his position on the basis of the alleged intention of the original Constitution without addressing the question of how, or even whether, that Constitution is transformed by the Civil War amendments. It is, however, either naive or disingenuous to think that one can appeal to the "original intentions" of those who framed and those who ratified the Constitution without facing forthrightly the question of what those intentions actually were. It is not possible to even discuss how or whether the Civil War amendments transformed the original Constitution without saying first of all what the original Constitution was.

In fact, the Attorney General appears to be wholly unaware of the fact that the greater part of those who aggressively invoke the doctrine of "original intent" today are self-styled conservatives whose chief intellectual progenitor appears to be—from all the available evidence—not the Father of the Constitution, James Madison or any of his coadjutors, but John C. Calhoun. That is to say, these conservatives largely follow the man who, more prominently than any other, rejected the proposition that all men are created equal, and who affirmed on the contrary that slavery was a "positive good." I believe, however, that it is undeniably true that it was the paramount intention of the Framers of the Constitution, and of the people for whom they framed it, "to institute new government" in the sense in which the Declaration of Independence speaks of instituting new government. Indeed, Madison is explicit in the 43rd *Federalist*¹³ that the Convention was justified by the right of revolution in transcending its instructions from the Congress of the Confederation. It was to be the purpose of the "more perfect Union" to better "secure these rights."¹⁴ These rights were the unalienable rights with which all men had

12. 1 *Kings* 3:16.

13. THE FEDERALIST No. 43 (J. Madison) (H. Lodge ed. 1888).

14. *Id.*

been equally "endowed by their Creator"¹⁵ under "the laws of nature and of nature's God."¹⁶ We are thus confronted with the paradox that those who today most aggressively appeal to the doctrine of original intent are among its most resolute antagonists. As I shall prove in appendix C, this is true of the new Chief Justice of the United States, Justice Rehnquist, as it is of his antagonist Justice Brennan.

In the present controversy, we find that Justice Brennan's Constitution is one of "overarching principles" whose application seems to be virtually uncontrolled by the specific provisions of the text, or by anything that those who drafted and those who ratified such provisions might have meant by them. For example, Justice Brennan brushes aside the references to capital crime in the fifth amendment and holds nonetheless that capital punishment is unconstitutional by reason of the provision against "cruel and unusual punishments" in the eighth amendment.¹⁷ He does so notwithstanding the fact that the fifth and eighth amendments were passed and ratified at the same time. Justice Brennan's "overarching principles" enable him to reject the provisions of the Constitution that he does not like and to give the ones he does like whatever meaning he chooses them to have. Clearly, this is the negation of constitutionalism. Perhaps he thinks that because the same Constitution that sanctioned capital punishment also sanctioned slavery, the abolition of slavery implied the abolition of the equally barbarous (as he might say) practice of capital punishment. This argument would be more persuasive were it not that the fourteenth amendment repeats the language of the fifth declaring that no state shall "deprive any person of life, liberty, or property, without due process of law"¹⁸ and signifying that persons *may* under certain circumstances be deprived lawfully of their lives, as well as of their liberty and property. Justice Brennan's "overarching principles" appear, therefore, to be part of an evolutionary process, a process in which a progressively exalted meaning is discovered in the various provisions of the Constitution (most particularly the equal protection and due process clauses of the fourteenth amendment). This meaning is revealed by the historical afflatus to

15. *Id.*

16. *Id.* at 275-76.

17. U.S. CONST. amend. VIII.

18. U.S. CONST. amend. XIV.

his progressive judicial conscience. Consider these remarks about Justice Brennan's supreme constitutional principle, "human dignity."

We are still striving toward that goal, and doubtless it will be an eternal quest. For if the interaction of this Justice [viz., himself] and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.¹⁹

It is then an evolutionary process that enables Justice Brennan to discover the true meaning of the Constitution even when flatly contradicting the text itself. And this same process enables him to contradict, not only the actual Constitution, but whatever it is that anyone else may think the Constitution ought to mean. For Justice Brennan is explicit that he alone may truly represent the community, even when no one else in the community shares his opinion: "On this issue [but why not any other?], the death penalty, I hope to embody a community striving for human dignity, although perhaps not yet arrived."²⁰

Thus, Justice Brennan finds the true meaning of the Constitution, not in the text and not in any interpretation of the text by others, including the entire political community acting through the political process, but in some kind of "striving," albeit "not yet arrived." This "striving" may have the character of a revelation vouchsafed to the Justice, but not to anyone else. Yet such "striving" appears to him to be sufficient ground for the authentic meaning of human dignity and therefore of the Constitution. Such visitations by the evolutionary *zeitgeist*²¹ parallel those of the proletarian consciousness that, as Lenin discovered, were not vouchsafed to the proletariat itself, but to the Central Committee of the Bolshevik Party and more particularly to its Chairman, namely, himself.²²

One can, therefore, fully sympathize with Attorney General Meese's (and indeed Justice Rehnquist's) repudiation of this idea of "a living Constitution." And one can sympathize as well with the desire to see constitutional jurisprudence

19. W. Brennan, To the Text and Teaching Symposium, Speech at Georgetown University (Oct. 12, 1985), reprinted in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 23 (1986).

20. *Id.* at 24.

21. *Zeitgeist* is a German term referring to the spirit of the age, the feeling or thought of a particular period. WEBSTER'S NEW WORLD DICTIONARY 1652 (2d ed. 1976).

22. N. LENIN, WHAT IS TO BE DONE? (1902).

anchored in what the Constitution actually says, and not what the Justices might wish it to say. But if it can be said that Justice Brennan's Constitution is one of "overarching principles" uncontrolled by the actual text, so it might be ventured that Mr. Meese's Constitution is a text without overarching principles.

In a speech delivered at Dickinson College, September 17, 1985, the Attorney General asserted that the principles of the Declaration of Independence were the principles of the Constitution.²³ That is indeed the truth of the matter, according to the greatest of all interpreters of the American Constitution, Abraham Lincoln. But Mr. Meese's Constitution Day speech, with its commitment to the idea of natural law as the ground of the Constitution's positive law, seems to have no precedent and no consequence either within the Justice Department, or among the cognoscenti of his judicial nominees. I do not know of a single judicial nominee—and least of all the new Chief Justice—who gives the least credence to the proposition that there are "laws of nature and of nature's God." Nor are there any, so far as I can tell, who recognize, with James Madison, that it is in the character or nature of the social compact or contract, made in pursuance of these laws, that the authority of the people may itself be discovered. As far as its theoretical recognition or its practical consequences are concerned, Mr. Meese's Constitution Day speech, however praiseworthy, is a quixotic irrelevance. I have, however, given it a sympathetic critique in appendix A.

Mr. Meese, and the new Chief Justice, have waged a war against judicial activism and against legislation disguised as adjudication. With this, one can certainly agree. But their argument comes, again and again, to rest upon the proposition (with which I am also in full agreement) that legislation is properly the function of the people, or the elected representatives of the people. Courts exist to enforce the laws—and to interpret them only as this becomes necessary as an incidence of their enforcement. But interpretation must not be a disguise by which judges invent the law—as Justice Brennan clearly does when he repudiates the actual words of the Constitution. In interpreting the laws, the judges are to ask themselves, what is the law? Not, what ought the law to be? For it is the will of the people, not the will of the judges, that the

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

courts are entrusted to carry out. The will of the people is the ground of all constitutional authority. What, however, is the ground of the authority of the will of the people? This question too must be answered.

For the Justice Department and the epigones of "original intent," the supremacy of "the people" is a *factum brutum*, an axiomatic premise from which everything follows, but which cannot—and therefore need not—have any justification. This, however, was not the understanding of the Founding Fathers, nor can it be reconciled with their "original intentions." James Madison, the Father of the Constitution, declared over and over again that "compact is the basis of all free government."²⁴ By this he meant that the will of a people is not the will of any chance aggregate of discrete individuals, but rather that of a body incorporated under "the laws of nature and of nature's God." It is a civil society deliberately and rationally formed for the purposes of civil government, which purposes are not themselves the invention of the people, but are rather given to them with their nature and flow from that nature as rationally apprehended. The people as understood by the Founding Fathers were characterized not merely by will, but by a rational will. Said the author of the Declaration of Independence in his inaugural address: "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."²⁵

We are reminded as well that in the first number of the *Federalist* Alexander Hamilton defined the enterprise embodied in the Constitution as an attempt "to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice [viz., by reason], or whether they are forever destined to depend for their political constitutions on accident and force."²⁶

It cannot be too greatly emphasized that the people's will, properly so called, is a rational will, whose inherent right to be obeyed is attenuated to the extent that it becomes merely arbi-

24. 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 392 (R. Worthington ed. 1884) [hereinafter WRITING OF JAMES MADISON].

25. T. Jefferson, First Inaugural Address (March 4, 1801), reprinted in H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 186, 187 (7th ed. 1963) [hereinafter COMMAGER].

26. THE FEDERALIST No. 1, at 3 (A. Hamilton) (J. Cooke ed. 1982).

trary or despotic. "An elected despotism was not the government we fought for,"²⁷ wrote Jefferson in the *Notes on Virginia*. Certainly the courts should not usurp the powers of legislation. But neither should majorities usurp the rights of minorities, nor should legislatures exercise powers that the people have not by the Constitution delegated to them. For the doctrine of the Framers of the Constitution was a doctrine of *limited* government. And the idea of limited government must be understood, not only in relationship to what the people collectively have reserved to themselves, and have not delegated to their government. It must be understood as well in relationship to what the individuals in forming a people, have reserved to themselves. What individuals have thus reserved, even the people collectively have no rightful power to delegate to government. Such reservations imply, therefore, that even the collective sovereignty of the people—such as that which ordained and established the Constitution—is limited. The sovereignty of the people does not authorize the establishment of any government whatever with any powers whatever. The people have no rightful power to do whatever "is not naturally impossible" (as the textbook account of the legal sovereignty of the "Queen in Parliament" asserts). The question of judicial usurpation in a free government is part of a much larger problem, a problem wholly invisible to the legal positivists of contemporary conservatism who see only the will, but not the reason of the people informing their sovereign authority.

The elements of rationality implicit in the choice of a free government obligate one not to impose despotism upon others, except insofar as it may become necessary as an incidence of the natural right to self-defense. These same elements of rationality inform the ordering of a free, as distinct from a despotic, government. Separation of powers, for example, was generally understood to be an indispensable feature of free government. The idea of the rule of law—flowing from the proposition of natural human equality—is embodied in the reciprocal requirement that those who live under the law should share in making the law they live under and that those who make the law should live under the law that they make.

The Attorney General, apart from his one spasmodic effort in the Dickinson College speech of 1985, seems to regard the question of the Constitution's principles as something that one

27. F. DONOVAN, *THE THOMAS JEFFERSON PAPERS* 101 (1963).

discovers merely by looking at the Constitution. The Constitution, however, as nearly everyone agrees, is a bundle of compromises. There is nothing in the Constitution itself by which one can discover the "prudence" of the Constitution, that is to say, by which one can distinguish the compromises of the Constitution from the principles of the Constitution. Eleven states attempted in 1861 to "secede" from the Union and establish an independent government, the Confederate States of America. They did so because Abraham Lincoln was elected President of the United States on a platform that called for an end to the extension of slavery into United States Territories. This intention to end the extension of slavery—or, as Lincoln himself put it, to place slavery "in the course of ultimate extinction,"²⁸ they declared to be a fundamental breach of the faith upon which the constitutional compact rested. It constituted such an invidious discrimination between the property and social institutions of the states as to make the continuation of the political union between them a moral and political impossibility. Nothing in the text of the Constitution, they declared, warranted such a distinction between the forms of property recognized to be such by the laws of the different states of the Union. For this they had what they claimed to be the highest of all constitutional authorities—the Supreme Court of the United States speaking through its Chief Justice in *Dred Scott*.²⁹ The Constitution, they insisted, had recognized the institution of chattel slavery in various ways, above all in the requirement that the government of the United States return fugitive slaves to their masters.

For a President, and a party, to hold in moral abhorrence an institution sanctioned by the laws of fifteen states and by the Constitution made political friendship among the states impossible. It was common ground to Lincoln and his antagonists that common citizenship implied and required agreement on the morality of such a fundamental institution as slavery. Note that the first platform of the Republican Party, in 1856, condemned both "polygamy and slavery" as "twin relics of barbarism."³⁰ In his House Divided speech,³¹ Lincoln declared

28. R. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 447 (1946) [hereinafter BASLER].

29. 60 U.S. at 393.

30. 2 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1040 (A. Schlesinger & F. Israel eds. 1971).

31. COMMAGER, *supra* note 25, at 345; BASLER, *supra* note 28, at 372.

that a point had been reached in which a decision in principle had to be made between slavery and freedom.

In *Dred Scott*, the Court declared that there was no lawful way to exclude slavery from any United States Territory.³² Once public opinion accepted this as a premise, there would, Lincoln said, be another decision for which *Dred Scott* was merely the prologue, declaring that there was no lawful way to exclude slavery from any state of the Union. At that point, said Lincoln, slavery would become lawful in all the states, old as well as new, North, as well as South. This, according to Lincoln, was the crisis of the house divided: Either slavery was wrong and ought to be restricted, or it was right and ought to be extended. The question about *Dred Scott* was not, as the Attorney General and Chief Justice Rehnquist suppose, whether or not the Court had usurped powers belonging to Congress, the question was whether Negroes (free or slaves) had any natural rights which the Constitution was bound to recognize.

Mr. Meese (with the exception of his Dickinson College Speech) and his judicial nominees come to the question of original intention, through the medium of a conservative movement which, at its heart, is in agreement with the argument of the South when it attempted to break up the Union in 1861. They come to the question of original intent having rejected the ground of the Constitution in natural justice and having rejected the distinction between despotism and freedom as that distinction was asserted in the Declaration of Independence.

In 1825 James Madison and Thomas Jefferson considered what books and documents the Board of Visitors ought to recommend as *norma docendi*, as authoritative principles of instruction, for the faculty of law of the new University of Virginia. The question uppermost in their minds was how best to educate the lawyers who were most likely to be the legislators, executives, and judges of the future, those whose vocation would make them in a peculiar sense the future guardians of the Constitution and of republican freedom. Madison and Jefferson were aware of the delicacy of proposing to tell the professors what to teach. They would not think of doing so, Jefferson said, in most of the branches of science in which the university would offer instruction. And yet, he wrote, and surely not without reason: "[T]here is one branch in which we

32. *Dred Scott*, 60 U.S. at 452.

are the best judges . . . [i]t is that of government."³³

So these two ex-Presidents and Founding Fathers concluded and recommended to the Board of Visitors, of which both were members and Jefferson was President, that of the "best guides" to the principles of the Constitutions of Virginia and of the United States, the first was "the Declaration of Independence as the fundamental act of Union of these states."³⁴ Let it be noted that Jefferson and Madison here refer to the Declaration, not only as the instrument by which the thirteen Colonies separated themselves from Great Britain, but as the instrument by which they combined with each other to become one Union—thirteen states indeed, but thirteen states *united*. As the "fundamental act of Union," the Declaration was and remains the fundamental legal instrument attesting to the existence of the United States. From it all subsequent acts of the people of the United States, including the Constitution, are dated and authorized. It defines at once the legal and the moral personality of that "one People" (who are said to be a "good people") who separated themselves from Great Britain and became free and independent. It thereby also defines the source and nature of that authority that is invoked when "[w]e the people of the United States" ordained and established the Constitution. For the same principle of authority—that of the people—that made the independence of the states lawful, made lawful all the acts and things done subsequently in their name. This tells us why the Constitution ought to be obeyed, why we have a duty to obey it, and why, and in what sense, it may be truly said that the voice of the people is the voice of God. For these reasons, the Declaration remains the most fundamental dimension of the law of the Constitution. It is the Declaration that tells us why and in what sense the government of the people is a government of right and not merely of force. It is by virtue of the principles of the Declaration that the Constitution must be said to reject the thesis that justice is nothing but the interest of the stronger. It is by virtue of the principles of the Declaration that, in the words of Leo Strauss, "[t]he United States of America may be said to be the only country in the world which was founded in explicit opposition to Machiavellian

33. 19 THE WRITINGS OF THOMAS JEFFERSON 460-61 (1903).

34. *Id.*; 9 THE WRITING OF JAMES MADISON 219-22 (G. Hunt ed. 1910).

principles."³⁵

To repeat, the Declaration of Independence, as seen by Jefferson and Madison, tells us why the political authority of the United States is also a moral authority, and why the physical force by which the United States may protect and defend itself is moral force and not merely the expression of collective self-interest. Finally, it tells us why slavery must be regarded as an anomaly, a necessary evil entailed upon the Constitution, but not flowing from—or consistent with—its genuine principles.

One would have thought that this opinion was canonical since both the author of the Declaration and the Father of the Constitution—who were also the third and fourth Presidents of the United States—had agreed upon the Declaration of Independence, both as the fundamental act of Union, and as a guide to the principles of the Constitution. Yet in all the discussion of "original intent" it has apparently not occurred to any of the luminaries of present-day conservative (or, of course, liberal) jurisprudence even to consider it. Even in the Attorney General's Constitution Day speech of 1985,³⁶ in which he declared the principles of the Declaration to be those of the Constitution, this assertion of Madison and Jefferson, which could have greatly strengthened his argument, was ignored. In truth, however, the denial of what Jefferson and Madison affirmed has been at the very core of constitutional theorizing in contemporary American conservatism. The source of this denial is not difficult to discover. It is found in the slavery controversy that began not long after Jefferson and Madison had passed from the scene. It is found in the fact that John C. Calhoun has been far more prominent in shaping American Conservatism—and indeed American legal thought generally—than Jefferson or Madison.³⁷

35. L. STRAUSS, THOUGHTS ON MACHIAVELLI 13 (1984).

36. See *supra*, note 23 and accompanying text.

37. Judicial Studies, Cumberland, Virginia (a major conservative "thinktank" in the Washington area) recently publicized as "The Defenders of the Constitution" James Madison, John Marshall, Joseph Story, Daniel Webster, John C. Calhoun, and Edmund Burke. Madison, Story, and Webster violently opposed Calhoun in the Nullification Crisis of 1828-1833 (on grounds that Marshall certainly agreed with). Madison's last years were largely preoccupied with refuting the theory of nullification. The Madison of this conservative think tank (like Marshall, Story, and Webster) has been sanitized of his opposition to Calhoun and his association with the natural rights theory of the Declaration. Why Burke is called a defender of the American Constitution is, I suspect, because he is identified (erroneously) as an enemy of the

At the center of Calhoun's constitutionalism was his doctrine of state sovereignty and state's rights. The essence of the doctrine of state sovereignty was no more an affirmation of the legal rights and powers of the states, vis-a-vis the federal government, than it was a denial of "the fundamental principles of the Revolution"³⁸—as Madison called them in the 39th *Federalist*. That is, the doctrine of the natural rights of individuals as the source of the authority of the state and of civil society as such. Calhoun's conception of sovereignty as set forth in his *Disquisition on Government*³⁹ was of a right that belonged to the collective entity called the state (that is, of government representing society). State sovereignty was sui generis, not derived from any antecedent principle or right. Sovereignty, however, as understood in the Declaration of Independence—and in all the great documents of the Revolution—was originally, and by nature, the equal and unalienable possession of individual human beings. The original equality of all human beings was an equality of sovereignty; no man had more right to rule another than the other had to rule him. The exercise of the natural right to rule one's self is transferred voluntarily to civil society by virtue of the social contract by which civil society is originally constituted. In the words of the Massachusetts Bill of Rights, "[t]he body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good."⁴⁰ As noted above, James Madison repeated over and over again, that "compact is the basis of all free government,"⁴¹ implying that the ground of all legitimate authority is social contract based upon natural equality. The ground of all positive legal rights in civil society—above all, the right to property—is the antecedent natural right grounded in natural equality that every person possesses in himself. This right is a fortiori a right of each person to possess the fruit of his

doctrine of natural rights in the Declaration of Independence. What is most striking about this gallery of honor, however, is the inclusion of that great enemy of the Declaration—John C. Calhoun—and the exclusion of its greatest defender, Abraham Lincoln.

38. THE FEDERALIST No. 39, at 250 (J. Madison) (J. Cooke ed. 1982).

39. 4 J. CALHOUN, THE WORKS OF JOHN C. CALHOUN (R. Cralle ed. 1854) [hereinafter THE WORKS OF JOHN C. CALHOUN].

40. COMMAGER, *supra* note 25, at 107.

41. See WRITINGS OF JAMES MADISON, *supra* note 24.

labor. The natural rights—to life, liberty, and property—are the ground of all authority, all sovereignty, in civil society.

Calhoun's doctrine of state sovereignty, on the contrary, rests upon the denial of any such antecedent natural rights. No rights to life, liberty, or property have any existence independent of society. In this respect—in their assigning an absolute priority of the society over the individual—Calhoun and Marx stand upon identical theoretical ground. Here is one of the deepest causes for the stultification of the present day conservative critique of communism. Conservatives most often attack communism on the grounds of its rejection of Christian revelation. But they do so in part because the "rationalism" of communism so closely resembles their own. To disguise this fact, they declare that "there is better guide than reason."⁴² This better guide, however, turns out to be not revelation, but the collective prejudices of their communities on such subjects as race, religion, and ethnicity, prejudices which they are at once unwilling to abandon and unable to defend. They are also—it needs to be said—prejudices utterly inconsistent with Christianity.

A corollary of Calhoun's doctrine of state sovereignty was what Abraham Lincoln called that "ingenious sophism"⁴³ by which, "any State of the Union may consistently with the national Constitution, and therefore lawfully and peacefully, withdraw from the Union without the consent of the Union or of any other State."⁴⁴ Calhoun's constitutionalism is frequently represented as a defense of minority rights against "the numerical majority."⁴⁵ Secession, like nullification, has been represented as a constitutional device to prevent the tyranny of the majority. But having denied individual rights as the basis of majority rule, how could Calhoun defend minority rights as such? The minority with whose defense he was particularly concerned was the particular minority that had a vested interest in that "peculiar institution," the institution of human slavery. To say the least, it is paradoxical to identify a

42. Cf. M. BRADFORD, *A BETTER GUIDE THAN REASON: STUDIES IN THE AMERICAN REVOLUTION*.

43. BASLER, *supra* note 28, at 603.

44. *Id.*

45. Calhoun makes this the center of his argument in the *Disquisition on Government*, in *THE WORKS OF JOHN C. CALHOUN*, *supra* note 39, and it has been repeated countless times since then. But see the unconstitutional endorsement of Calhoun by Lord Acton, *Political Causes of the American Revolution*, in *ESSAYS IN THE LIBERAL INTERPRETATION OF HISTORY*.

defense of slavery as a defense of minority rights.⁴⁶

A major feature of the ante-bellum debate was the attack by Calhoun and his followers upon the teaching of human equality in the Declaration of Independence. While the Declaration continued to be appealed to in public debate for its pronouncement that the just powers of government are derived from the consent of governed (secession was justified as a legitimate withdrawal of consent), the proposition that all men are created equal was scorned and rejected. It was scorned and rejected notwithstanding the fact that the equality of man is the ground or reason for the requirement of consent. For if there were an inequality among men, such as there is among other species, there would be no reason for consent to give legitimacy to government. No one asks his cattle (*viz.*, chattels), or his dog, horse, cow, or pig for its (or their) consent. On the other hand, every human being has the indefensible right to ask anyone proposing to exercise authority over him, "why should I obey?" Every human being also has the identical right to reply with deleted expletives to such answers as "because I am better than you are," or "because it is in my interest that you should obey." The divorce of consent from equality, which was at the heart of ante-bellum southern constitutionalism, remains at the heart of conservative constitutionalism to this very day.⁴⁷

By denying the principles of equality, southern defenders of slavery (e.g., Taney) denied that any constitutional distinction could be drawn between slave property and any other species of property. They insisted, notwithstanding the acknowledged anti-slavery views of most, if not all, of the Founding Fathers, that those anti-slavery views had no constitutional standing. What mattered was not the personal views of the Founding Fathers on slavery, but the constitutional commitment to slavery that had been "nominated in the bond" of the Constitution.⁴⁸ Constitutional morality constituted fidelity to that bond. From the southern point of view in the ante-bellum debate, the "original intentions" of the Founding Fathers

46. This, however, is what Calhounites, then and now, have always done. See Meyer, *Lincoln Without Rhetoric*, NAT'L REVIEW, Aug. 24, 1965 at 725. *Contra* Jaffa, *Lincoln and the Cause of Freedom*, NAT'L REVIEW, Sept. 21, 1965 at 827.

47. See, e.g., Bradford, *The Heresy of Equality: Bradford Replies to Jaffa*, MODERN AGE, Winter 1976, at 62. "Equality as a moral or political imperative . . . is the antonym of every legitimate conservative principle." *Id.*

48. J. CALHOUN, 4 THE WORKS OF JOHN C. CALHOUN 507 (R. Cralle ed. 1854).

consisted of their commitment to constitutional morality, something entirely independent of whatever private views they (or others) may have entertained. For the southerners took their stand on the Constitution as the moral and political embodiment of union. Whatever denied the authority of that bond—as the equality principle of the Declaration seemed to do—must be of no power or effect in interpreting the Constitution. And so, on the southern side of the ante-bellum debate—inherited by contemporary conservatism—the Declaration of Independence was read out of the authoritative role it had in the American political tradition for the entire Revolutionary generation and most certainly for those who framed, and those who ratified the Constitution of 1787.

Equally important to Calhoun's constitutionalism was the denial of Jefferson's and Madison's assertion that the Declaration of Independence was "the fundamental act of Union" of the states.⁴⁹ The idea that secession was a legal and constitutional right, required that it be believed that the Union was formed, not in 1776, but in 1787 and 1788, and solely by the acts by which the states ratified the Constitution. From this, the official constitutional theory underlying the formation of the Confederacy, acts of secession were acts of deratification. The Declaration, from Calhoun's point of view, created not one union, but a league of thirteen separate and independent states. All Confederate apologists, from Jefferson Davis and Alexander Stephens to the late Willmoore Kendall, would repeat this. Kendall would refer to "the baker's dozen" of independent states resulting from the Declaration,⁵⁰ an expression repeated without question by Garry Wills (once a Kendall disciple) in his recent book on the Declaration of Independence, *Inventing America*.⁵¹

Taney's opinion in *Dred Scott*⁵² is a sport of the parent Calhounian stock. To give slavery the unequivocal moral sanction of the Constitution, Taney did not deny the authority of the Declaration, as did Calhoun. Instead, Taney denied that Negroes had been included in the proposition that all men are created equal. He simply ignored the reference in the Declara-

49. See generally, J. CALHOUN, 4 THE WORKS OF JOHN CALHOUN (R. Cralle ed. 1854).

50. W. KENDALL, BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION 90 (1970).

51. G. WILLS, INVENTING AMERICA (1978).

52. See *supra* notes 5-8 and accompanying text.

tion to "the laws of nature and of nature's God"⁵³ and treated the principles set forth by the Declaration as if they were merely human or positive rights or law. This is all the more astonishing since, as a Roman Catholic, he should have had some acquaintance with the Thomistic distinction between natural law and the human law, as well as the Aristolelian-Thomistic conception of the role or prudence in mediating between ends and means. He treated as irrelevant, despite the status accorded Negroes by custom or positive law, the truth that by nature they were certainly human. He simply ignored statements concerning slavery, such as Jefferson's in the *Notes on Virginia* by which it was certain beyond any possible doubt that Negroes were included in the Declaration.⁵⁴ He admitted that the meaning of the words of the Declaration in and of themselves included all members of the human race, of whatever color. But he denied that the Signers of the Declaration could have meant what they said, because had they meant it, they as moral men, he thought, would have immediately set about abolishing slavery.

Taney's utterly absurd and mistaken belief that the rights set forth in the Declaration of Independence were understood to apply to whites only is today perhaps the most commonly held view of the Founding. For example, the 1968 report of the President's Commission on Crime and Civil Disorder held "white racism" to be the chief cause of the evils the Commission had been charged to investigate.⁵⁵ As evidence of the endemic character of this racism, the Commission noted the alleged fact that Negroes had not been included in the proposition of equality in the Declaration of Independence! The staff director of the Commission relied, he said, on "expert" opinion. This meant certain "New Left" (or "Black Power") historians. Facts meant no more to these "scholars" than to their unsung hero, Roger B. Taney. The agreement today between the radical Left and the radical Right (e.g., between the advocates of Black Power and the Ku Klux Klan or White Citizens Councils) is striking. On neither side is there the least awareness of, or concern with, statements such as Lincoln's on the prudential character of the relationship between the theory of the

53. The Declaration of Independence (U.S. 1776).

54. 4 THE WRITINGS OF THOMAS JEFFERSON 276 (P. Ford ed. 1892-99).

55. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 81 (1968).

Declaration and the practice of the Founding generation. Here is how Lincoln, in 1857, met the objection that Negroes could not have been included in the Declaration because the Founding Fathers had not abolished slavery.

Chief Justice Taney, in his opinion in the *Dred Scott* case, admits that the language of the Declaration is broad enough to include the whole human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites. Now this grave argument comes to just nothing at all, by the other fact, that they did not at once, *or ever afterwards*, actually place all white people on an equality with one another They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which could be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people of all colors everywhere.⁵⁶

A writer espousing the Justice Department's polemic against "judicial activism" has recently denounced this passage from Lincoln's speech on the *Dred Scott* decision as if it were a justification of Justice Brennan's evolving judicial conscience as a mode of constitutional interpretation. But this is nonsense. Lincoln is speaking of the meaning of the Declaration of Independence apart from the Constitution and before there was a Constitution. He is addressing the meaning of the Declaration of Independence as the act of the Continental Congress, which was a legislative, not a judicial body. He is discussing the meaning of the Declaration as the authoritative statement by the American people of the purposes to be served by whatever government they might choose to institute. But that same Declaration of Independence also speaks of the dictates of prudence as the means by which the Declaration's principles are to be implemented. The "standard maxim of free society" was,

56. BASLER, *supra* note 28, at 360.

as the words assert, a maxim for *society*, for the political community, as a guide for the direction of public policy. The shaping of which is, of course, primarily a function of legislative prudence.

Lincolnian morality—the morality of the Founding Fathers—was prudential. Principles are the necessary, but not the sufficient condition, for deciding cases. We cannot decide upon an intelligent policy to deal with slavery unless we know that slavery, in principle, is morally wrong. But knowing that it is wrong does not, of itself, tell us what to do about it. Prudential morality means doing the most good, or the least evil, in any given situation. As Lincoln once said, "I would consent to any great evil, to avoid a greater one."⁵⁷ The guarantees given to the institution of slavery in the Constitution were necessary if the slave states were to acquiesce in the far stronger central government proposed in the Constitution of 1787. Yet it was better, so Lincoln thought, even from the most anti-slavery point of view that there be such a stronger Union. For only such a Union could—its guarantees to slavery notwithstanding—place the institution as a whole "in the course of ultimate extinction."⁵⁸ Purists might have formed a smaller Union without slavery. But slavery itself would have grown far greater. We cannot forbear noticing that the purpose Lincoln attributed to the Founding Fathers—long before he became President—of containing slavery and placing it in course of ultimate extinction, was fulfilled in his Presidency.

The idea of prudential morality—the morality celebrated by Aristotle, Aquinas, Burke, and the Declaration of Independence—found no favor with Taney and has little favor today. Taney adopted the essentially Kantian view of supposing that the Founding Fathers could not have meant what they said about human equality, had they not acted upon it categorically. That meant acting upon their alleged perception of the rightness or wrongness of each particular action, without regard to the consequences. Moreover, Taney deduced the meaning of the Fathers' words from what he believed to be the purport of their actions. He paid no attention to what *they* said about what they meant. He insisted upon *his* understanding of their actions as the sole guide to the meaning of *their* words. This is the same procedure used today by behavioral scientists and

57. BASLER, *supra* note 28, at 308-09.

58. *Id.* at 447.

Marxist historians (or social scientists) and accounts at least in part for the popularity of Taney's, rather than Lincoln's, interpretation of the Declaration of Independence. But let us not forget either that the reconciliation of slavery and the Founding was first and foremost the work of Calhoun, and it is Calhoun's interpretation of the Founding which to this day dominates American Conservatism.

In his speech on the Oregon Bill, June 27, 1848, Calhoun, addressing the proposition "[t]hat all men are created equal," made these remarks.

All men are not created. According to the Bible, only two, a man and a woman, ever were, and of these one was pronounced subordinate to the other. All others have come into the world by being born, and in no sense . . . either free or equal [This proposition] was inserted in our Declaration of Independence without any necessity. It made no part of our justification in separating from the parent country Breach of our chartered privileges, and lawless encroachment on our acknowledged and well established rights by the parent country, were the real causes, and of themselves sufficient without resorting to any other, to justify the step. Nor had they any weight in constructing the governments which were substituted in the place of the colonial. They were formed of the old materials and on practical and well-established principles, borrowed for the most part from our own experience and that of the country from which we sprang.⁵⁹

The doctrine that the American Revolution was fought to defend "our chartered privileges" has become canonical in American Conservatism, replacing the principles of the Declaration of Independence recognized by Jefferson and Madison (and indeed by all the Founding Fathers). "Chartered privileges" represent prescriptive rights, rights sanctioned by usage—by custom or the mere lapse of time—but not by reason or nature. It is a right in which the "ought" has been assimilated by the "is," in which all right is positive right—which is, of course, another way of saying that whatever is, is right, or that "justice is nothing but the interest of the stronger." The idea of prescription as the ground of right was of course wholly favorable to the idea of the legitimacy and indefinite perpetuation of slavery. After all, slavery, next to the family, is the old-

59. J. CALHOUN, 4 THE WORKS OF JOHN C. CALHOUN 507 (R. Cralle ed. 1854).

est and hence most prescriptively right social institution known in human history.

Thus Irving Kristol, inaugurating the American Enterprise Institute's Distinguished Lecture Series on the Bicentennial of the United States, referred only obliquely to the great proposition that Calhoun had denounced openly. Kristol said that "[t]o perceive the true purposes of the American Revolution it is wise to ignore some of the more grandiloquent declamations of the moment."⁶⁰ According to Kristol one should instead "look at the kinds of political activity the Revolution unleashed,"⁶¹ above all at the state constitutions. (Notice the resemblance to Taney's—"Look at what they did, not at what they said"—interpretation of the Founding.) These constitutions, said Kristol, "were for the most part merely revisions of the pre-existing charters."⁶² The purpose of the American Revolution, according to Kristol—speaking in the spirit and very nearly in the words of Calhoun—"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."⁶³ The late Martin Diamond, agreeing with the late Willmoore Kendall, also insisted that the Declaration of Independence offers "no guidance whatsoever" for the construction of the constitutions, state or federal, that were adopted after 1776.⁶⁴

Recently, Judge Robert Bork has written that, "[o]ur constitutional liberties arose out of historical experience *They do not rest upon any general theory.*"⁶⁵ Compare this with Abraham Lincoln: "Public opinion on any subject always has a 'central idea,' from which all its minor thoughts radiate . . . [t]he 'central idea' in our political public opinion at the beginning was, and until recently has continued to be 'the

60. I. Kristol, *The American Revolution as a Successful Revolution*, in AMERICA'S CONTINUING REVOLUTION 12 (1976).

61. *Id.*

62. *Id.*

63. *Id.*

64. M. Diamond, *The Revolution of Sober Expectation*, in AMERICA'S CONTINUING REVOLUTION 26 (1976). (Emphasis added.) This lecture followed Kristol's at the American Enterprise Institute's Distinguished Lecture series on the Bicentennial of the United States.

65. R. Bork, *Tradition and Morality in Constitutional Law*, a lecture at the American Enterprise Institute (1984), reprinted in VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS (M. Cannon & D. O'Brien ed. 1985) [hereinafter cited as Bork].

equality of men.' ”⁶⁶

Lincoln also characterized that central idea, central not only to political public opinion but to a Constitution based upon such opinion, (since “our government rests in public opinion”) as “*an abstract truth, applicable to all men and all times.*”⁶⁷ Judge Bork, however, denounces all “[a]ttempts to frame a theory that removes from democratic control areas of life the framers intended to leave there . . . , [which attempts] can only succeed if abstractions are regarded as overriding the constitutional text and structure.”⁶⁸ But it was precisely the attention to “constitutional text and structure” praised by Bork, attention divorced from the “abstractions of moral philosophy” by which slavery was condemned, that led Taney to his conclusions in *Dred Scott*. Yet Bork goes on to contrast the American and French Revolutions, declaring that, “the outcome for liberty was much less happy under the regime of ‘the rights of man.’ ”⁶⁹

Since the doctrine of the rights of man (embracing as it did “the abstractions of moral philosophy”) was at least as prominent a feature of the American Revolution as of the French Revolution, one wonders whether Judge Bork has ever read a single document of our Founding. Not only does the Declaration of Independence proclaim the rights of man, but eight of the thirteen revolutionary state constitutions do so. Massachusetts, for example, proclaims that “[a]ll are born free and equal, and have certain natural, essential, and unalienable rights”⁷⁰ These assertions of abstract truths, “applicable to all men and all times,” were—Kristol and Bork to the contrary notwithstanding—the very heart of the revolutionary activity, at the state level no less than at the national level. And no one questioned that it was so before the slavery controversy made such abstractions so very inconvenient, and “history” began to replace natural rights as the ground of political and of constitutional theory. But our genuine history—and not the fictitious history invented by the neo-Calhounites—places the doctrine of the rights of man at the very center of our historical experience.

Consider further the following from our recent and very

66. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 385 (R. Basler ed. 1953).

67. BASLER, *supra* note 28, at 489 (emphasis added).

68. BORK, *supra* note 59, at 170.

69. *Id.*

70. COMMAGER, *supra* note 25, at 107.

distinguished Ambassador to the United Nations, Jeane Kirkpatrick. Mrs. Kirkpatrick, celebrating Independence Day 1982, declared in the pages of NATIONAL REVIEW that

[t]he 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.⁷¹

Irving Kristol, in the bicentennial lecture referred to above, called Tom Paine "an English radical who never really understood America [and who] is especially worth ignoring."⁷² Here is the Neo-Conservative dictum on Tom Paine, whose "Common Sense" was credited by no one less than George Washington for having given the greatest impulse to the movement for independence, and who carried a musket in the Battle of Trenton. Mrs. Kirkpatrick is less slighting of him than Kristol, although it is worth recalling how "marvelous and inspiring" some of Paine's words actually were. Think of what Churchill's We Will Fight on the Beaches speech meant to Great Britain in 1940.⁷³ Think of what it must have meant to the freezing soldiers—and their beleaguered Chief—at Valley Forge to be told that

[t]hese are the times that try men's souls. The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of their country; but he that stands it *now*, deserves the love and thanks of man and woman. Tyranny like hell is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph.⁷⁴

This is the St. Crispin's Day speech of American history, worthy of Shakespeare himself, and it ill beseems any American—any lover of human freedom—to slight its author. The truth, however, is that it is Jefferson who is being depreciated in the slighting of Paine. But he is too large a figure to be attacked directly. It is not the *Rights of Man*, but the Declaration of

71. J. Kirkpatrick, *Why Not Abolish Ignorance (While we're at it)*, NAT'L REV., July 9, 1982, at 829 [hereinafter *Abolish Ignorance*].

72. Kristol, *The Revolution of Sober Expectation*, in AMERICAN CONTINUING REVOLUTION 12 (1976).

73. W. CHURCHILL, BLOOD, SWEAT AND TEARS, 289, 297 (1941).

74. 2 THE LIFE WORKS OF THOMAS PAINE 283 (V. Van der Weyde ed. 1925).

Independence that is the indirect object of their patronizing condescension. While we are anxious to share with Mrs. Kirkpatrick her admiration for the Constitution's "careful web of restraints, of permission, of interests, of tradition," we would like to know her explanation of the very prominent place of human slavery in that web. Certainly article IV, section 2, paragraph 3, weaves a very careful "web of restraints" around those unfortunate human beings who were attempting to escape from bondage, and it gave careful recognition (as did other sections of the Constitution) to the interests of slaveholders (but not of the slaves). If, as Kristol says, it was true that there was an actual American way of life that no one then thought challenging, then no one thought of challenging American slavery, certainly a most conspicuous feature of that way of life in 1776 and 1787. 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 Chief Justice Taney did in *Dred Scott*.

One must ask Mrs. Kirkpatrick, however, how she thinks that her black fellow-citizens can discover their rights as Americans "rooted" in their "concrete rights as Englishmen."⁷⁵ Is she thinking of the concrete rights of slaves and free Negroes in colonial America? Or is she thinking of the rights embodied in the African slave trade before Independence, a trade protected by the British Crown over the protests of colonial Americans? The Declaration of Independence speaks of the rights with which we are "endowed by our Creator."⁷⁶ Does Mrs. Kirkpatrick believe that God is an Englishman? We yield to no one in praise of "the Constitution . . . [as] explained in *The Federalist Papers*."⁷⁷ But I would like to know how Mrs. Kirkpatrick explains the provisions of the original Constitution cited by Taney to justify his view that the Constitution permits no distinction between slave property and any other form of property. I would like to know how she distinguishes between the protection of slave property as an end of the Constitution from any of the other ends of the Constitution. Are not those "slogans" of which Mrs. Kirkpatrick speaks so lightly (or the "grandiloquent declamations" dismissed by Irving Kristol) precisely the reason why Madison and Jefferson turned

75. *Abolish Ignorance*, *supra* note 71, at 829.

76. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

77. *Abolish Ignorance*, *supra* note 71, at 829.

first to the Declaration of Independence—and not to the Constitution itself (or the *Federalist*)—to instruct the young law students at the University of Virginia in the principles of the Constitution? "A word fitly spoken is like apples of gold in pictures of silver."⁷⁸

According to Abraham Lincoln

[t]he assertion of that *principle* ["that all men are created equal"] . . . was *the word*, "*fitly spoken*" which has proved an "apple of gold" to us. The *Union*, and the *Constitution*, are the *picture of silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn* and *preserve* it. The *picture* was made *for* the apple—not the apple for the picture.⁷⁹

That "abstract truth applicable to all men and all times,"⁸⁰ so scorned by John C. Calhoun and his legion of present-day conservative epigones, was, according to Lincoln, what gave life and meaning to the Constitution. It is what enables us to distinguish, in the Constitution of 1787, the principles of that Constitution from its compromises. It is what enables us to say that the securities given to slavery in the Constitution represent concessions for the sake of the stronger Union and are ultimately in the interest of the antislavery cause itself. But Lincoln is saying, albeit in poetic language, nothing that was not implied in Madison's own judgment that the first place to look for the principles of the Constitution was the Declaration of Independence. How is it that Mrs. Kirkpatrick, so eloquent in her praise of the *Federalist*, disregards the judgment of one of its major authors in this most crucial of all respects?

In all the great documents of the American Revolution, the equality of the natural rights of mankind is the fundamental doctrine to which appeal is made. Historical experience was consulted by our revolutionary Fathers. But it did not, indeed it could not, provide more than partial instruction in an enterprise so novel in the most important respects. Madison on at least one occasion called the Constitution—rather infelicitously—nondescript.⁸¹ He did so, he said, because there was no name yet for a form of government so unprecedented. What was unprecedented, however, was not only the system of

78. *Proverbs* 2:11.

79. BASLER, *supra* note 28, at 513. [Lincoln's punctuation.]

80. BASLER, *supra* note 28, at 374-76.

81. 9 THE WRITINGS OF JAMES MADISON 511 (G. Hunt ed. 1910).

dual federalism of a government "partly national, partly federal,"⁸² but the attempt, as stated in the *Federalist* Number 1, to establish "good government from reflection and choice."⁸³ This, of course, required that prudence—and hence experience—should be consulted. Experience may instruct us in what is possible in given circumstances. But of itself it does not tell us what is desirable. And what is prudent is what is the more desirable among those alternatives that are possible. Prudence, and history, must be in the service of philosophic truth concerning the just and the unjust, the right and the wrong, the good and the bad. It must be in the service of "words fitly spoken."

The past, merely as past, was no prologue to the future for our Revolutionary forbears. The past, merely a past, showed mankind by and large "depending for their political constitutions on accident and force." The decisive and salutary historical fact governing the formation of American republicanism, according to George Washington in 1783, was that its foundations "were not laid in the gloomy ages of ignorance and superstition, but at an epoch when the rights of mankind were better understood and more clearly defined than at any other period."⁸⁴ The Burkeans among us are constantly praising, as indeed they ought, the "funded wisdom of the past." But for George Washington, it was equally important to distinguish the ignorance and superstition of the past from its wisdom. History furnishes no lessons to those who do not have the criteria, supplied by right reason, to distinguish the good things that have happened from the bad things. During the Revolution, Alexander Hamilton had declared that "[t]he sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power."⁸⁵

Without exception the Fathers held, as the Declaration of Independence asserts, that the only legitimate purpose of government was to secure rights whose origin is antecedent to all charters or human or positive laws. These rights are grounded in "the laws of nature and of nature's God,"⁸⁶ and as such

82. THE FEDERALIST No. 39, at 257 (J. Madison) (J. Cooke, ed. 1982).

83. THE FEDERALIST No. 1, at 3 (A. Hamilton) (J. Cooke ed. 1982).

84. 10 THE WRITINGS OF GEORGE WASHINGTON 265 (W. Ford ed. 1891).

85. 1 THE PAPERS OF ALEXANDER HAMILTON 12 (1961).

86. The Declaration of Independence (U.S. 1776).

belong equally to all members of the human race. These rights may have been recognized in good traditions. But it is not in tradition as such that the ground of such rights is to be found. Thus, Lincoln concluded that "[s]lavery is founded in the selfishness of man's nature—opposition to it in his love of justice. These principles are an eternal antagonism. Repeal the Missouri Compromise—repeal all compromises—repeal the Declaration of Independence—repeal all past history, you still cannot repeal human nature."⁸⁷

It cannot be emphasized too often that mere tradition carried no authority, either to the Founding Fathers or to Abraham Lincoln. The past, merely as past, encompassed "the gloomy ages of ignorance and superstition."⁸⁸ It was in reason and nature that the purposes or ends of government were to be discovered. The ultimate ground of rights is first and foremost a matter of cognition. ("We hold these truths to be self-evident . . .") As such they are not a matter of volition. What belongs to man as man is "unalienable" and, therefore, not subject to deliberation. What makes legitimate civil society a voluntary association is itself rooted in an unchanging human nature. We do not reason together to decide whether we wish ourselves or others to be, or to become, slaves. To be governed by reason rather than will is to be governed by law rather than force. For law in its essence is, as Aristotle said, "reason unaffected by desire."⁸⁹

Let us submit facts to our candid countrymen. In the Letters of the Massachusetts General Court (viz., the Massachusetts Colonial Legislature) to the British Ministry, it is said over and over again, as it was on January 29, 1768:

That it is an essential, unalterable right, in nature, ingrafted into the British Constitution, as a fundamental law, and ever held sacred and irrevocable by the subjects within the realm . . . that what is a man's own is absolutely his own; and that no man hath a right to take it from him without his consent; [and] may not the subjects of this province, with a decent firmness . . . plead and maintain this natural constitutional right?⁹⁰

The substance of these Letters was incorporated into the

87. BASLER, *supra* note 28, at 309.

88. 10 THE WRITINGS OF GEORGE WASHINGTON 265 (W. Ford ed. 1891).

89. ARISTOTLE, POLITICS 92 (E. Barker trans. 1972) (Book III).

90. COMMAGER, *supra* note 25, at 65.

Massachusetts Circular Letter of February 11, 1768, drafted by Sam Adams. Repeating much of the foregoing, it adds “[t]hat the American Subjects may, therefore, *exclusive of any consideration of charter rights*, with a decent firmness, adapted to the character of free men and subjects, assert this natural and constitutional right.”⁹¹

In these assertions by Massachusetts in 1768 we may see encapsulated the whole political theory of the American Revolution—and of the Constitution of 1787 as a fruit of that Revolution. “No taxation without representation.” The product of a man’s labor is his own property. This right of property is understood—as it is in Locke’s *Second Treatise of Civil Government*—to be an extension of his right to life and to liberty. In this there is a categorical condemnation in principle of all slavery as a violation of the laws of nature. For slavery is nothing but the most extreme form of taxation without representation. Property as the fruit of one’s labor is an “unalterable right in nature,” and therefore belongs to all human beings as human beings. With respect to it, therefore, all men must be understood to be created equal. It belongs to subjects of the British crown, not because they are British, but because they are human. This natural right is said to have been “grafted into the British Constitution.”⁹² The right in question is not deserving of respect because it is British. Rather, the British Constitution deserves respect because it recognizes the right. But the origin of the right is not the British Constitution. Its origin is in nature.

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. What these documents assert also contradicts the greatest of all gurus of contemporary American conservatism, Russell Kirk. For more than thirty years he has, with notable success, pursued the path of John C. Calhoun in reading the Declaration of Independence—and its reasoned teaching of equal and universal natural and human rights—out of the American political tradition. A summary of what one finds in his many books is the following from the Introduction to a recent reprint of Albert Jay Nock’s *Mr. Jefferson*:

Nock’s book has very little to say about the Declaration of

91. *Id.* at 66 (emphasis added).

92. Massachusetts Circular letter by Samuel Adams (Feb. 11, 1768).

Independence. That is as it should be, for the Declaration really is not conspicuously American in its ideas or its phrases, and not even characteristically Jeffersonian. As Carl Becker sufficiently explains, the Declaration was meant to persuade the court of France, and the *philosophes* of Paris, that the Americans were sufficiently un-English to deserve military assistance. Jefferson's Declaration is a successful instrument of diplomacy; it is not a work of political philosophy or an instrument of government, and Jefferson himself said little about it after 1776.⁹³

Think of it, the Declaration of Independence "not conspicuously American." But if not the Declaration, what? Not Yankee Doodle, not General Washington, not the Continental Army, not the Minute Men, not Paul Revere, or the Old North Church! For the conservative illuminati who rapturously acclaim this doctrine it would seem that the only things "conspicuously American" are "our rights as Englishmen!" One may wonder whether any greater foolishness has ever been condensed into fewer words anywhere in the world's records of writings on politics. As to Kirk attributing to Carl Becker the opinion that in the Declaration Jefferson was diplomatically fawning upon the French to persuade them that the Americans were un-English, here is what Becker actually wrote:

Democratic impudence could not well go farther than to ask the descendant of Louis XIV to approve a rebellion based upon the theory that "governments derive their just powers from the consent of the governed." If the French government received the Declaration, it did so in spite of its political philosophy because it could not forego the opportunity to take a hand in disrupting the British empire.⁹⁴

To this, one might add that some of the worst excesses of the King of England denounced in the Declaration were among the most ordinary practices of the French monarchy. That the Declaration was welcomed by the *philosophes* for very different reasons than those espoused by the French Court is certainly true. But neither the Court nor the French patrons of the Enlightenment needed to be taught that the Americans were "sufficiently un-English" now that they had expressed their determination to reduce the British empire by the sepa-

93. Kirk, INTRODUCTION TO A. NOCK, MR. JEFFERSON (1983).

94. C. BECKER, THE DECLARATION OF INDEPENDENCE 230 (1942).

ration from it of its most valuable portion—the thirteen colonies.

Russell Kirk would have us believe that the doctrine of the equal natural rights of mankind was introduced into the rhetoric of the American Revolution by the Declaration, and then only to please Frenchmen! Recently, he has written that

The Declaration of Independence, calculated to please Paris and Versailles, had broken with the constitutional argument of the Americans that had been advanced ever since the passage of the Stamp Act. Until 1776, protesting Americans had pleaded that they were entitled to the rights of Englishmen, as expressed in the British constitution, and particularly in the Bill of Rights of 1689. But Jefferson's Declaration of Independence had abandoned this tack—what did Frenchmen care for the real or pretended rights of Englishmen?—and had carried the American cause into the misty debatable land of an abstract liberty, equality, fraternity.⁹⁵

One would think, from the foregoing, that when Paul Revere called out, "[t]he British are coming," he meant that they were coming to rescue us from French philosophy. But whatever it was that Paul Revere meant to do, it is clear that Russell Kirk—like John C. Calhoun before him—means to deliver us from the pernicious and un-American abstractions of the Declaration of Independence! And so we are again reminded of Mrs. Kirkpatrick's belief that, not the rights of nature and of nature's God, but the rights of Englishmen, are the "roots" of the American Revolution. Such is the "Conservative" vision of American history today.

What Russell Kirk asserts about the Declaration of Independence "breaking" with the constitutional arguments that the Americans had hitherto advanced in the quarrel with Great Britain is sheer nonsense. Jefferson and the Congress did not "abandon" any "tack" in abandoning the argument regarding the rights of Englishmen. There was nothing in the least "diplomatic" in their statement of principles, as Becker notes, and what they said had nothing whatever to do with conciliating Frenchmen. They said what they believed in the most unequivocal and uncompromising language the world has ever witnessed. We Americans have as much right to be proud today of the fearlessness with which they asserted their convic-

95. Kirk, *Burke and the United States Constitution*, THE INTERCOLLEGIATE REV., Winter 1985-86, at 6.

tions as of the courage with which they fought to uphold them. They had indeed hitherto used arguments drawn from the real or alleged principles of the British or English Constitution—but always as reflections or embodiments of the more fundamental laws of nature. Now, however, they were no longer Englishmen! Hence, there could no longer be any legal or political reason for grounding their actions—certainly not the action by which they separated themselves from England—in the laws of England. How in the world could Russell Kirk have expected them to appeal to their rights under the laws of England at the precise moment that they were telling the world that they were no longer Englishmen?

That the second paragraph of the Declaration embodies a concise but complete epitome of political philosophy has not, so far as I know, been denied by anyone except Russell Kirk. This is not to say that many—most notably the disciples of Calhoun and Marx—have not regarded it as false. Carl Becker, as we have seen, refers to the Declaration as a work of political philosophy as a matter of course. And we know that both Madison and Jefferson regarded it as an instrument of government when they called it “the fundamental act of union of these states.”⁹⁶ That Jefferson, according to Kirk, “said little about” the Declaration after 1776 is contradicted by the fact that he together with Madison, agreed to require the faculty and students at the law school of the University of Virginia to look to it as the primary source of guidance in the principles of the constitutions of both Virginia and the United States. Nor is it consistent with the inscription Jefferson composed for his tombstone, an inscription naming the three things by which he wished most to be remembered. The first of these three things was his authorship of the Declaration of Independence.

As we have seen, and shall see again, the abstract truths of the Declaration, in one form of expression or another, were present from the very beginning of American resistance. What Massachusetts called a “natural and constitutional right” can hardly be considered primarily or inherently British. It is by definition a right of all who share in mankind’s common humanity. With respect to it, therefore, it must be true “that all men are created equal.” The doctrine of the Declaration long antedates the decision for independence and in itself has nothing whatever to do with the exigencies of diplomacy. In

96. 9 THE WRITINGS OF JAMES MADISON 219-22 (G. Hunt ed. 1910).

the Declaration and Resolves of the First Continental Congress, October 14, 1774, we are told "[t]hat the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following Rights."⁹⁷

The ground for the authority of the ensuing rights is seen in their order. First is nature, next the English Constitution, and then the colonial charters. The constitution and the charters reinforce the rights grounded in nature, but only because they themselves incorporate and reflect that ground. Of course, the Americans will appeal to rights grounded in English law as long as they regard themselves as English. Once they cease to be English, however, the ground of their authority, the right to be bound by laws of their own making, is solely in virtue of those rights with which they have been "endowed by their Creator," their rights under "the laws of nature and of nature's God."

Long before the decision for independence, it was clear that the ground of the American argument was not the English Constitution but "the immutable laws of nature."⁹⁸ As long as the argument was addressed to the Crown, or to fellow subjects of the Crown, the appeal to English law strengthened their side of the political argument. But intrinsically, as distinct from politically, natural law always took precedence in the order of importance. The primacy of rights and of right, understood in the light of the laws of nature, was the argument of the American Revolution from the beginning. And this argument must be understood to constitute the "original intent" governing American constitutionalism, as it took shape in the Convention and in the ratification process—and in the adoption of the Bill of Rights that followed.

Irving Kristol, as we have noted, asks us to pay special attention to the kinds of activity unleashed by the Revolution, and in particular the kind found in the state constitutions.⁹⁹ But characteristically he shows little familiarity with the documents to which he invites our attention. In saying that the constitutions were for the most part "revisions of pre-existing charters," he speaks truthfully. Like Calhoun (and Kirk,

97. COMMAGER, *supra* note 25, at 83.

98. *Id.*

99. I. Kristol, *The American Revolution as a Successful Revolution*, in AMERICA'S CONTINUING REVOLUTION 12 (1976).

Kirkpatrick, and Bork), however, he ignores the relationship asserted by the colonial Americans between those charters and "the immutable laws of nature."¹⁰⁰ Even more conspicuous is the fact, to which we have already adverted, that when the newly independent states drew up their constitutions they—or at least eight of the thirteen—prefaced their constitutions with elaborate and ringing statements of the natural law doctrine upon which their positive law was founded. I have already quoted from the Massachusetts Bill of Rights of 1780, but I give here the parallel beginning by Virginia, which actually preceded the Declaration of Independence by three weeks: "A Declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government."¹⁰¹ The first paragraph in this declaration is as follows:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.¹⁰²

What is distinctive—and indeed unprecedented, but also characteristic—in Virginia's Revolutionary State constitution is the unwillingness to mistake or confound the ground of authority in reason and nature with that of prescription, custom, or tradition. For what is here called the "basis and foundation of government" for themselves and their posterity is, *ex vi termini*, the permanent or unchanging "basis and foundation." It is not such a basis and foundation as is revealed in Justice Brennan's emergent (or "arrived") evolutionary conscience, nor is it one discovered in colonial charters, or any authoritative written record as such. Historical experience means experience in time, but what is permanent is recognized as an intelligible necessity—or as grounded in an intelligible necessity—outside of time. It is this understanding of what is due to man as man, in and by human government, because of what man is, that is the basis for the "original intentions" properly so called of the Founding Fathers, whether in Vir-

100. COMMAGER, *supra* note 25, at 83.

101. COMMAGER, *supra* note 25, at 103.

102. *Id.*

ginia, in Massachusetts, or anywhere else in Revolutionary America.

In asking what were the original intentions of the Founding Fathers, we are asking what principles of moral and political philosophy guided them. We are not asking their personal judgments upon contingent matters. We are asking what were those principles—those truths “applicable to all men and all times”—to which they subscribed. The crisis of American constitutionalism—the crisis of the West—lies precisely in the denial that there are any such principles or truths. It is no less a crisis in the heart of American conservatism than of American liberalism.

We return again to Irving Kristol's assertion that the aim of the American Revolution was to harmonize our political institutions with an “actual ‘American way of life’ which no one even dreamed of challenging.”¹⁰³ Yet the American Revolution unleashed a movement of reform perhaps unprecedented in human history. This movement proceeded on a broad front. Once the connection with the British crown was dissolved there was no motive for Americans to pretend that their institutions were not, or ought not to be, as republican as possible. Here again, Conservative writers have misled us. The late Martin Diamond, in the lecture which followed Kristol's in the American Enterprise Institute's Bicentennial Series, wrote that “the Declaration holds George III ‘unfit to be the ruler of a free people,’ not because he was a king, but because he was a tyrannical king.”¹⁰⁴ Diamond would have us believe the Declaration is “neutral” as between the different forms of government, and implies no brief against monarchy or oligarchy or any other form of government, as such. But this is to ignore the Whig theory by which Jefferson and the Congress had interpreted the English Constitution and its monarchy. Here is how Jefferson addressed the British monarch in *A Summary View of the Rights of British America*, a year before independence:

[T]his his Majesty will think we have reason to expect when he reflects that he is no more than chief officer of the people, appointed by the laws, and circumscribed with defi-

103. I. Kristol, *The American Revolution as a Successful Revolution*, in AMERICA'S CONTINUING REVOLUTION 13 (1976).

104. M. Diamond, *The Revolution of Sober Expectation*, in AMERICA'S CONTINUING REVOLUTION 29 (1976).

nite powers, to assist in working the great machine of government, erected for their use, and, consequently, subject to their superintendance.¹⁰⁵

Clearly, Jefferson's characterization of the British monarchy is that of a republican chief executive. The eighteenth century Whig theory of the British constitution—the theory formed under the influence of John Locke by those who made the Glorious Revolution—was that it was a republic under the forms of a monarchy (just as today we would say that it is a democracy under the forms of a monarchy). The American Whigs were willing to pretend that the monarchical and aristocratic or oligarchical 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. Once Americans saw their liberties as no longer connected in any way with their "rights as Englishmen," but dependent solely upon their rights as men under the laws of nature, an enormous energy for change and reform was released. The direction that change was to take was toward far greater civil and religious liberty and far greater popular or democratic republicanism than the world had ever seen before. Let us remember that by article IV of the Constitution, "[t]he United States shall guarantee to every State in this Union a republican form of government"¹⁰⁶ Given the many anomalies of the Constitution—and none greater, of course, than slavery—it is good to have Madison's and Jefferson's word that the principles of the Constitution and the principles of republicanism (nowhere defined in the Constitution itself) are those of the Declaration of Independence. From this we are enabled to say that the principles of the Constitution condemn chattel slavery, even as its compromises offer it a temporary security.

To repeat, after the American people had made good their independence, there was no reason for them to continue any of the aristocratic, or oligarchic, or monarchic features of the constitution of the mother country. They proceeded to lay the ax to both, as well as to the connection between church and state

105. 1 THE WRITINGS OF THOMAS JEFFERSON 429 (P. Ford 1892-99).

106. U.S. CONST., art. IV.

that had arisen in English history because the King had been head of the church. The constitutional freedom of Englishmen in England—and in America so long as Americans were English—was seen to subsist in that connection between crown and church that was formed by Henry VIII's separation from Rome. Henry's assumption of the headship of the Church of England in the sixteenth century was, among other things, a means of preventing the Pope from placing a Spanish (or Hapsburg, other Catholic or foreign) prince on the English throne. Henry's confiscation and re-distribution of the lands of the monasteries (and other church lands) following the break with Rome, formed a new propertied class in England, whose title to their property was no better than the King's title as head of the English Church. The union of church and state in England was, therefore, an instrument of national independence and national freedom.

Once America separated from England, the accidents of Reformation history no longer carried the practical meaning in America in regard to civil and religious liberty that they still possessed in England. When Hamilton in the first number of the *Federalist* speaks of the desirability of "establishing good government from reflection and choice,"¹⁰⁷ rather than "forever depending for our political constitutions on accident and force," he is undoubtedly thinking of some of the accidental features of the British Constitution, which, although happy in their effects in Great Britain, would have been utterly irrational in an independent America. The separation of church and state, the election of both houses of bicameral legislatures and of chief magistrates, state or federal, the steady broadening of the franchise, the ending of primogeniture and entail (the legal foundation of hereditary aristocracy) were all consequences of emancipating the principles of republican government from any deference to, or dependence upon, the constitution of England. All these are among the reasons Jefferson and Madison believed that the principles of the Declaration of Independence ought to be the norma docendi of the faculty, and as such, taught to the law students at the University of Virginia as the principles of the constitutions of Virginia and of the United States.

The assertion that the American Revolution was intended to bring our institutions into a more perfect correspondence

107. THE FEDERALIST No. 1, at 3 (A. Hamilton) (J. Cooke ed. 1982).

with an actual American way of life "which no one even dreamed of challenging" may be regarded as true—if somewhat hyperbolic—but in a sense of which Irving Kristol himself never dreamed. There was an American way of life that was actually in the mind of the American people. That way of life was expressed in the Declaration of Independence, which Jefferson himself in 1825 declared to be "an expression of the American mind."¹⁰⁸ It embodied that "standard maxim of a free people" which should, as Lincoln said, steadily and continuously augment "the happiness and value of life to all people of all colors everywhere."¹⁰⁹ That the Great Seal of the United States should proclaim the *novus ordo saeculorum* would be sufficient evidence to everyone except the pseudo-Burkeans of American Conservatism (who list Burke and Calhoun but not Lincoln among the "Defenders of the Constitution") that the Founding of the United States looked forward, not backwards.

We find ourselves [Lincoln wrote in 1838] under the government of a system of political institutions, conducting more essentially to the ends of civil and religious liberty, than any of which the history of former times tells us.¹¹⁰

Since nothing in "the history of former times" can serve as a model for our own "system of political institutions," ours is not a way of life defined by tradition or prescription. Tradition and prescription might be incorporated into the new regime: experience was to be consulted, but there was to be no identification of the old with the good, except as the old might justify itself at the bar of reason and nature. One cannot too often repeat Washington's words, that the foundations of American government were "not laid in the gloomy ages of ignorance and superstition . . ."¹¹¹ The American Revolution retained the old Puritan dream of a City on a Hill. But this City—now emphatically republican or democratic—was no longer defined by the exclusive, revealed theology of the Puritans, but by the inclusive, philanthropic, tolerant, but not less moral theology of:

a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; acknowledging and

108. 16 THE WRITINGS OF THOMAS JEFFERSON 118 (A. Bergh ed. 1907).

109. BASLER, *supra* note 28, at 361.

110. BASLER, *supra* note 28, at 76.

111. See *supra* note 74 and accompanying text.

adoring an overruling Providence, which by all its dispensations proves that it delights in the happiness of man here and his greater happiness hereafter. . . .¹¹²

In one respect, the reforming impulse of the Revolution fell short—and that was with respect to Negro slavery. As to the American way of life that no one dreamed of challenging—surely one of the most unfortunate historical characterizations ever ventured—consider the following from *The Revolutionary Records of the State of Georgia*.¹¹³ At Darien, on the southern border of settled Georgia, a group of citizens met in January of 1775 to align themselves with the rebellion against Great Britain. These Georgians, including slave owners, promulgated a set of resolutions specifying both British evils and American goals. This was the fifth resolution:

To show the world that we are not influenced by any contracted or interested motives, but a general philanthropy for all mankind of whatever climate, language, or complexion, we hereby declare our disapprobation and abhorrence of the unnatural practice of slavery in America (however the uncultivated state of our country or other specious argument may plead for it), as a practice founded in injustice and cruelty and highly dangerous to our liberties (as well as lives), debasing part of our fellow creatures below men, and corrupting the virtues and morals of the rest, and is laying the basis of the liberty we contend for (and which we pray the Almighty to continue to the latest posterity) upon a very wrong foundation. We, therefore, resolve at all times to use our utmost endeavors for the manumission of slaves in this Colony, for the most safe and equitable footing for the masters and themselves.¹¹⁴

This resolution is remarkable for saying nearly everything that Jefferson's famous diatribe against slavery in the *Notes on Virginia* says.¹¹⁵ But it is all the more remarkable for saying it nearly eight years before the *Notes on Virginia*. Indeed, it is some three months before Lexington and Concord and eighteen months before independence. Moreover, it was made by anonymous citizens, not by leaders of the Revolution or (as Russell Kirk would have us think) by Francophile intellectu-

112. COMMAGER, *supra* note 25, at 182.

113. REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA (1906).

114. *Id.*

115. 9 THE WRITINGS OF THOMAS JEFFERSON 276 (P. Ford ed. 1892-99).

als. And the southern border of Georgia was very far from the Quakers of Philadelphia or the radicals of Boston. Here is conclusive evidence of the popular roots of the belief in human equality, conclusive proof that Taney could not have been more wrong than when he said that, in the Revolutionary period, it was a "fixed and universal opinion . . . which no one thought of disputing or supposed open to dispute"¹¹⁶ [that black men were] beings of an inferior order . . . and so far inferior that they had no rights which the white man was bound to respect . . . and that the negro might justly and lawfully be reduced to slavery for his benefit."¹¹⁷

I do not recollect a single piece of documentary evidence to support Taney's contention, and all the evidence I have seen from this period is fully consistent with the Georgia resolution. The "prevailing" (not "fixed and universal") opinion of the Revolutionary and Founding generation was expressed by Alexander Stephens, Vice President of the Confederacy, in his famous "Cornerstone Speech", delivered in Savannah, Georgia, in April of 1861, before the firing on Fort Sumpter:

The prevailing ideas entertained by [Jefferson] and most of the leading statesmen at the time of the formation of the old Constitution, were that the enslavement of the African was in violation of the laws of nature: that it was wrong in principle, socially, morally, and politically. It was an evil they knew not well how to deal with, but the general opinion of that day was, that somehow or other, in the order of Providence, the institution would be evanescent and pass away.¹¹⁸

Here we have powerful witness against Taney (and against Kirk, Kirkpatrick, Bork, et al.) and in favor of Lincoln's account of political public opinion at the time of the Founding. It is also of decisive importance with respect to the "original intentions" of those who framed and those who ratified "the old Constitution." It is authoritative, in part, because Stephens speaks as a disciple of Calhoun's doctrine of state sovereignty. But Stephens is more reliable than Calhoun himself on the intention of the Framers of the Constitution of 1787, because he no longer speaks as a citizen of the Union engaged in controversy over the interpretation of the "old Constitution." Cal-

116. *Dred Scott*, 60 U.S. at 407.

117. *Id.*

118. THE POLITICAL HISTORY OF THE GREAT REBELLION 103 (E. McPherson ed. 1865).

houn had perversely denied the authority of the Founding generation's conviction concerning the natural rights of mankind for the interpretation of the Constitution, because he meant to have his own opinions (against natural equality, and in favor of the "positive good" theory of slavery) substituted as the genuine "original intent."

In his *Discourse on the Constitution and Government of the United States*, Calhoun had systematically argued for the superiority of his own understanding.¹¹⁹ He meant to have it replace that of the Founding Fathers—as it has largely succeeded in doing in the minds of American Conservatives. His followers (after his death in 1850) believed that that effort had come to naught with the election of Abraham Lincoln. But Calhoun's constitutionalism had triumphed nevertheless in the framing of a new Constitution—that of the Confederate States of America. But the Union victory in the Civil War canceled that triumph.

Calhoun's heirs have, ever since, returned to the original Calhounian project, of restoring his anti-anti-slavery view of the Founding, and of the "original intent" of the Framers. Let us remember that Stephens in the "Cornerstone Speech" is speaking as Vice President of the Confederate States of America at the high tide of Confederate optimism, when it was not only hoped, but believed, that the separation of the states would be both peaceful and permanent. That is to say, he spoke before the American people and the world had come to know what difference it made whether it was James Buchanan or Abraham Lincoln, who as President of the United States, declared secession to be unlawful and the Union unbroken.

After the Civil War was over and Stephens came to write his classic *Constitutional View of the Late War Between the States*, he pretended that slavery was not the real cause of the conflict. The cause of the South, he then held, was its defense of state rights, against the tyranny of the majority.¹²⁰ However, it cannot be too often repeated that the defense of state rights and the defense of slavery became one and the same when Calhoun divorced the idea of sovereignty from any connection with the natural rights of individual human beings. In his "Cornerstone Speech," Stephens was, as we have seen,

119. J. CALHOUN, *THE WORKS OF JOHN C. CALHOUN* 15 (K. Cralle ed. 1851).

120. A. STEPHENS, *CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES* (1868-72).

entirely correct in his characterization of the thought of those who framed and those who ratified "the old Constitution." And in 1861 he was candid in contrasting that thought with the thought of the founders of the new Confederacy.¹²¹ In the decisive respect, said Stephens, the ideas of the "old" Fathers

were fundamentally wrong. They rested upon the assumption of the equality of the races. This was an error Our new government is founded upon exactly the opposite idea; its foundations are laid, its cornerstone rests upon the great truth that the negro is not the equal of the white man. That slavery—the subordination to the superior race, is his natural and normal condition. This our new Government is the first in the history of the world, based upon this great physical and moral truth. This truth has been slow in the process of its development, like all other truths in the various departments of science.¹²²

Stephens was not a pure legal positivist (like Chief Justice Rehnquist). He did not reject the idea of nature—or the Creator—as the origin and source of political rights. But he thought that the progress of science placed both nature and the Creator in a newer and better light. In so thinking, he also showed that the Confederacy—certainly in his mind—was the very antithesis of a traditional society. On the contrary, in breaking with "the old Constitution" in the name of science it was more radically modern than any other. It is no accident that this speech was delivered two years after the publication of Darwin's *Origin of Species*:

The architect, in the construction of buildings, lays the foundation with proper materials . . . the substratum of our society is made of the material fitted by nature for it, and by experience we know that it is best, not only for the superior, but for the inferior race that it should be so. It is indeed in conformity with the ordinance of the Creator . . . [that] the great objects of humanity are best attained when conformed to His laws and decrees, in the formation of government, as well as in all things else. Our Confederacy is founded upon principles in strict conformity with these laws. This stone which was 'first rejected by the first builders is become' 'the chief stone of the corner' in our new edifice.¹²³

121. THE POLITICAL HISTORY OF THE GREAT REBELLION 103 (E. McPherson ed. 1865).

122. *Id.*

123. *Id.* at 104.

Let me clarify what Stephens just said. The “stone . . . rejected by the first builders” is the “great truth that the negro is not the equal of the white man.” “Scientific racism” may be said to have been in its infancy in 1861, but we now know well what it is when it is fully grown.

The idea of evolution as a feature of political—and not only of biological—thought, in one manifestation or another, had been looming every more prominently in the “climate of opinion” of the nineteenth century. It undoubtedly received its greatest impulse from Rousseau’s 1754 *Discourse on the Origin and the Foundations of Inequality Among Men*. But it was in the course of the nineteenth century that it was transformed from “philosophic” to “scientific” status. That is to say, it was thus transformed at a time when science was achieving status as the highest authority in human affairs, while philosophy was being relegated into a minor academic discipline. Stephens compares the discovery of the inequality of the races to Harvey’s discovery of the circulation of the blood, as well as to the discoveries of Galileo and Adam Smith. Here we see, as noted, the early version of that “scientific racism” that came to its fullest flower in Houston Stewart Chamberlain—and Adolph Hitler. But we must not fail to notice as well the parallel of Stephens’ thought—no less than that of Calhoun—to that of Karl Marx. Marx also rejected eighteenth century natural rights teaching on the ground that it too had been superseded by later scientific discoveries, most notably his own. For Marx, the primacy of classes paralleled that of races. Whether as the struggle of races (or nations) or as the struggle of classes, neo-evolutionary social Darwinism became the predominant form of late nineteenth century political thought. The crucial fact about Calhoun, Marx, and the neo-Darwinian racists is their denial of individual rights according to nature, and their assertion of the primacy of society, whether as race, class, nation, or as “concurrent” social grouping.

In my remarks above on Justice Brennan,¹²⁴ I observed that it was “evolution” operating through the judge’s conscience which defined the genuine constitution, even if that constitution differed from the explicit and unambiguous words of the unamended written document. Contemporary liberalism—as represented by Justice Brennan, rejects the natural rights teaching of the Founding for the same underlying rea-

124. See *supra* text accompanying notes 17-22.

son that it was rejected by Calhoun and Stephens, viz., because it has been superseded by the progress of "science." Jefferson and Madison, the authors of the Declaration of Independence and of the tenth and fifty first *Federalist*¹²⁵ subscribed to a conception of nature which modern liberals believe to have been superseded by the great discoveries of Marx, Darwin, and Freud. The modern liberal believes with his conservative brother that society is in every fundamental respect antecedent to the individual. He believes, therefore, that there can be no individual "rights" which limit the scope or action of government, because the "individual" whose rights are to be vindicated, only exists in a hypothetical future, in a society produced by their "reforming action." Modern liberalism and modern conservatism thus viewed stand upon common ground. They are mirror images of each other. They differ only as to where Right and Left are located on the images.

125. THE FEDERALIST No. 10, at 56 (J. Madison) (J. Cooke ed. 1982).

APPENDIX A

Attorney General Meese, the Declaration,
and the Constitution

Attorney General Meese's speech at Dickinson College, Carlisle, Pennsylvania, on September 17, 1985—Constitution Day—was his "first address relating to the Bicentennial of our Constitution."¹²⁶ In this speech, the Attorney General asserted unequivocally that the principles of the Declaration of Independence are the principles of the Constitution. Since this is, as we have seen, what Jefferson and Madison said,¹²⁷ what Lincoln believed,¹²⁸ and what I am convinced is the truth of the matter, I wish this speech had been the occasion for greater rejoicing. Unfortunately, the Attorney General's great and true assertion about the relationship of the Declaration of Independence to the Constitution was made in a desultory and confused manner. It was made without any apparent awareness that it was controversial: Indeed, that it is as controversial today as at any time in our past including that of the Civil War generation. He seemed oblivious of that rejection of the Declaration so characteristic of conservative jurisprudence, which I have so amply documented. Indeed, although Mr. Meese is often referred to these days as the keeper of the conservative flame in the flickering Reagan "revolution," I am not aware of a single instance in which Mr. Meese has persuaded anyone, in or out of the Department of Justice, of the truth of his contention concerning the relationship between the Declaration and the Constitution. I do not know of a single one of Mr. Meese's judicial nominees who supports this view. Most conspicuous is its absolute rejection—in the name of radical positivism and relativism—by the new Chief Justice Rehnquist. (Justice Rehnquist's opinions on this matter I have subjected to critical examination in appendix C.)

Mr. Meese writes that "[t]he Civil War . . . was nothing less than a war between brothers for the very soul of the American Constitution—the principle of human equality . . . we have endured precisely because through that bitter conflict

126. E. Meese, Speech at Dickinson College (Sept. 17, 1985) [hereinafter cited as Meese].

127. See *supra* text and accompanying note 33.

128. *Id.*

our politics were forced to conform to our most ennobling principles."¹²⁹ The "very soul of the American Constitution" and "our most ennobling principles" are contained—according to Mr. Meese—in that paragraph of the Declaration of Independence beginning "[w]e hold these truths to be self-evident" Commenting on it, he observes that the rights with which men are said to be endowed by their Creator are "rights that existed *in nature* before governments and laws were ever formed. As the physical world is governed by natural laws such as gravity, so the political world is governed by other natural laws in the form of natural rights."¹³⁰ But we have here a radical confusion between the concept of natural law as governing the physical, and as governing the political (or moral), world. Gravity, as a law of the physical world, merely states an invariant relationship between matter and motion. Matter "obeys" the law of gravity because it cannot do otherwise. Indeed, we have here two different, and in certain respects opposite, conceptions both of nature and of reason, although Mr. Meese appears to be unconscious of that difference.

In an article published in *Imprimis* entitled "The Moral Foundations of Republican Government,"¹³¹ an article, I observe, that repeats textually much of the speech at Dickinson College, Mr. Meese injects this added gloss on his view of the Founding Fathers:

[W]e first need to remember that our Founders lived in a time of nearly unparalleled intellectual excitement. They were the true children of the Enlightenment. They sought to bring the new found faith in human reason to bear on practical politics. Hobbes and Locke, Harrington and Machiavelli, Smith and Montesquieu—these were the teachers of our Founders. These were the authors of celebrated works that had called into question long-prevailing views of human nature and thus of politics. Our nation was created in the light cast by these towering figures.¹³²

This seemingly academic assertion raises disturbing questions. Leaving aside the other authors for the moment, in what sense can it be said that Machiavelli was one of the teachers of the Founders? Leo Strauss has written that "the United States of

129. Meese, *supra* note 126.

130. *Id.*

131. Meese, *The Moral Foundations of Republican Government*, *IMPRIMIS*, Sept. 1986 (Hillsdale College, Hillsdale, Michigan) [hereinafter *The Moral Foundations*].

132. *Id.*

America may be said to be the only country in the world which was founded in explicit opposition to Machiavellian principles."¹³³ To which he has added that "contemporary tyranny has its roots in Machiavelli's thought, in the Machiavellian principle that the good end justifies any means."¹³⁴ When Mr. Meese speaks of a "new found faith in human reason," what is implied, whether he knows it or not, is the faith in what reason can accomplish when it is divorced from moral restraint. It is curious that Mr. Meese mentions the names only of modern philosophers as "the teachers of our Founders." Surely he must have known that Jefferson, when writing to Henry Lee (May 8, 1825) of the sources of the Declaration of Independence, mentioned "the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc." By writing as he does of a "new found faith in human reason,"¹³⁵ Mr. Meese implies the rejection of that old faith in human reason represented transcendently by Aristotle and Cicero, a faith in human reason in which reason's concern for means is never divorced from reason's concern with ends. The typically modern view, on the other hand, implies that reason has nothing whatever to do with ends, because ends—in the sense of good and bad, just and unjust, right and wrong are themselves essentially unknowable.

In the case of Hobbes, for example, the only ends recognized as having any authority over reason are those that are the objects of the strongest passions. It was Hobbes, after all, who declared that tyranny was merely "kingship disliked."¹³⁶ One can hardly imagine language that more directly contradicts the central thesis of the Declaration of Independence, a document which itself continues a very old tradition that justifies tyrannicide.

In Aristotle and Cicero, however, reason is inherent in nature itself, and nature is understood to be a source of norms of human conduct. The specifically modern view of nature is one of mindless matter and energy with no end or purpose discernible by reason. Mr. Meese, by silently dropping Aristotle and Cicero from Jefferson's enumeration, unknowingly gives credit to the view that "the laws of nature and of nature's God" referred to in the Declaration have no moral content

133. L. STRAUSS, THOUGHTS ON MACHIAVELLI, at 13-14 (19).

134. *Id.*

135. *The Moral Foundations*, supra note 131.

136. 3 THE ENGLISH WORKS OF THOMAS HOBBS 171 (W. Molesworth ed. 1839-45).

whatever. This view would justify Chief Justice Taney (and Senator Stephen A. Douglas) in maintaining that the proposition of equality meant only that the British in America were equal to the British in Great Britain and had nothing to do with black men or any other human beings! This view agrees also with Justice Rehnquist when he writes that there is no way to "logically demonstrate" that the judgments of any one "conscience" are superior to those of any other.¹³⁷ Above all, a commitment to unalloyed modernity and to Machiavellianism means a commitment to atheism. Walter Berns, for example, who finds Hobbesianism at the core of the Founding, has recently declared that there is a "parade of evidence . . . that Washington, Jefferson, and Madison were opposed to revealed religion and understood it to be incompatible with an attachment to 'Nature's God.'"¹³⁸ But if revealed religion—most especially Christianity—is incompatible with "the rights of the laws of nature," then it is incompatible with a government devoted to securing such rights. Such a government must pursue a policy designed to lessen, if not eliminate, the influence of Christianity (and other revealed religions) in the minds of the citizens of such government. That, according to Berns, was the hidden agenda of "Washington, Jefferson, and Madison."¹³⁹ Does Mr. Meese, who spends his spare time drafting constitutional amendments authorizing school prayer, (prayer, I suppose, directed for the most part to the God of revealed religion, the God of the Bible) really believe such nonsense? Why then does he place Machiavelli, but not Aristotle or Cicero, among the teachers of the Founding Fathers?

The laws of the political world, unlike the laws of gravity, or of "scientific" laws, generally, are laws only because they can be disobeyed. But it is not only the case that political laws can be disobeyed; it is also the case that there is a variety of political laws on the human scene. Not only are there different laws in different places at the same time, and different laws in the same place at different times, but sometimes even what may be called the same law—e.g., the law of the Consti-

137. See *infra* text and accompanying note 201.

138. Berns, Comments to *Christian Politics and the Modern State*, THIS WORLD, Fall 1983, at 97-98. See also Berns, *Judicial Review and the Rights of the Laws of Nature*, 1982 SUP. CT. REV. 49 (thesis that rights and laws of nature, in the American Founding are to be understood solely as derivative from Hobbes).

139. Berns, Comments to *Christian Politics and the Modern State*, THIS WORLD, Fall 1983, at 97-98.

tution of the United States—may be said to differ at different times. For example, the law of the Constitution has both permitted and forbidden human slavery and intoxicating liquors. In the case of intoxicating liquors, it has permitted, forbidden, and then permitted them again. It is an interesting question whether “[w]e the people . . .” have the same inherent authority to repeal the thirteenth, as to repeal the eighteenth, amendment. If the sovereignty of the American people, or of any people, can be rightfully exercised only in the service of the inherent and unalienable rights with which all human beings have been equally endowed by the laws of a moral and rational nature, then there can be no rightful and lawful exercise of sovereignty ultimately inconsistent with such ends.

Human reason investigates, but does not deliberate upon, the physical laws of nature. And although there may be differences of opinion as to what the “laws” governing matter are, it is supposed on all sides that there can be only one such law governing any given phenomenon. But all moral and political questions are—characteristically—matters of dispute. And human beings deliberate in the face of moral and political alternatives. For there is nothing in the moral or political universe that is not, as Aristotle says, “capable of being otherwise.”¹⁴⁰ Men can be free, and men can be slaves. Men can enslave their fellow men or emancipate them. Men can choose death rather than slavery, or slavery rather than death. Which is the better, red than dead, or dead than red? Which laws, or moral injunctions, should be obeyed? Does calling laws or rights natural laws or natural rights make them decisively authoritative? Is not calling laws naturally right merely a rhetorical trick? Certainly, the natural rights doctrine of the Declaration has had few adherents among the main line conservatives who list John C. Calhoun, but not Abraham Lincoln, among the “Defenders of the Constitution.”

Mr. Meese asserts, however, with Jefferson, Madison, and Lincoln, that there exists “a natural standard for judging whether governments are legitimate or not. That standard is whether or not the government rests upon the consent of the governed. Any political powers not derived from the consent of the governed are, by the laws of nature, illegitimate and hence unjust.”¹⁴¹

140. ARISTOTLE, *NICOMACHEAN ETHICS* Book 6, at 114a 30 (W.D. Ross trans. 1942).

141. Meese, *supra* note 126.

Unfortunately, Mr. Meese has not been consistent in his commitment to the ideas of natural rights and natural law expressed in the Declaration of Independence. In a speech delivered to the St. Louis University School of Law, September 12, 1986, Mr. Meese went out of his way to denounce the idea of natural law as a standard for constitutional jurisprudence.¹⁴² The speech as a whole was designed as a eulogy of the late Justice Hugo Black on the occasion of Black's 100th birthday. In it the Attorney General singled out for praise Black's dissent in the *Griswold*¹⁴³ case in which the Court ruled unconstitutional a Connecticut statute that proscribed the use of birth control devices and made it a criminal offense for anyone to give information or instruction on their use.¹⁴⁴ It was in this case that the Court, speaking through the late Justice Douglas, discovered a constitutional "right of privacy" among the "emanations" and "penumbras" of the first, third, fourth, fifth, and ninth amendments. And it was this discovery of a right to privacy in the *Griswold* case that enabled the Court, in *Roe v. Wade*,¹⁴⁵ to further discover that a woman's right to an abortion was within the compass of the right to privacy. One can understand the Attorney General's desire to enlist the authority of Black in his campaign against the legal foundations of *Roe v. Wade*. But how can one account for this "Douglas's opinion in *Griswold* allowing the Court to return to a most constitutionally pernicious doctrine, that of resting constitutional interpretation on the 'mysterious and uncertain' ground of natural law."¹⁴⁶

In the Dickinson College speech, as seen, the Attorney General is unequivocal in asserting that the principles of the Declaration of Independence as principles of natural law are the principles of the Constitution. And, according to the Declaration, the right to life is the first of the rights to be secured by government under "the laws of nature and of nature's God."¹⁴⁷ Mr. Meese, in the Dickinson speech, asserts that there is "a natural standard for judging whether governments are legiti-

142. E. Meese, Speech at St. Louis University School of Law (Sept. 12, 1986).

143. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

144. *Id.* at 480. See also R. ROSSUM & G. TARR, *AMERICAN CONSTITUTIONAL LAW* 712 (1983).

145. 410 U.S. 113 (1973).

146. Meese, *supra* note 126.

147. On the question of the relationship of the right to life, in the Declaration, and the right to life, with respect to *Roe v. Wade*, see Lehrman, *The Right to Life and the Restoration of the American Republic*, *NAT'L REV.* Aug. 29, 1986, at 25.

mate or not."¹⁴⁸ How can there be such a standard for declaring the legitimacy of governments, but not one for declaring whether the acts of government, in certain fundamental respects, are legitimate? If it is true, that the principles of the Declaration are the principles of the Constitution, then we do not look outside the Constitution, but rather within it for the natural law basis of constitutional interpretation. Justice Black's attack on alleged appeals to the natural law, as a pretext for judicial usurpation, is based upon his positivist prejudices against the idea of natural justice—against the central idea of the American Founding and hence of the American Constitution.

The St. Louis speech demonstrates that Mr. Meese's constitutionalism sometimes becomes self-contradictory, if not incoherent, in the presence of his passion against judicial activism. For example, he paraphrases with full approval the following from Black's dissent in *Griswold*:

[T]here is no provision in our Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious, or irrational.¹⁴⁹

Certainly, the Court has no right to set aside statutes as unconstitutional merely because it regards them as unwise, or even as arbitrary. But surely Mr. Meese (and Justice Black after he left the Ku Klux Klan) would regard the Jim Crow laws of many states, from the end of Reconstruction until the 1960's, to be not only unreasonable and arbitrary, but utterly inconsistent with the ends of free government and hence of the Constitution. Mr. Meese himself in his Dickinson speech argues against racially based quotas or preferences as follows: "Counting by race is a form of racism. And racism is never benign, never benevolent. It elevates a perverted notion of equality and denies the original understanding of equality that has guided our political thinking since we began as a nation."¹⁵⁰ When Mr. Meese speaks here of "the original understanding of equality" he must refer to the Declaration of

148. See *supra* note 126.

149. Meese, *supra* note 126 (paraphrasing *Griswold v. Connecticut* 381 U.S. 479, 512 (1965) (dissenting, Black, J.)).

150. Meese, *supra* note 126.

Independence, since the words "equal" or "equality" do not occur in the Constitution of 1787. The word "equal" enters the text of the Constitution only with the fourteenth amendment. The aforesaid "original understanding of equality" must then be that of "the laws of nature and of nature's God." What then, according to Mr. Meese, is the constitutional status of this "original understanding?" Here is Mr. Meese again:

In practice this principle means that there must be a regard for *individual* rights; for by being created equal . . . each person has dignity as an individual . . . This original understanding of liberty and equality is undermined by those who seek to claim group rights and to secure group remedies.

There are constitutional and legal obligations in the United States to enforce the principle of nondiscrimination. The equal protection clause of the 14th Amendment and the various pieces of Civil Rights legislation demand it. This principle is offended by policies that seek to bestow special rewards on the basis of race or gender or any other immutable and morally irrelevant characteristic, just as it is offended by policies that purposely deny opportunities on the basis of race.¹⁵¹

Here Mr. Meese is categorical in asserting that the right not to be discriminated against is an *individual* constitutional right arising from the fact of being "created equal." The Attorney General regards it as a constitutional right—at least since the adoption of the fourteenth amendment—*because it is a natural right*. And the fourteenth amendment is here seen as a measure that brings the Constitution as a whole more in conformity with its original foundation in the natural law. This foundation was flawed by the concessions to slavery arising from "necessity" but not from "principle." If such is the case, however, would not a legislative enactment discriminating on the basis of race, by a state or by the United States, be an unconstitutional violation of that right? Would not individuals have the right to claim remedies for such discrimination in the courts and finally in the Supreme Court? Does not Mr. Meese here assert that the right of individuals not to be discriminated against by race—or any other "morally irrelevant characteristic"—flows from the original natural law intent of the Constitution, embodied finally in the positive law of the Constitution by the fourteenth amendment? Is not Mr. Meese right in

151. *Id.*

asserting the Declaration's understanding of equality as the basis for interpreting the fourteenth amendment in opposition to Justice Brennan's wholly subjective "evolutionary" conception of "human dignity"? But is it not also the responsibility of the courts to protect such rights against infringement by legislatures as well as by the action of the executive branch of government? Hence *in such cases* must not the Supreme Court necessarily "sit as a supervisory agency over the acts of duly constituted legislative bodies and set aside their laws." Of course, it cannot do this if the Justices—as for example Justice Brennan and Justice Rehnquist—do not accept what Mr. Meese says here about the natural law conception of equality as the ground of constitutional jurisprudence.

Mr. Meese is aware of the fact that in 1860 and 1861 eleven states of the Union "deratified" the Constitution by acts of "secession." In so doing they declared themselves to have withdrawn their consent from the government of the Constitution of the Union. The subsequent exercise of the authority of the Union over them was the result, they said, not of consent, but of conquest. But "consent of the governed," Mr. Meese says, "is a political concept that is the reciprocal of the idea of equality. Because all men are created equal, nature does not single out who is to govern and who is to be governed Consent is the means whereby equality is made politically operable."¹⁵² The foregoing statement goes to the root of the meaning of both the Declaration and the Constitution. Mr. Meese here asserts that consent gives rise to the "just powers of government" only as the logical correlate—the "reciprocal"—of natural human equality. In doing so, he is indeed expressing his agreement with Jefferson, Madison, and Lincoln. In doing so, he is also affirming that conception of abstract truth, of reasoning about man and nature, as the very ground and basis of all political rights that we have seen so categorically rejected by the main line of conservative thought. For if consent is the reciprocal of equality, then the consent of the Declaration of Independence is *enlightened* consent, and consent properly so called cannot be granted to anything not inherently consistent with the equality of rights of the consenting individuals. If consent is the reciprocal of equality, then genuine consent implies a fundamental limitation—discernible by reason, and ultimately enforceable by the right of

152. *Id.*

revolution—upon the lawful powers of governments, whether acting by majorities or otherwise. Consent properly so called does not then arise merely from agreement, from consensus, from “chartered rights,” however ancient, or from community sentiment divorced from the reasoned ground of natural law and natural rights. Not tradition, or even the free vote of a free people, can make slavery an institution that can be said to be justified by the “consent of the governed.” By this Mr. Meese rejects Calhoun’s argument of the right of any state, at its pleasure, to secede from the Union. For Calhoun completely divorced the conception of the legal and political equality of the states from any connection with the natural equality of human beings as such. In so doing, he grounded consent entirely in will as distinct from reason. In denying natural equality, he denied that concept of consent as the “reciprocal” of equality affirmed by Mr. Meese. Hence Mr. Meese places himself squarely on the side of Abraham Lincoln, as opposed to that of John C. Calhoun (and Jefferson Davis), with regard to secession as a constitutional right. For there cannot be a constitutional right to carry out a purpose inconsistent with the ends of constitutional government, which is what eleven Southern states attempted to do in 1861.

Hence, Mr. Meese continues, “[t]his theory of government, this philosophy of natural rights¹⁵³ is what made the institution of slavery intolerable. For there is nothing that one can imagine that denies the idea of natural equality as severely, as completely, as slavery.”¹⁵⁴ But if the institution of slavery was “intolerable,” how does Mr. Meese account for its presence within the Constitution whose bicentennial we celebrate this year? Here is what he says: “It is a common view that the Framers of the Constitution made concessions to slavery . . . but that rather common view is, in fact, a common mistake. The Constitution did *not* make fundamental concessions to slavery at the level of principle.”¹⁵⁵ Mr. Meese sustains this opinion by quoting Frederick Douglass, writing in 1863, as follows:

I hold that the federal government was never, in its essence, anything but an anti-slavery government. Abolish slavery tomorrow, and not a sentence or syllable of the Constitution

153. *Id.*

154. *Id.*

155. *Id.*

need be altered. It was purposely so framed as to give no claim, no sanction to the claim, of property in man¹⁵⁶

With all due respect, however, this is mere hyperbole and is not sustained by the text of the Constitution itself. One can speak of the "essence" of the ante-bellum federal government being "anti-slavery" only if one is thinking of the doctrine of universal human equality in the Declaration of Independence as that essence. But the Constitution of 1787 does not expressly repeat that doctrine, and the text is filled with "accidents" that are very difficult to reconcile with such an "essence." Or, to speak more precisely, the doctrine of the Declaration is present in the Constitution only if one links the opening words of the Preamble, "[w]e the people" with the "one people" (who are also "the good people of these colonies") of the Declaration.¹⁵⁷ This, however, the Attorney General fails to do. Failing to do so, he leaves unexplained the actual provisions of the Constitution relating to slavery, above all those provisions cited by Chief Justice Taney in *Dred Scott*.¹⁵⁸

I have already noted the clause that counted three-fifths of a slave for purposes of representation.¹⁵⁹ I must again ask, however, how can three-fifths of a person be counted, when there is no such thing in nature. Is personality a creation of positive law, or does positive law rest upon distinctions existing in nature? We cannot fail to notice that the representation to which the slaves contributed augmented the political power of their masters and was, in fact, opposite to the interest of the slaves themselves. Yet it is "representatives and direct taxes" that are apportioned in article I, section 3. This clause actually augments the representatives of the slave owning districts at the same time that it augments their liability for direct taxes. We must take note of this fact, even if it is true that direct taxes were not levied before the Civil War. The "three-fifths" clause initiates that treatment of the "personality" of the slaves that is followed in the rest of the Constitution, which is, that they are treated simultaneously as subhuman chattels and as human persons. This is notwithstanding the fact that the definition of a chattel as lacking a rational will and that of a person as possessing a rational will are mutually exclusive.

156. *Id.*

157. Declaration of Independence (U.S. 1776).

158. 60 U.S. (19 How.) 393 (1857). See *supra* notes 1-11 and accompanying text.

159. U.S. CONST., art. I, § 2, at 3.

The most powerful evidence of slavery within the Constitution, the most powerful evidence cited by Taney in *Dred Scott*, is however article IV, section 2, paragraph 3:

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.¹⁶⁰

The passage is preceded, in article IV, by the Full Faith and Credit, the Privileges and immunities, and the Criminal Extradition Clauses. All three are modeled with only minor variations upon parallel passages in article IV of the Articles of Confederation. But there is no precedent in the Articles for the Fugitive Slave Clause. This massive addition of both power and responsibility to the new government constitutes *prima facie* evidence of what was meant by a "more perfect Union." On its face, the Fugitive Slave Clause represents a change in the fundamental law of the United States wholly favorable to slavery. Not to recognize it as such, whether by Mr. Meese or by ourselves, would be, as John Locke would say, "foolish as well as dishonest." For not only does it give federal constitutional recognition to the law of chattel slavery within the slave states, but it requires the government of the United States to assist in the enforcement of that law. This made the federal government a partner in the maintenance of the institution of slavery, which it would be disingenuous to deny. But there is worse to come! The final section of article IV of the Constitution is as follows:

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.¹⁶¹

Here we have the greatest single stumbling block to the proposition to which Jefferson, Madison, Lincoln, the Attorney General, and I subscribe: that the principles of the Declaration of Independence are the principles of the Constitution. What is that "republican form of government" guaranteed to each state by the United States? To say that a republican form of govern-

160. U.S. CONST. art. IV, § 2, cl. 3.

161. U.S. CONST. art. IV, § 4.

ment is sufficiently defined as one in which “[n]o title of nobility shall be granted” would be silly and trivial. No people were ever more alive to the differences between mere names and the substance of reality than the Founding Fathers. The forbidding of titles of nobility was a necessary but far from a sufficient condition for republicanism. Jefferson once declared that the republican form of government was the only one not secretly or openly at war with the rights of man. “To secure these rights,” e.g., to life and to liberty, is clearly the function that the form of republican government is to serve. In the light of this function, as Mr. Meese has declared, “the institution of slavery [is] intolerable.” However, by declaring that the United States “shall guarantee” the republican form to every state, the Constitution implies that every state then existing was already republican. It implies thereby not only that there was no “intolerable” conflict between slavery and republicanism, but that there was no conflict at all! And still worse follows. For the same sentence enjoining the guarantee, also enjoins upon the United States the responsibility of protecting each of the states against invasion and “domestic violence.” As a general proposition, one might say that this duty surely was a leading purpose of any “more perfect Union.” But protection against “domestic violence” was also understood in 1787 to apply to any efforts by the slaves towards their own freedom. Taken in conjunction with the Fugitive Slave Clause, it meant that the new government would use all its force to return escaped slaves to captivity, and with that same force suppress any efforts they might make towards freedom in the places of their captivity. It would be committed to doing these things in the very article in which it guarantees “a republican form of government” to every state! This is the hardest of all nuts to crack, if one is to successfully oppose the Calhoun-Taney interpretation. Far more is required of us than the Attorney General’s simple denial that the Constitution of 1787 made any fundamental concessions to slavery at the level of principle.

Before fulfilling that requirement, however, we need to complete the case against ourselves. In the words of Lord Charnwood, the true obligation of impartiality is that one conceal no fact that tells against one’s own view. Article I, section 9 reads in part: “The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one

thousand eight hundred and eight"¹⁶² Mr. Meese, in defending the anti-slavery character of the Constitution of 1787 says that it "made explicit provision for a time in the not-so-distant future when Congress could seek to restrict not only the slave trade but the institution itself."¹⁶³ But article I, section 9 does not prohibit the foreign slave trade. On the contrary, it prohibits the prohibition of that trade by Congress for twenty years. Moreover, it permits, but does not require, the prohibition of that trade after twenty years. But what ground does Mr. Meese have for saying that it seeks to restrict, not only the foreign slave trade, but slavery itself? Some years ago, Walter Berns argued very persuasively that the word "migration" in the foregoing section of the Constitution, in addition to "importation," was intended to give Congress power over the interstate, no less than over the foreign slave trade after twenty years.¹⁶⁴ Yet James Madison scotched that interpretation in the first Congress, and not even Abraham Lincoln ever claimed that the power of Congress to regulate commerce among the several states (whether on the basis of article I, section 8 or of article I, section 9) might be used to interfere with interstate commerce in slaves. Lincoln, implicitly accepting Madison's interpretation, took the guarantee embodied in the Fugitive Slave Clause as a pledge not to use the commerce power as the basis of an attack upon the existing institution of slavery.¹⁶⁵ There is then no justification for the Attorney General's belief that article I, section 9, of the Constitution is evidence of an intention to abolish slavery.

How then shall we defend the anti-slavery character of the Constitution? We return to the Attorney General's misreading of *Dred Scott* in which he abandons the principal ground upon which the honor of the Constitution may truly be defended. "The issue in *Dred Scott*," Mr. Meese writes in the Dickinson speech,

was not whether slavery was right or wrong but only whether Congress has the legitimate power to keep it out of the new territories. Congress and Lincoln and *Dred Scott* said Congress did have that power. The Supreme Court said it did not. By declaring the Missouri Compromise unconstitutional, the Court, in the view of some, made war

162. U.S. CONST. art. I, § 9.

163. Meese, *supra* note 126.

164. Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198 (1968).

165. See generally BASLER, *supra* note 28, at 579-589.

inevitable.¹⁶⁶

The truth is, however, that whether slavery was right or wrong was the *only* important question in *Dred Scott*. In a letter dated December 22, 1860, Lincoln wrote to his old friend Alexander Stephens—soon to become Vice President of the Confederacy—as follows: “You think slavery is right, and ought to be extended; while we think it is wrong, and ought to be restricted. That I suppose is the rub. It certainly is the only substantial difference between us.”¹⁶⁷

What was “the only substantial difference” in the secession crisis was a fortiori “the only substantial difference” in *Dred Scott*. Taney’s opinion in *Dred Scott* turned upon the judgment that those human persons denominated as chattels by the laws of the slave states remained in the legal condition of chattels after entering the Territories. They did so notwithstanding the fact that the Territories, prior to statehood, remained under the jurisdiction of the Congress and hence under the authority of the fifth amendment to the Constitution that provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law”¹⁶⁸ The central question in *Dred Scott* was this: Which took precedence when a slaveowner entered a Territory with his slave, the Negro slave’s human personality under “the laws of nature and of nature’s God,” or his chatteldom under the laws of the slave state whence he came?¹⁶⁹ Taney decided upon the latter, and hence decided that under the fifth amendment the Negro not only remained a slave in a territory, but that his owner was entitled to the full protection of the government of the United States to assure the enjoyment of his right of property in that slave.¹⁷⁰ The only power conferred, namely, on Congress by the Constitution, Taney had written, is the power coupled with the duty of guarding and protecting the owner in his rights.¹⁷¹ From the moment Taney issued this dictum, the deep South regarded any failure of the government of the United States in providing less protection to slave property than to any other kind of property in the Territories to be an invidious discrimination between the different forms of property within the sev-

166. Meese, *supra* note 126.

167. BASLER, *supra* note 28, at 167.

168. U.S. CONST. amend. V.

169. See *generally* 60 U.S. at 393.

170. See *Id.* at 411-12.

171. See *Id.* at 401.

eral states, a discrimination not sanctioned by the Constitution and inconsistent with the legal and political equality of the states within the Union. Taney's opinion led directly to secession and civil war when the deep South insisted (and the upper South later followed their lead) that the government of the United States had a constitutional duty not only to permit the ingress of slavery into the Territories, but that it also had the duty to provide federal police protection of slavery there, if the Territorial government failed to supply that protection.

The first, and in some respects the greatest, of the secession crises provoked by *Dred Scott* was the withdrawal of delegates from the deep South from the Democratic National Convention in Charleston in May of 1860. They withdrew in protest against the refusal of the majority of the Convention to adopt a plank calling for a federal slave code for the Territories. The Convention, under the leadership of Senator Stephen A. Douglas (who would shortly become the Convention's nominee for President) refused, clinging to Douglas's popular sovereignty doctrine under which the protection of property of all kinds in the Territories remained the responsibility of the legislatures of the Territories, not of Congress. But Taney's opinion in *Dred Scott* had undercut Douglas's doctrine of popular sovereignty no less than it had undercut the Republican doctrine of Congressional exclusion. Yet Lincoln, in his debates with Douglas and elsewhere, repeated endlessly that if Taney was right (as Douglas said that he was) in holding that the Negro slave remained a chattel in the Territories, then his owner was entitled to the protection he demanded.¹⁷² There was only one way to resist the consequences that the delegates from the deep South drew from Taney's opinion in *Dred Scott*: That was to deny the truth of the opinion. That opinion was in itself fatal to the idea of constitutional freedom, not because it was held by the Chief Justice of the United States and a majority of the Court, but because the opinion was in itself destructive of constitutional government. In fact, the opinion would have been equally pernicious, if not more pernicious, had it been adopted by majorities in both houses of Congress as a result of the ordinary operation of the political process. We must remember that Hitler came to power by constitutional processes. In short, we must hold that the word "person" in the fifth amendment refers to a human person, a member of

172. BASLER, *supra* note 28, at 321.

the species *homo sapiens*, without any further qualification. In the law of the Constitution the meaning of personality that must be given precedence is that of nature. Personality as such must not be looked upon as a creature of positive law. Positive law must reflect the truths of nature. If not, there is no person who might not become an "unperson" by the same positive law that regarded him as a person. And an "unperson" has no right to life, liberty, or property. (A fractional person, I might add, would have only fractional rights. And as rights are seen, as they increasingly are seen, as group rights, they become by this fact increasingly fractional.) In the ante-bellum Constitution, the positive law of the slave states, in making a natural person into a conventional chattel, reversed the presumption that governed the Constitution as a whole. Under their police power, the states might depart from the normal (natural) understanding of the rights of Negroes, because of circumstances in which it was judged that freedom for the slaves would jeopardize what was believed to be a compelling and an overriding interest in personal security of whites. Slavery, in short, was justified as a necessary evil, a temporary departure from a natural norm. Nothing in such a departure could, however, justify the extension of slavery, the bringing of this evil into places where it did not already exist. The extension of slavery could be justified only on the assumption that it was either a "positive good," or that it was morally neither a good nor evil. In short, one could justify the extension of slavery only by the explicit rejection of the doctrine of natural human equality.

The judgment in *Dred Scott* declaring the Missouri law of 1820 unconstitutional was, however, perfectly reasonable once one conceded that the question of the Negro's personality was purely a matter of positive law. It was reasonable, also, in light of the 1850 legislation providing Territorial government for Utah and New Mexico. Congress declared that the states to be formed from these Territories "shall be received into the Union, with or without slavery, as their constitution(s) may prescribe at the time of their admission."¹⁷³ This was in itself compromise language of utmost vacuity. The crucial question was the status of slavery in the Territories *before* the framing of the constitution with which the Territory would seek admission. The answer to this question was one upon which the

173. COMMAGER, *supra* note 25, at 321.

Congress could not agree. What they agreed upon was language that declared that in any cases involving titles to slaves in Utah or New Mexico, an appeal could be made directly from the supreme court of the Territory to the Supreme Court of the United States. Although *Dred Scott* as a case did not arise in either Utah or New Mexico, Congress by this 1850 provision of law effectively made the territorial question a judicial question to be resolved by the Supreme Court of the United States.

The meaning of the "republican form of government" guaranteed to every state of the Union by the Constitution can be understood only in light of the answer to the question of who or what are the "persons" of which the Constitution speaks. "Persons" are represented by the electoral process, and "persons" have rights which are protected by law. There is hardly space for a comprehensive consideration of this question here.¹⁷⁴ Before the Civil War, however, the most acute form of this question arose in *Dred Scott*. In judging that slavery was unconstitutional in the Territories because it was morally wrong, and because it violated the principles of natural justice in the Declaration of Independence, Abraham Lincoln judged that slavery in the states where it existed lawfully was an evil tolerated by necessity, not something either morally indifferent or positively good. A state might then be republican, even with slavery, so long as it assumed that slavery as such was an evil, and that public policy was premised upon its eventual extinction.¹⁷⁵ Only on such a premise could the Constitution as a whole be regarded as anti-slavery. I think there is ample evidence to document this understanding of the Framers' intent in the Constitution of 1787. Perhaps no evidence is stronger than that provided by Calhoun—in his tendentious rejection of the Declaration and by the testimony of Alexander Stephens in his "Cornerstone Speech" quoted above.¹⁷⁶ This evidence comes into view, only when one understands that the central question in *Dred Scott* had nothing to do with the jurisdiction of Court and Congress, but only with the question of whether slavery was right or wrong under "the laws of nature and of nature's God."

174. On whether the principles of the Declaration of Independence are republican, see H. JAFFA, *HOW TO THINK ABOUT THE AMERICAN REVOLUTION* 118-140 (1978).

175. BASLER, *supra* note 28, at 470.

176. *THE POLITICAL HISTORY OF THE GREAT REBELLION* (E. McPherson ed. 1865).

APPENDIX B

Are These Truths Now, Or Have They Ever
Been, Self-Evident? The Declaration of
Independence and The United States
of America on Their 211th Anniversary

Leszek Kolakowski, Professor at the University of Chicago and Fellow of All Souls College, Oxford, began the 15th annual Jefferson Lecture, in Washington, D.C., in April of 1986 as follows:

Consider what is probably the most famous single sentence ever written in the Western hemisphere: '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'. . . . Immediately, we notice that what seemed self-evident to Thomas Jefferson would appear either patently false or meaningless and superstitious to most great men who keep shaping our political imagination: to Aristotle, Machiavelli, Hobbes, Marx and all his followers, Nietzsche, Weber, and for that matter, to most contemporary political theorists.¹⁷⁷

I would not speak as confidently as Professor Kolakowski does of how those "great men" would have viewed the central proposition of the Declaration (or, for that matter, of the Gettysburg Address), but Thomas Jefferson, in his unsophisticated innocence, said that in the Declaration, he was placing "before mankind the common sense of the subject," and that what he wrote was an "expression of the American mind." He did not, he said, aim at originality of any kind, but sought to give expression to the "harmonizing sentiments of the day, whether expressed in conversations, in letters, in printed essays or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc." Aristotle, I might observe, although long known as "*The Philosopher*," was not a professional philosopher like Professor Kolakowski. And professional philosophers are notoriously incapable of understanding the language of ordinary human beings, above all the language of ordinary

177. Kolakowski, speech at 15th Annual Jefferson Lecture, Washington, D.C. (April 1, 1986).

citizens, in the way that these human beings and citizens themselves understand it. But Jefferson expressed the convictions of his fellow citizens in language, which although extraordinary in its eloquence, was recognized instantly by them as representing their deepest convictions. These convictions were at once peculiarly and profoundly American, while peculiarly and profoundly representative of a natural law tradition—a belief in objective norms of conduct for both men and nations that lies at the root of everything making our human existence civilized. But this was in the days before professional philosophers, or “contemporary political theorists,” had mined and sapped the ordinary man’s confidence in the vitality of ordinary language and of the common sense moral judgments upon which they, like Aristotle, had once relied.

Just before he died, Jefferson wrote that, “[a]ll eyes are opened or opening to the rights of man . . . [and to] the palpable truth that the mass of mankind has not been born, with saddles on their backs, nor a favored few booted and spurred, ready to ride them. . . .” A professional philosopher would, of course, set to work immediately to point out that horses are not born with saddles on their backs either. But Jefferson knew, and his fellow-citizens knew, that the aristocrats of Paris on the eve of the French Revolution regarded their peasants in much the same light as human beings in general looked upon horses—as an inferior order in nature whose highest purpose in this world was to serve as beasts of burden to their masters. Jefferson’s fellow-citizens understood him to say, as we might still understand him once we shake off the miasma of the professional philosophers, that there is no such thing as a natural or divine right of any man or class of human beings to rule others. Legitimate government arises solely from a voluntary agreement embodied in laws binding rulers and ruled by which it is understood that all government exists to secure equally the natural rights of every citizen and the safety and happiness of all. Government is not for the private advantage of any self-anointed individual or class. Republican government, the only form of government intrinsically compatible with the rights of man, is government in which those who live under the law share equally in making the law they live under, and in which those who make the law are equally subject to the laws that they make.

Let me elaborate upon the meaning of “all men are cre-

ated equal," the proposition that Abraham Lincoln called the "father of all moral principle among us," and the "central idea" from which all the minor thoughts of our political tradition radiate. This proposition, although in terms no intelligent human being in 1776 failed to understand, is indeed elliptical. "Man equals man" would be true only because tautological. Much is owing to the word "created," which implies a "Creator," who is mentioned almost immediately. (No doubt this is what leads Professor Kolakowski to think that the sentence would be looked upon as "superstitious" by the cognoscenti.) "Created equal" implies such a relationship between man and man as arises from a contemplation, not of man only, but of the whole Creation. In looking at man in the light of the whole Creation, we see him in comparison with what is lower than humankind and with what is higher.

Although the existence of God is certainly implied by the proposition that all men are created equal, it is not necessarily implied. What is necessarily implied is not the Creator, but Creation. In 1776 America, the language of the Bible was the language of the ordinary man. There were sophisticates, as Jefferson knew, who had considered that evolution, or the doctrine of the eternity of the universe, might offer alternative explanations to that of the Bible. To everyone, however, Creation meant the world whose existence is known to us by sense perception, and hence by such common nouns, or universals, as light and darkness, heaven and earth, land and water, the birds of the air, the fish of the sea, and the moving things, the animals, upon the land. Indeed, the world became an object of knowledge, the world accessible to the senses, and from the senses to the mind, was once familiar to most Americans as the world of which they had read in the first chapter of *Genesis*. To believe that this world actually exists is to believe nothing more than the evidence of our senses. (Professional philosophers, or most of them, at least since Hume, have systematically denied that our senses tell us anything reliable about the external world.) To believe that this same world is the work of the living God may be an act of faith. But for Jefferson and his fellow-countrymen there was at least no disagreement that such a world existed. Nor was there any disagreement that the facts of this world, "these truths," held the key to the right ordering of man's moral and political life. In the 26th verse of the first chapter of *Genesis*, God said "[l]et us make man in our

image, after our likeness, and let them have dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the earth, and over every creeping thing that creeps upon the earth."¹⁷⁸

For Jefferson and his contemporaries, there was no question but that the differences in natures, differences inherent in the distinctions the Bible itself draws between man and beast, had implications (as in the Bible) that were no less moral than metaphysical. Man had both power and right to exercise the dominion that the Bible said had been given to him by God. With that power and right went, of course, responsibility. Man might not gratuitously destroy the resources of the lower nature (John Locke had said that it would be foolish as well as dishonest to do so): but he might use them prudently for his own ends. There were no ends of the lower nature higher than the ends that they might serve in serving man. But the rule of a man over his horse or dog is by nature. Nature itself marks out which is to be master, and which is to be servant. This, believe it or not, is self-evident!

I recall a debate once with a prominent conservative who denied that the proposition that all men are created equal (or any other proposition) was in truth self-evident. Finally, I asked him, was it not self-evident to him that he was not a dog? His answer was, no. To this I responded that, since he did not know that he was not a dog, he might not know that I was not a fire hydrant, and I warned him to keep his distance. I might have added that even if he did not know that he was not a dog, there was no dog living that was so ignorant! In truth, however, we have here an example of someone saying what he could not possibly have believed, unless of course he had become insane. But professional philosophers, and this man suffering from this delusion, make a point of pretending to forget what they actually know in order to maintain their credentials as professional skeptics. By this they disprove the possibility of philosophy itself as it was before the amateurs of wisdom had been replaced by professionals. But such peculiarities should have no weight with normal human beings who can see instantly and without argument that men really are not dogs, or gods.

The equality of man proclaimed by the Declaration of Independence is to be understood first of all by comparison

178. Genesis 1:26.

with the inequality that characterizes man's relationship with the lower orders of living beings. In comparison with this inequality there is nothing more evident, in the familiar words of John Locke, than that no human being is marked out by nature to rule, while others are marked out for subjection. This does not mean that human beings are not distinguished by such important marks as age, beauty, strength, intelligence, or virtue. Nor does it mean that these differences, or some of them, are not important in determining who should rule. But the question who shall rule becomes relevant only after the recognition that it is the rights of the whole community, and of every member of that community for whose sake the government is instituted. Who has courage, moderation, justice, and wisdom to best serve the community becomes a question only after the community is formed, and the rule of law enshrined within it. It becomes a question only after there is an agreement, voluntarily entered into, that the right each man has by nature to govern himself will become valuable to him only as he has transferred the exercise of that right to a government. And a legitimate government is essentially the by-product of an understanding that henceforth the power of all will defend the right of each. Under the legitimate government of a civil society, every man obeys the law for the reason that in doing so he understands that he is enabling it to defend him, to secure his rights. This so called "social contract" is the greatest of all practical applications of the golden rule: "Do unto others as you would have others do unto you."¹⁷⁹ Human virtue or excellence does indeed give some human beings, men or women, the right to hold office, the right to rule. But it is a right that can become valuable only as it is recognized as a right, not to privileges, but to service. It is a right which comes to light by virtue of the prior recognition of the equality of mankind and of the rule of law constructed upon its premises.

That the political process by which such recognition is made, may be an extremely defective one was recognized by Winston Churchill when he said that "[d]emocracy is the very worst form of government, except all those other forms that have been tried. . ."¹⁸⁰ Its defects the fact reflect that if man is higher than the beasts, he is very far from being God (or a god). The idea of God belongs to natural, no less than to

179. Matthew 7:12.

180. The OXFORD DICTIONARY OF QUOTATIONS 150 (3rd ed. 1979).

revealed theology. This idea is formed by reflecting upon the resemblances, as well as the differences, of man and beast. Man is a compound of reason and passion. In beasts, instinct controls the mechanism of the passions. Beasts are controlled by reason only when they are controlled by human beings. But man, although possessed of the appetites of the instincts, knows that he has, by reason of his reason, the ability to control and direct instinct and passion alike. And he (that is except professional philosophers) knows that with his reason, he has been given to the ability to know good and bad, just and unjust. That his reason is fallible is true: indeed, in nothing so much does man show that he is a rational animal than in recognizing such fallibility. This fallibility is moreover two-fold: First, in the difficulty in knowing amidst the complexity of human affairs what is just or right; second, in doing what is just or right. Knowing what is just or right also is exposed to a two-fold difficulty: the one arising from the obscurity that sometimes lies in the subject; the other (and most common) arising not from the subject, but from the influence of the passions upon reason. King David did not see his sin when he seized the wife of Uriah the Hittite and compassed Uriah's death. But when the prophet Nathan presented his own story to him disguised in a parable, he was exceedingly wrathful against the offender. Only then did the prophet tell him who the offender was. Then the King judged his own offense even as God judged it, showing that the faculty of judgment was in him, when his passion did not obscure the truth.¹⁸¹ It is precisely because the human soul is a compound of reason and passion that human wisdom prescribes the rule of law as fitting the human condition. For the glory of the rule of law is that it enables human reason to take into account the defects of human nature and to transcend those very defects by taking them into account. While human government needs human wisdom in the highest degree, even the wisest men may be subject to that partiality that endangers justice. And even assuming perfect impartiality, just judgments will be questioned by those against whom the judgments are given. It is essential to the stability of government that those judgments be given not as the personal wisdom of the wise, but of the law. Only thus can governments command the confidence of the governed.

The vote of the wise is then always for the rule, not of the

181. 2 Samuel 12:1-13.

wise, but of the law. It is in the making of laws that the highest wisdom of the race is manifested. The meaning of law is to be found, above all, in the understanding of the difference between man and God. It is this difference, the reciprocal so to speak of the difference between man and beast, which completes the meaning of what it is that we hold to be self-evident. For further evidence of its self-evidence to our ancestors, evidence that is as compelling today as it was in 1776, I turn to the good citizens of Malden, Massachusetts who on May 27, 1776, instructing their representatives in the Continental Congress on a Declaration of Independence, wrote that an American republic "is the only form of government which we wish to see established; for we can never be willingly subject to any other King than he who, being possessed of infinite wisdom, goodness and rectitude, is alone fit to possess unlimited power."¹⁸² The equality of mankind is then to be understood in the light of this two-fold inequality: the inequality of man and the lower order of Creation, on the one hand and the inequality of man and God on the other. The contemplation of the very differences between man and beast instructs us in what it is that makes man by nature the master of beast. But the contemplation of these same differences instructs us in man's imperfections. Man's wisdom, goodness, and rectitude are forever limited by the fact that his passions are often at war with his reason, and his self-interest with his goodness and rectitude. Hence it is that no man is good enough, in Lincoln's words, to govern another without his consent. For consent is the reciprocal of equality. And in the reciprocity of equality and consent we find that ground of morality that Lincoln found in the great proposition. The consent arising from equality assures, as we said at the outset, that those who live under the law will share in the making the law they live under, and that those who make the law must live under the law that they make. Constitutions are devices—inventions of prudence—to carry into practice these principles. But except in the light of these principles, a constitution is an empty vessel that can be a means to any ends whatever. The utopianism that lies at the root of all modern totalitarianism always presupposes the denial or abandonment of human nature and that "great chain of being" within which such nature is discovered. Unfortunately, such abandonment is equally characteristic of present-

182. COMMAGER, *supra* note 25, at 97-98.

day conservatism and of present-day liberalism. A wise constitution—such as ours—ceases to be wise the moment it is separated from the principles that give it life. Man is by nature the master of what is below him in the order of Creation. But his ability to govern himself rests upon his recognition of what God is, and hence of what he is not. That “all men are created equal” means then that man is neither beast nor God. This is indeed a self-evident truth. It is the ground of our Constitution, as it is the ground of all constitutionalism. It is the supreme justification for the rule of law and, as Abraham Lincoln said, the greatest barrier against despotism ever conceived by the human mind.¹⁸³

183. BASLER, *supra* note 28 488.

APPENDIX C

Original Intent and Justice Rehnquist

The Wall Street Journal (August 7, 1986) carried an editorial page article by Professor Bruce C. Ledewitz of Duquesne University Law School entitled "The Questions Rehnquist Hasn't Had to Answer."¹⁸⁴ Professor Ledewitz's theme is expressed in the following excerpts.

We are about to elevate to Chief Justice . . . the greatest judicial skeptic since Oliver Wendell Holmes. How truly ironic it is that Ronald Reagan, Jerry Falwell, and Pat Robertson so strongly support . . . a man who does not believe there is such a thing as right and wrong . . . Justice Rehnquist's jurisprudence may be characterized as legal positivism founded upon moral skepticism. He is unable to affirm any substantive value as true or good, and so his constitutional interpretation retreats to the search for an unobtainable, objective analysis of the "original intention" of the framers of the constitution. Justice Rehnquist represents not a triumph of conservatism, but a triumph of modernism. As such, he is merely the most extreme and intellectually honest representative of 20th century American law.¹⁸⁵

I think Professor Ledewitz goes beyond his evidence in saying that Justice Rehnquist "does not believe there is such a thing as right and wrong." A man may think that there is no foundation in reason for the distinction between right and wrong—and this does, in fact, seem to be the Rehnquist view—while still believing in the distinction itself. Carl Becker declared that to ask whether the natural rights philosophy of the Declaration was true or false was essentially a meaningless question.¹⁸⁶ Yet notwithstanding Becker's belief that reason was impotent to answer the question of whether the philosophy of the Declaration was true or false, he was himself passionately committed to it. To Becker, the Declaration expressed a "fundamental reality" for which he, no less than George Washington, was willing to fight.¹⁸⁷ However, in saying that the

184. Ledewitz, *The Questions Rehnquist Hasn't Had to Answer*, Wall St. J., Aug. 7, 1986, at 26, col. 3 [hereinafter Ledewitz].

185. *Id.*

186. C. BECKER, *THE DECLARATION OF INDEPENDENCE* Ch. 6 (1942).

187. *Id.*

philosophy of the Declaration was grounded in a "fundamental reality," Becker exposed himself to the objection that he was calling something a fundamental reality that he also asserted to be inaccessible to reason.¹⁸⁸ If reality is inaccessible to reason, how can we say it is reality? Becker was well aware, when he came to write the Introduction to the 1942 edition of his book (originally published twenty years earlier), that the followers of Adolph Hitler looked upon the doctrines of their leader with the same passionate commitment that Becker looked to those of the Signers of the Declaration. What then made the reality of Thomas Jefferson more fundamental than that of Adolph Hitler? Becker could not say, even as he declared his unqualified opposition to National Socialism.¹⁸⁹

This same difficulty must be faced by Justice Rehnquist. It is, moreover, discouraging to learn that the new Chief Justice—in opposition to Attorney General Meese who, however, appears to be completely unaware of this opposition—does not, in the least, believe in the principles of the Declaration of Independence either as myth or as reality. He does not believe that we can say that despotism is intrinsically evil. Nor does he believe that we can say that free government and the rule of law are intrinsically good. All he can say about the former, eg, is that Hitler's regime is in accordance with Nazi value judgments, just as Bolshevik government is in accordance with Bolshevik value judgments.¹⁹⁰ In saying that Justice Rehnquist "retreats to the search for an unobtainable, objective analysis of the 'original intention' of the framers of the Constitution,"¹⁹¹ Professor Ledewitz is imputing to Justice Rehnquist an impossibility. No one can at one and the same time be a legal positivist and an adherent of the original intentions of the Framers. For the Framers were very far from being either moral skeptics or legal positivists. Their commitment to the natural rights and natural law doctrine of the Declaration of Independence represented the most profound of their original intentions. It is simply a self-contradiction to assert that Justice Rehnquist is committed to the original intentions of the Framers and to his version of moral skepticism and legal positivism, although this self-contradiction may indeed be Rehn-

188. *Id.*

189. *Id.* at Introduction.

190. See generally *infra* note 193.

191. Ledewitz, *supra* note 184.

quist's, not Ledewitz's. But Professor Ledewitz is himself profoundly mistaken, if he means to say that a genuinely "objective analysis of the 'original intentions' of the Framers of the Constitution" is "unobtainable."¹⁹² It would be unobtainable only if their understanding of the laws of nature, and of the rights of man under these laws, was merely subjective. But suppose that the Framers' understanding of the difference between despotic and non-despotic government—recorded for all time in the Declaration of Independence—is the true understanding. Suppose that their views of tyranny and despotism were not merely subjectively held ("We hold these truths . . ."), but objectively valid. Would not an analysis of these views not constitute an objective account of their most profound and guiding intention in establishing a Constitution to secure the blessings of liberty to themselves and their posterity?

In his celebrated essay on "The Notion of a Living Constitution,"¹⁹³ Justice Rehnquist takes to task those who

ignore . . . the nature of political value judgments in a democratic society. If such a society adopts a constitution and incorporates in that constitution safeguards for individual liberty, these safeguards do indeed take on a generalized moral rightness or goodness. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice but instead simply because they have been incorporated in a constitution by the people.¹⁹⁴

Here is the heart of that jurisprudence that Professor Ledewitz rightly calls into question. A constitution—and law generally—is something "a society adopts," but which prior to adoption has no "intrinsic worth." Among those things that prior to adoption have no intrinsic worth are "safeguards for individual liberty." But Rehnquist does not say that even after adoption these safeguards, and what they protect or secure, *are* morally right or are possessed of intrinsic worth. He says they

192. See *supra* note 184 and accompanying text.

193. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, (1976) [hereinafter *Living Constitution*]. This is the revised text of the ninth annual Will E. Orgain Lecture, delivered at the University of Texas Law School on March 12, 1976. Reprinted in TAKING THE CONSTITUTION SERIOUSLY, 77 (1981). In 1985, Justice Rehnquist published a slight abridged version of this essay. I assume, therefore, that it still represents his opinions.

194. *Living Constitution*, *supra* note 193, at 204.

“take on” a kind of moral rightness. This means no more than that they acquire a kind of veneer of opinion in their favor. I am sure that Justice Rehnquist abhors as much as I do the midnight visits of a Gestapo or of a KGB and the removal of citizens from their homes to prisons merely because they are personae non grata to the government. But Rehnquist will not say that such arbitrariness is unreasonable, and wrong because unreasonable. All he will say is that it is not in accordance with our value judgments, although thoroughly in accordance with Nazi or Bolshevik value judgments. But Nazi and Bolshevik value judgments are incorporated in Nazi and Bolshevik constitutions just as “our” value judgments are incorporated in our Constitution. And all value judgments qua value judgments are created equal! Rehnquist may perhaps object that Nazi and Bolshevik constitutions are not acts of “the people.” But they *are* acts of the people, according to the Nazi and Bolshevik definitions of what constitutes a people.

The American definition of what constitutes a people is to be found in the Declaration of Independence and asserts that by the laws of nature and of nature’s God all men are equally endowed by their Creator with certain unalienable rights, and that to secure these rights a people institute a government.¹⁹⁵ By the principles of the Declaration a people that ignore these rights in instituting its government are not, properly speaking, a people. The Declaration preserves Plato, Cicero, and Augustine’s distinction between a people, properly so called, and gang of robbers. But for Justice Rehnquist, this distinction is itself just another “value judgment.” By the principles of the Declaration—by the principles that constitute the “original intentions” of the Framers of the Constitution—the moral rightness of “the safeguards of individual liberty” is prior to and independent of its incorporation in a constitution by the people. That moral rightness was found by the Signers of the Declaration a priori in “the laws of nature and of nature’s God.” If that moral rightness was not antecedent to the Constitution, it could not exist in the Constitution. One cannot repeat too often that the Founding Fathers were neither moral skeptics nor legal positivists.

As I have noted, Justice Rehnquist has given no hint how something that has no intrinsic worth becomes endowed with “generalized moral rightness” merely because it has been

195. The Declaration of Independence (U.S. 1776).

“incorporated in a constitution by a people.”¹⁹⁶ The only intelligible meaning one can assign to such an assertion is that a powerful government can compel behavior consistent with its laws. This means no more than that in obeying the laws we are yielding to a superior force or that justice is the interest of the stronger. But to most of us—and most certainly to the Founding Fathers of this nation—“moral rightness” implies something very different. Morality implies voluntary action, not compulsion. Constitutional morality implies that the individual rights safeguarded by the Constitution deserve a conscientious respect and not merely a recognition that their disregard will be punished. Rehnquist’s assertion that adoption by a people, or incorporation into a constitution, transforms “value judgments” into “a form of moral goodness” is a non sequitur.¹⁹⁷ Someone who says that constitutional morality has no other foundation than “value judgments” has nothing to say to the man who does not share such “value judgments.” If such a man is strong enough to disobey the law of the Constitution with impunity, and can do so, whether by corruption, craft, or force, why should he not do so? To say that constitutional morality has no other foundation than “value judgments,” is to say that the very idea of constitutional morality is an illusion.

Bear in mind, moreover, that when I speak of safeguarding individual rights or liberty, what I mean, first and foremost, is preventing offenses against persons, property, and society such as assault, murder, theft, rape, and perjury. According to Rehnquist’s logic, to call these things evil expresses “only personal moral judgments until in some way [they are] given the sanction of law.”¹⁹⁸ In saying this, however, Rehnquist defies the common sense of the human race, and incidentally of the common law, that denies that these things are offensive merely as “personal moral judgments.” They are believed to be prohibited because they are wrong and not wrong because prohibited. Nor can it be said that these prohibitions merely represent rules that have been useful: useful to whom? Or, that these prohibitions contribute to the greatest good of the greatest number. The argument from utility does not say why anyone should obey these prohibitions who finds it useful or

196. *Living Constitution*, *supra* note 193, at 704.

197. *Id.*

198. *Id.*

pleasant to disobey them, and who prefers what he regards as his own good, to that of the greatest number of any number other than one. The argument of American constitutionalism, the argument of Jefferson and Lincoln and the Declaration of Independence, is not a merely utilitarian argument. It is not only an argument as to why the people have an interest in preventing tyranny. It is ultimately an argument as to why potential tyrants have an interest (a self-interest rightly understood, in Tocqueville's phrase) in preferring morality to tyranny. It is an argument as to why potential tyrants ought not to become actual tyrants no matter what opportunities for despotism may arise. Lincoln's argument against American Negro slavery was a demonstration that the principles of the Declaration condemned any and every form of despotism.¹⁹⁹ That argument held that government under the rule of law is in the interest of every man, because it is in accordance with the nature of man, a nature that defines the limits within which every human being must seek his good if he is to enjoy that good. It is an argument that tyranny is bad for human beings and hence is as bad for the tyrant as for everyone else. Jefferson's diatribe against slavery in his *Notes on Virginia* held that slavery corrupted the morals—and hence the well-being of the masters.²⁰⁰ In this he only made explicit what was implicit in the argument of the Declaration.

It is, of course, the common sense of mankind that morality, or at least that part of morality that consists in respecting the rights of others, is for the most part ineffectual without law. But morality without law is no more ineffectual than law without morality. It is utterly absurd to suppose that "value judgments" become morality by being adopted into law. If law, or what is called law, became the authority for morality, as Rehnquist seems to think, then Nazi or Bolshevik (or cannibal) law would result in the same "generalized moral rightness or goodness" as the law of a constitutional democracy.

Perhaps Rehnquist would say that he was speaking only of "the nature of political value judgments in a democratic society." However, the sequel to the foregoing passage in "The Notion of a Living Constitution" is as follows:

Beyond the Constitution and the laws in our society, there is

199. See generally BASLER, *supra* note 28, at 360.

200. A. KOCH & W. PEDEN, *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 278 (1944) [hereinafter KOCH].

simply no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa.²⁰¹

The key assertion here is that “there is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience” This is not a characterization of “political value judgments” only or merely “in a democratic society.” It is an assertion concerning all such judgments by the human mind, everywhere and always. Rehnquist implies by this that he knows of no way in which any moral judgment, which is bound to be a “value judgment,” can be “logically” shown to be superior to any other moral judgment. Since all choices among regimes, choices between Nazi or Bolshevik or cannibal or constitutionally democratic regimes, are value judgments, no such choice can be founded upon reason. This would mean, for example, that there is no way in which the principle of a system of laws guaranteeing religious liberty could be “logically” shown to be superior to that of a system of religious bigotry. Yet Jefferson and Madison, whose argument is an extension of the argument of the Declaration of Independence, thought that the Virginia Statute of Religious Liberty did precisely what Rehnquist thinks impossible. Rehnquist utterly disregards the reasoned convictions of Jefferson and Madison (and the Founding Fathers generally), which formed the guarantees of the first amendment, but quotes with reverent admiration the words of Justice Holmes “in his famous essay on natural law”:

Certitude is not the test of certainty. We have been cocksure of many things that were not so. . . . One cannot be wrenched from the rocky crevices into which one is thrown for many years without feeling that one is attacked in one's life. What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally

201. *Living Constitution*, *supra* note 11, at 704.

dogmatic about something else. And again this means skepticism.²⁰²

This notable and notorious passage from Holmes's writing extolling as it does the virtues of skepticism is swallowed by Justice Rehnquist without the slightest trace of skepticism. Can any reasonable human being put moral choice on the same level as the preference for granite rocks and barberry bushes? The preference for granite rocks and barberry bushes, however passionate, is not a moral preference. Such preferences, Holmes says, are "generally . . . determined by early association."²⁰³ If that is so, it is largely because they are largely matters of indifference to everyone except the person holding them. But to say that one's opinions on matters of right and wrong, e.g., the choice in 1940 between the cause of Adolph Hitler and the cause of Winston Churchill, are arrived at (not *determined*) simply by one's "early associations" is to deny any role whatever to human reason or human freedom in shaping human destiny. In fact, Holmes contradicts himself in the foregoing. He says that "recognition of how they came to be," namely, "our preferences," enables us to be tolerant of the contrary opinions of others. But learning to be tolerant of the opinions of others would not be possible, if our opinions are simply determined by early associations, an Oedipus complex or anything else. If we can learn to be tolerant of some opinions that are different from our own, why cannot we learn to be intolerant of other opinions? Does not tolerance by its very nature engender an opposition to intolerance, especially for racial and religious bigotry?

Holmes tells us that reason can emancipate us from simple preference for our own opinions by showing us that different opinions have the same cause. However, once someone recognizes that opinions on moral questions differ, is he not bound to wonder which of the contrary opinions is right, or whether or not there is one non-contradictory truth underlying the many contrary and sometimes contradictory opinions. That is the thesis of Aristotle's *Nicomachean Ethics*. This thesis is reflected in the Declaration of Independence when it speaks of "a decent respect to the opinions of mankind." It is what Abraham Lincoln had in mind when he referred to the propo-

202. *Living Constitution*, *supra* note 11, at 704-05 (citing O.W. HOLMES, *Natural Law*, in COLLECTED PAPERS 310, 311 (1920)).

203. *Id.*

sition of human equality in the Declaration as "an abstract truth, applicable to all men and all times."²⁰⁴ That there is a non-subjective morality of man, as man, is the necessary presupposition of what we call Western civilization; it is the essential constitutive element of that civilization, a civilization that, despite its name, is not understood as related to a particular place any more than to a particular time. That there is such a morality is also an absolutely necessary presupposition of the Constitution of the United States of America, Holmes and his disciple Rehnquist to the contrary notwithstanding. Any discussion of "original intent" apart from this morality is ultimately vain.

Holmes (and Rehnquist) cannot grant to human reason the first step in the emancipation of the self from a crude self-preference and then declare that at that point all reasoning must stop. (This, however, is what they do!) If we were simply or merely "determined" in our moral preferences or "value judgments," we would not be capable of that "recognition" of what is common to ourselves and others of which Holmes himself speaks. Indeed, that recognition leads us away from mere self-preference. Emancipation from mere self-preference is then an essential element of our humanity. It is evidence that we are not determined in our moral choices and that human freedom is a reality. Political freedom would be meaningless if there were not moral freedom, and moral freedom would be meaningless if we were moved to action merely by sense perception, memory, and imagination, which is what is implied in Holmes's passage about barberry bushes and early associations.

Moral freedom must be based upon a metaphysical freedom of the mind that moves from mere sense perception to reason and from reason to moral choice. The comparison of alternative courses of action that constitute moral freedom must follow from a fundamental comparison of ideas. In this comparison, the human mind makes a judgment as to the correspondence of abstract ideas with concrete phenomena. One decides whether this is a plant or an animal, and whether this animal belongs to this species or that one. (E.g., whether a Negro or a Jew is properly placed in the species *homo sapiens* with a white man or a gentile.) Only by this comparison of ideas can one say that despotism, which fits the relationship of

204. R. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 489 (1946) [hereinafter BASLER].

man to beast, does not fit the relationship of man to man. This is the reasoning process that underlies and is embodied in the condemnation of despotism in the Declaration of Independence. Without it, all our ideas of constitutional government are vain and profitless. To repeat, the ability of the human mind to recognize truth ("We hold these truths to be self-evident. . . .") is the metaphysical ground of the morality of the Declaration of Independence. The universality of the rights of humankind is the ground of all our constitutional morality because it rests upon the recognition that reason is the defining characteristic of the human species. But we cannot assert man's humanity as the ground of his rights, while denying the reality of human freedom grounded upon abstract reasoning in making human choices.

"Certitude is not the test of certainty" is one of those sounding truisms that often does more to obscure than to reveal what it propounds.²⁰⁵ Leo Strauss expressed the same thought when he declared that there is no difference between the subjective certainty of the philosopher and that of the madman.²⁰⁶ Put somewhat differently, we might say that Napoleon himself was never more certain that he was Napoleon than the poor inmate in the lunatic asylum who thinks he is Napoleon. But notwithstanding the affectations of Holmesian skepticism, most of us will continue to believe in the objective difference between being the historical Napoleon and imagining one is that Napoleon. More generally, we must attend to the objective difference between what is subjectively persuasive to the sane man, and what is subjectively persuasive to the lunatic. This difference turns upon the quality of the evidence and of the reasoning that supports the opinions of the one as opposed to the other. It implies that the sane man's assertions can be confirmed by his peers and that in the process of inter-subjective communication the grounds of objectivity can be discovered.

Someone familiar with the processes by which merely subjective opinions may be replaced with objective truth knows the difficulties and uncertainties that attend the exercise of human reason. For this reason, the sane man is apt to be moderate in his moral judgments. Moderation, moreover, is itself a moral virtue. All the moral virtues are, moreover, in the ser-

205. See *supra* notes 201-03 and accompanying text.

206. L. STRAUSS, ON TYRRANNY 189 (1968).

vice of human reason, including, most certainly, courage. Holmes served honorably in the Union Army in the Civil War and was wounded three times. It would be a travesty of his sacrifices, as of the sacrifices of countless others, among them those who came to their final rest upon the battlefield of Gettysburg, to say that they were “determined” in what they did by their early associations or to imply that their or Holmes’s “preference” for the Union cause—for the cause of human freedom in comparison with the cause of human slavery—was not qualitatively different from a childhood preference for granite rocks and barberry bushes.

The passage from Holmes’s essay on natural law ends as a eulogy to the virtues of skepticism.²⁰⁷ But neither Holmes nor his disciple Rehnquist seems aware of the genuine meaning of that word. A skeptic is one who inquires. Inquiry, however, presupposes doubt or an awareness of ignorance. Skepticism implies a priori both doubt (or an awareness of ignorance) of what one knows and faith or hope that by inquiring one can remedy that defect. One is not a genuine skeptic, if one is certain a priori that one’s doubt or ignorance cannot be remedied by any process of thinking. If one is perfectly convinced, as Rehnquist appears to be, that no one can employ reason (“logically demonstrate”) to discover that any one moral judgment is superior to any other (e.g., that one is justified in calling Hitler’s or Stalin’s regimes “evil empires”), then he is “logically” free to adopt whatever moral judgment appeals to him secure in the conviction that reason can never testify against him. This radical skepticism, which is a false skepticism, leads directly to radical dogmatism. If reason cannot rule against the most insane moral preferences then there is no reason not to adopt whatever opinions are most agreeable to one’s passions.

I am reminded of a story in one of Hitler’s biographies of Himmler informing the Fuhrer of how the boxcar floors in which thousands of Jews were transported had been covered with lime. Himmler assured Hitler that all the Jews would have been burned to death by the lime before reaching their destination. Their deaths, moreover, would occur in circumstances of utmost pain and suffering as they would be steadily and continuously seared by the corrosive chemicals while packed and pressed together in unimaginable stench and filth. As the story was told, both Hitler and Himmler began to laugh

207. See *supra* note 201-03 and accompanying text.

and laugh ever more uproariously as they contemplated the agonies of the Jews in the boxcars.²⁰⁸ Torturing and killing Jews were the "granite rocks and barberry bushes" that they loved and from which they certainly derived great enjoyment. According to Justice Rehnquist, however, "there is no conceivable way . . . [to] logically demonstrate" that the judgments of our consciences on this matter are superior to the judgments of Hitler's and Himmler's.²⁰⁹ I conclude that radical skepticism as patronized by Holmes and Rehnquist is something whereby any reasoned conviction concerning morality is abolished. Such skepticism is equally compatible with moral indifference or moral fanaticism. But it has no connection with moderation or tolerance—that "decent respect to the opinions of mankind" that forms the core of the constitutional morality of the American Founding.

Rehnquist also denounces the idea of a "living constitution."²¹⁰ By this he acknowledges a living constitution to be one in which "the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so."²¹¹ Rehnquist turns most appropriately to John Marshall for his understanding of judicial review under the Constitution:

All who have studied law, and many who have not, are familiar with John Marshall's classic defense of judicial review, in his opinion for the Court in *Marbury v. Madison*

. . . .²¹²

The ultimate source of authority in this Nation, Marshall said, is not Congress, not the states, not for that matter the Supreme Court of the United States. The people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it.²¹³

It is worthwhile, at this point, to quote the key sentence by the great Chief Justice in *Marbury*: "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

208. See generally R. PAINE, HITLER.

209. See *Living Constitution*, *supra* note 193, at 695.

210. See *Living Constitution*, *supra* note 193.

211. *Id.* at 695.

212. 5 U.S. (1 Cranch) 137 (1803).

213. *Living Constitution*, *supra* note 193, at 696.

happiness is the basis on which the whole American fabric has been erected."²¹⁴

Now I do not believe there is the slightest room for doubt that when Marshall penned those words, he had in mind and everyone to whom he then addressed those words had in mind, the following: "That . . . it is the right of the people . . . to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."²¹⁵ The resemblance of the language of the Declaration and that of *Marbury* can no more be coincidental than the resemblance of the language of the Declaration to certain passages in Locke's *Second Treatise*. But according to the Declaration, and Locke, the original right of the people as a collectivity is not original right simply.²¹⁶ Original right simply is grasped from the proposition that every human being is endowed by his Creator with certain unalienable rights. A people, properly so called, arises from the social contract or compact by which individual human beings agree to form a civil society, a civil society in which the citizens consent to be governed for the better security of their original rights. The Massachusetts Bill of Rights of 1780 makes explicit the doctrine of the Declaration of Independence when it says that "[t]he body-politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good."²¹⁷

The underlying premise of this compact or contract is, as with every valid contract, the equality of the contracting parties. And so Massachusetts declares, as the United States had already declared, that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights . . ."²¹⁸ To repeat, individual human beings could not form a body-politic, nor have a government whose "just powers" are derived from their consent had there not been such an equality in the original endowment of rights. It is that equal endowment of natural rights under "the laws of nature and of nature's God,"

214. *Marbury v. Madison*, 5 U.S. at 175-76.

215. *Id.*

216. Declaration of Independence (U.S. 1776).

217. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 107 (9th ed. 1973) [hereinafter COMMAGER].

218. *Id.*

which makes "the people of the United States" (like the people of the State of Massachusetts, or of any other state) something other than an a mere numerical aggregate. Within the framework of the laws of the United States and of the several states, corporations may be chartered, but only for lawful purposes. And so, men may incorporate themselves into civil societies, but again only for purposes which are lawful by "the laws of nature and of nature's God." The Framers of our Constitution clearly and wisely believed that there must be a lawfulness antecedent to positive law for positive law itself to be lawful. When Justice Rehnquist says that constitutions do not have any ground in any "idea of natural justice,"²¹⁹ he is repudiating the Framers and John Marshall, who followed them.

Here I am bound to say, although I am mortified to say it, that the new Chief Justice of the United States accuses himself of not understanding the very first premise of the Constitution of the United States. By this I do not imply that he does not understand many things about the Constitution. But viewed either ordinally or cardinally, the very first premise of the Constitution is found in the words "[w]e the people of the United States . . ." with which is joined "do ordain and establish this Constitution for the United States."²²⁰ By Justice Rehnquist's own testimony, given on the authority of Chief Justice Marshall, the first constitutional premise is that "[t]he people are the ultimate source of authority . . ."²²¹ But Justice Rehnquist does not understand, indeed he denies, the only ground upon which the people may be possessed of this authority. For "the people," that is to say, "the good people" who became independent, are not a collection of predators, a gang of thieves. They are not the "people" of the Preamble merely because they have called themselves by that name. They are a people because they have incorporated into their association with each other the morality of "the laws of nature." These laws determine their purpose "to secure these rights" and imply duties corresponding to these rights. The government they may establish, however much in accordance with what they may think conducive to "their safety and happiness," is not a government which may trample upon the equal rights of others at their pleasure. A people ignorant of their rights

219. *Living Constitution*, *supra* note 193, at 704.

220. U.S. CONST., preamble.

221. *Living Constitution*, *supra* note 193, at 696.

under the laws of nature are ignorant of the means by which they may enjoy their freedom. This is what Jefferson had in mind when he declared that for a people to be ignorant and free is an impossibility.²²² Majority rule is a rule for free government only to the extent to which the majority understands itself as the trustee of the rights of the minority or minorities. "An elective despotism was not the government we fought for"²²³ is one of the axiomatic maxims of the authors of the Declaration of Independence. To understand why this is so is vital to understanding the Constitution. But it is not possible to understand it, unless one understands why the moral basis of both majority rule and minority rights is altogether antecedent to the positive law of the Constitution.

To repeat, what is first about the Constitution is the fact and source of its authority. Before the Constitution, before the Articles of Confederation, it had become necessary for "one people" who were "the good people of these colonies" "to assume . . . the separate and equal station to which the laws of nature and of nature's God entitle them."²²⁴ By their own understanding, they had every right to which those laws entitled them, but no right to anything those self-same laws did *not* entitle them. Nor could they have consented to any government inconsistent with their remaining a "good people." The "consent of the governed" from which "the just powers" of government are derived is intelligent or enlightened consent; it is not anything whatever to which men may agree. There is no such thing as a right of a people under the laws of nature to form Nazi or Bolshevik constitutions. Nor was there a right simply to the institution of chattel slavery, albeit that that institution did receive certain guarantees under the 1787 Constitution.

But these guarantees rested upon the premise that slavery was an inherited evil so deeply rooted that it would require some generations to overcome. The Father of the Constitution declared that the words slave and slavery were carefully kept out of the text of the Constitution (by elaborate euphemisms) so that when the institution had finally disappeared, no trace of its former existence would remain upon the Constitution's face. The true miracle of the Founding is to be found in the

222. KOCH, *supra* note 200, at 394-95.

223. F. DONOVAN, *THE THOMAS JEFFERSON PAPERS* 101 (1963).

224. Declaration of Independence (U.S. 1776).

fact that a nation of slaveholders declared that all men are created equal. It is found in the fact that the slaveholders emancipated themselves from the barberry bushes and granite rocks of their upbringing and declared that what was right in itself would henceforth be the "standard maxim" for the free society they were founding. That it took fourscore and seven years to abolish the great anomaly of the Founding is hardly surprising in itself. But it could never have happened had not the original intent of the Constitution—in the laws of nature—prevailed. Thus, Abraham Lincoln in his debates with Stephen A. Douglas: [D]ouglas contends that whatever community wants slaves had a right to have them. So they have, if it is not a wrong. But if it is a wrong, he cannot say people have a right to do wrong.²²⁵

Lincoln, like Marshall, interpreting the Declaration as the source of the principles of the Constitution, finds the authority of the people as subject to the moral law and not prior to or independent of that law. Neither Marshall, nor Lincoln, nor any of the Founding Fathers ever imagined that morality was a function of "social acceptance" in the wake of the adoption of a constitution. On the contrary, a constitution was adopted because of the prior acceptance of a morality whose foundation was in the reason that recognized certain truths as self-evident. The will of the people was a rational and moral will, not a mere will. Here, I leave aside the matter of morality as the revealed will of God, although certainly the great majority of the American people at the Founding believed that morality was known both by unassisted human reason and by divine revelation. I leave it aside, not because it is unimportant, but because the American people at the Founding believed that the laws of nature instructed by unassisted human reason and the revealed laws of God as they bore upon human conduct in civil society were largely in agreement with each other. They did not deem it wise to have this moral consensus undetermined by theological differences. But the moral consensus itself understood by the light of nature and supported in society by the teachings of divine revelation was an absolutely necessary condition of the idea of self-government.

I challenge the new Chief Justice to find a single document from the Founding era illustrative of the thought of the American people who ratified the Constitution that supports

225. *Commager, supra* note 25, at 363.

the moral skepticism and legal positivism that he shares with the late Justice Holmes. Indeed, it was the rise of this skepticism and positivism in the generation before the Civil War that repudiated the Founders view of slavery. It was the repudiation of the moral foundation of constitutionalism that led to the view that either slavery or freedom are wholly matters of positive right, because natural right does not exist. This was the deepest reason for the Civil War, and it is appalling that the underlying view of the defenders of slavery should now predominate in the Union preserved only by the destruction of slavery.

Justice Rehnquist continues from the point I have quoted above, saying

[i]n addition, Marshall said that if the popular branches of government—state legislatures, the Congress, and the Presidency—are operating within the authority granted to them by the Constitution, their judgment and not that of the Court must obviously prevail. When these branches overstep the authority given them by the Constitution, in the case of the President and the Congress, *or invade protected individual rights*, and a constitutional challenge to their action is raised in a lawsuit brought in federal court, the Court must prefer the Constitution to the government acts.²²⁶

Rehnquist then goes on to declare that the

apogee of the living Constitution doctrine²²⁷ during the nineteenth century was the Supreme Court's decision in *Dred Scott v. Sanford*²²⁸ The Court, speaking through Chief Justice Taney, held that Congress was without power to legislate upon the issue of slavery even in a territory governed by it Congress, the Court held, was virtually powerless to check or limit the spread of the institution of slavery

. . . .

The Court in *Dred Scott* decided that all of the agitation and debate in Congress over the Missouri Compromise in 1820, over the Wilmot Proviso a generation later, and over the Kansas-Nebraska Act in 1854 had amounted to absolutely nothing The decision had never been one that Congress was entitled to make; it was one that the Court

226. *Living Constitution*, *supra* note 193, at 696 (emphasis added).

227. That the Supreme Court may step in and do what the elected branches should have done but did not do.

228. 60 U.S. (19 How.) 393 (1857).

alone, in construing the Constitution, was empowered to make.²²⁹

Rehnquist has misunderstood the case of *Dred Scott* in ways so closely resembling those of the Attorney General, as I described above both in the letter to *Policy Review*²³⁰ and in appendix A, that I strongly suspect that he is the source of Mr. Meese's errors. Since *Dred Scott* turns altogether upon the meaning of "[w]e the People . . .," it is a case that Rehnquist is unable to understand.

First notice that Rehnquist's historical survey jumps from the Wilmot Proviso of 1847 to the Kansas-Nebraska Act of 1854, omitting mention of the Compromise of 1850 and the territorial legislation thereof. As I noted above²³¹ in the Acts for Utah and New Mexico of that year, Congress was unable to resolve the question of the legal status of slavery in those Territories. There were at least three major differing opinions on the question, the description and explanation of which would require a separate monograph. The Acts provided that when states formed from these Territories were admitted into the Union, they would be so admitted "with or without slavery, as their constitution may prescribe at the time of admission."²³² This is what Stephen A. Douglas in 1854 claimed as the justification of his doctrine of popular sovereignty, which incorporated into the Kansas-Nebraska Act of that year.²³³ As I have shown above, however, Congress left unsettled the crucial question of what the legal status of slavery would be in the Territory before the adoption of a state constitution. It was generally understood that the status of slavery *during* the Territorial period would determine whether the state constitution, drawn up preparatory to entry into the Union would allow slavery or prohibit it. That the "game" would be won or lost during the Territorial period was something Lincoln never tired of repeating during his speeches after 1854.²³⁴ It also bears repetition that Congress in the 1850 Territorial legislation provided that any question involving title to a slave in a Territory might be appealed from the Supreme Court of the Territory directly to the Supreme Court of the United

229. *Living Constitution*, *supra* note 193, at 701-02.

230. Letter from Harry V. Jaffa to the Editor, *POL'Y REV.*, Spring 1986, at 84.

231. See text and accompanying note 173.

232. *COMMAGER*, *supra* note 217, at 321.

233. *Id.* at 331.

234. See generally *BASLER*, *supra* note 28, at 441-461.

States.²³⁵ In doing this, Congress, it might be said, laid the baby on the doorstep of the Supreme Court, rang the bell, and then disappeared. For Justice Rehnquist to speak of *Dred Scott* as if it was a case purely and simply of judicial usurpation is a sheer misreading of history.

The Court's decision, and Taney's opinion in *Dred Scott*, were not merely gratuitous interventions in the political process. *Dred Scott* did not declare unconstitutional any law currently in effect.²³⁶ Lincoln's House Divided speech of 1858 had charged a conspiracy to extend slavery by four "workmen"—Stephen, Franklin, Roger and James—two Presidents, a United States Senator, and a Chief Justice of the United States.²³⁷ It was this alleged conspiracy, involving all three branches of the government and not any unilateral action by the Supreme Court that Lincoln directed his arguments against in 1858. Rehnquist quotes from Lincoln's inaugural address as follows:

[T]he candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.²³⁸

But Lincoln was not, as Rehnquist seems to think, attacking the Court for having usurped powers belonging to the Congress. He disagreed with the Court's decision in *Dred Scott*, and his reasons for so doing were developed at great length in virtually all his speeches in and after 1857 especially in his debates with Douglas. In his inaugural address, however, his argument is directed against those in the political community who were attempting to exploit the Court's decision in order to force the extension of slavery upon the country through the political process. As I noted, it was the secession of the delegates from the Deep South, from the Charleston Convention, and from the National Democratic Party that set the pattern

235. IX Stat. p. 462 (1850).

236. The status of slavery in Minnesota Territory as a result of *Dred Scott* is, however, open to question. See D. FEHRENBACHER; THE DRED SCOTT CASE 186 (1978).

237. BASLER, *supra* note 204, at 372.

238. *Living Constitution*, *supra* note 193, at 702 (citing First Inaugural Address by Abraham Lincoln, March 4, 1961, in A. LINCOLN, SPEECHES AND LETTERS 171-72 (M. Roe ed. 1894)).

followed later by those same states in attempting to "secede" from the Union after Lincoln's election. In the secession ordinances, it was the refusal of the North to accept Taney's obiter dicta in *Dred Scott* as if they had been the very words of the Constitution that constituted one of the paramount grievances justifying secession. It was this use of *Dred Scott*, rather than *Dred Scott* itself, to which Lincoln objected when he spoke the words Rehnquist quoted. This is plain from what Lincoln says in the immediate sequel.

Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink, to decide cases properly brought before them; and it is no fault of theirs if others seek to turn their decisions to political purposes.²³⁹

To repeat, it was the "political purposes" of "others," not the court's decision as such against which Lincoln's argument is directed in his inaugural.

In speaking of the Kansas-Nebraska Act, which repealed the Missouri Compromise restriction of slavery three years before the Court declared it unconstitutional, Rehnquist writes as follows:

The enactment of the bill was, of course, a victory for the proslavery forces in Congress and a defeat for those opposed to the expansion of slavery. The great majority of the anti-slavery groups, as strongly as they felt about the matter, were still willing to live with the decision of Congress. They were not willing, however, to live with the *Dred Scott* decision.²⁴⁰

Rehnquist's version of ante-bellum American history is, to speak mildly, confused. I am not certain what he means by "willing to live with." But the repeal of the slavery restriction in the Missouri Compromise in the Kansas-Nebraska bill raised the greatest political fire storm the Republic has ever known. It brought Abraham Lincoln back into politics, and it led to the formation of the Republican Party, which was known for most of its first year of existence simply as the Anti-Nebraska party.²⁴¹ Its original purpose, and for some time its sole purpose, was to restore the Missouri Compromise

239. BASLER, *supra* note 204, at 587.

240. *Living Constitution*, *supra* note 193, at 701.

241. COMMAGER, *supra* note 25, at 329.

restriction of slavery.²⁴² I would not call this being “willing to live the decision of Congress.” By 1857, the Republicans, and the free-soil coalition they engendered, already foresaw the victory that had narrowly evaded them in the Presidential election of 1856. When the *Dred Scott* decision was handed down in 1857, all free-soilers howled their maledictions upon the heads of Taney and his cohorts.²⁴³ But the soberer ones among them, like Lincoln, made no attack upon the Court as an institution, nor did they declare there was anything in the political process that they were “not willing . . . to live with”²⁴⁴ They meant to do no more, nor less, than to have the decision reversed by a future Court by means of electing a President and Congress of their persuasion. It was the pro-slavery party who could be said to be unwilling to “live with” *Dred Scott*, because they would not “live with” its purely legal results, but demanded that its obiter dicta be accepted by all parts of the political community as rules binding upon their political actions.²⁴⁵ It was the pro-slavery groups who, as I have noted repeatedly, insisted that the political branches end their discussion of slavery in the Territories and accept Taney’s opinion in all its aspects as binding upon their political decision making.²⁴⁶ Their answer to the refusal of the American people to accept Taney’s dictum as a political rule was secession.²⁴⁷ That is what “not willing to live with” something really meant. It had nothing whatever to do with the question of the jurisdiction of the Court vis-a-vis that of the Congress.

I noted above Rehnquist’s assertion that according to Taney’s opinion “Congress was without power to legislate upon the issue of slavery even in a Territory governed by it”²⁴⁸ But this is inaccurate. Taney said that Congress *did* have the power of legislation, “coupled with the duty of guarding and protecting the owner in his rights.”²⁴⁹ It could legislate *for* slavery in the Territories, but not against it. This was the obverse of the free soil view, which was Lincoln’s, that Congress could legislate *against* slavery in the Territories, but not

242. *Id.* at 363.

243. D. FEHRENBACHER, *THE DRED SCOTT CASE* 417 (1978).

244. *Living Constitution*, *supra* note 193, at 701.

245. *Id.*

246. *See e.g.*, Jefferson Davis’ Senate Resolutions cited by D. FEHRENBACHER, *THE DRED SCOTT CASE* 531.

247. *See generally* D. FEHRENBACHER, *THE DRED SCOTT CASE* (1978).

248. *Living Constitution*, *supra* note 193, at 701.

249. *Dred Scott*, 60 U.S. at 452.

for it. At no point did the dispute take the form which Rehnquist would like to think that it took: which branch of the government, the Congress or the Court ought to decide the question of slavery in the Territories. Before secession, each side wanted Congress to adopt its view of the legality of slavery in the Territories, and each side wished, if possible, to have its view endorsed by the Court. Abraham Lincoln would have had no objection whatever to any alleged intrusion of the judiciary into political or legislative decision making had the Taney court decided *Dred Scott* in accordance with the free soil understanding of the Constitution. Lincoln would have been happy to have the Court decide both that Dred Scott was free and that Congress had the power, coupled with the duty, of guaranteeing freedom in the Territories. Lincoln believed that the natural condition of the Territories was freedom, but that it was prudent for Congress to make explicit what was implicit constitutional law.

What then was the fundamental question in *Dred Scott*? I have written upon this so many times that I hesitate to bore my audience, if not myself, by doing so again.²⁵⁰ What I have written, however, seems not to have penetrated either the emanations or the penumbra of American jurisprudence as represented by the Department of Justice or its nominee for Chief Justice of the United States. Briefly, the fifth amendment to the Constitution declares that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law” Taney said that the Constitution recognized the right of property in slaves by declaring in article IV as follows:

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor shall be due.²⁵¹

This represented constitutional recognition of the laws of the slave states that regarded those persons “held to service or labor” (viz., slaves) as chattel property. Moreover, in article I, section 9, the Constitution declared that “[t]he migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Con-

250. See generally CRISIS OF THE HOUSE DIVIDED (1959).

251. COMMAGER, *supra* note 217, at 322.

gress prior to the year one thousand eight hundred and eight”²⁵²

This unrepealable limitation for twenty years upon the power of Congress “to regulate commerce with foreign nations and among the several states . . .” was evidence, said Taney, that a Negro slave was regarded, at the time the Constitution was written, as “an ordinary article of merchandise and property.”²⁵³ One might cavil that since no other form of property is thus singled out in the text of the Constitution it would have been more proper for Taney to have called it *extraordinary*. Although one might object, as Lincoln did, that the right to property in a slave is not *expressly* affirmed in the Constitution, one can hardly deny that it is affirmed by necessary implication. If the government of the United States is compelled by the Constitution to recognize the validity of those state laws guaranteeing the right of property in a slave and is expressly empowered to assist in the enforcement of those laws, then one can certainly say that the right of property in slaves in the laws of the aforesaid states is recognized by the Constitution. But “no person [may] . . . be deprived” of property “without due process of law.”²⁵⁴ To deprive a citizen of a slave state of his particular form of chattel property because he set foot in a United States Territory with it would certainly seem to qualify as a violation of the right to property protected by the fifth amendment.

Justice Rehnquist, in a passage I already quoted, has declared (on the authority of John Marshall) that when “the popular branches of government . . . overstep the authority given them by the Constitution . . . or invade protected individual rights,” the Court may act to protect those rights.²⁵⁵ Now this is precisely what Taney believed the Court was doing in the case of *Dred Scott*. Looked at in this light, a law excluding slavery from a Territory would be as surely unconstitutional as an *ex post facto* law. Whatever one may say of Taney’s opinion, at this point, it cannot be censured as a usurpation of power by the judiciary.

What then was wrong with Taney’s opinion in *Dred Scott*? The heart of Taney’s opinion was the judgment that constitu-

252. U.S. CONST., art. I, § 9.

253. *Dred Scott*, 60 U.S. at 452.

254. U.S. CONST., amend. V.

255. *Living Constitution*, *supra* note 193, at 696.

tionally the Negro was not a man, but a chattel. Everything that Taney had to say about the power of Congress over slavery in the Territories followed from his opinion that the slave was the chattel property of his owner and that the owner's right in that property was protected by the fifth amendment. How can Rehnquist object? According to Justice Rehnquist, all moral judgments are merely "value judgments" and take on "generalized moral rightness" only by being incorporated into a constitution by a people. The constitutions of the slave states in 1857 reflected their peoples' "value judgments" that Negroes—whether free or slave—were "so far inferior that they had no rights which the white man was bound to respect." For this reason they "might justly and lawfully be reduced to slavery" These "value judgments" having been duly incorporated into these state constitutions had, I may presume, "take[n] on a form of moral goodness because they [had] been enacted into positive law."²⁵⁶ Moral obligation proper, according to Rehnquist, is grounded only in the positive law. "[I]ndividual moral ['value'] judgments," he says, have reference only to the consciences of the individuals who hold them.²⁵⁷ And, it would appear, all consciences are created equal, which is to say that prior to enactment into positive law, no one's moral judgment has any more authority than anyone else's. All moral judgments are, according to Rehnquist, in a Hobbesian state of nature with respect to each other.²⁵⁸ That is to say, apart from positive law [viz., the will of the sovereign] no action (as for example enslaving another human being) is unjust. The opinion that the Negro is subhuman has, therefore, equal authority a priori with the opinion that he is human, and whichever of these opinions gains "sufficiently numerous" adherents will become the positive law and have the authority of the sovereign people behind it. By this fact alone can it be called morally obligatory. The truth is that Justice Rehnquist has no ground whatever to object to Taney's opinion in *Dred Scott*. Indeed, Taney's opinion, as we have restated it, is the only one consistent with Justice Rehnquist's premises.

But Rehnquist's and Taney's premises are wrong. That the Negro is a human being is a matter of fact and not of opin-

256. *Living Constitution*, supra note 193, at 704.

257. *Id.*

258. *Id.*

ion. In the Fugitive Slave Clause of the Constitution, the slave is referred to, not as a chattel, but as a person.²⁵⁹ He is "a person held to service or labor," but a person nonetheless. The state laws holding him to such service or labor called him a chattel, *but the Constitution does not*. Even the aforesaid state laws were not themselves consistent in holding him a chattel. The very essence of chatteldom is the absence of a rational will. A chattel—e.g., a dog, a cow, or a pig—cannot be held responsible for its actions. Only an adult human being, one who has reached the age of consent, can be held responsible for his actions, *because he is responsible for knowing the difference between right and wrong*. Yet Negro slaves, not to mention free Negroes, were held responsible for a variety of felonies under the criminal codes of all the slave states. As such they were, however, inconsistently "persons" in the sense of the fifth amendment. But what about free Negroes? Who ever heard, Lincoln asked, of free horses or free cattle? And what about the laws forbidding miscegenation? Who ever heard about laws forbidding the marriage of whites and cattle?

Fundamental to the law of the Constitution was the fact of the Negro's personality—in short, his humanity. But it cannot be repeated too often that a person cannot be a chattel and a chattel cannot be a person. Viewed in this light, one may say that the Constitution is self-contradictory, if not schizophrenic. But it is an axiom of constitutional interpretation that a self-contradictory interpretation is a mistaken interpretation, because one cannot obey a self-contradictory law. That the Negro belongs to the species *homo sapiens* is as undeniable as that any white (or yellow, red, or brown) individual belongs to this species. His rationality—his use of the parts of speech which characterize human language—is indicative of the essence of his humanity, the color of his skin, a mere accident. What makes the slaughter of cattle for food not only lawful, but moral, is the subhumanity of their species. What makes the gratuitous killing of a black man murder is the fact that his species is the same as that of the man who murders him. But what makes the killing of a black man murder, makes his enslavement theft. For to enslave a man is to steal his labor and the fruit of his labor. This is theft apart from all positive law as much as murder is murder apart from all positive law. Indeed, to take the whole of the fruit of a man's labor for his

259. COMMAGER, *supra* note 217, at 332.

whole life makes murder and theft, in any final sense, morally indistinguishable. Hence Lincoln denied that the moral condemnation of slavery required any positive law. The ground of this condemnation was antecedent to any positive law or to any human pronouncement whatever.

Slavery is founded in the selfishness of man's nature—opposition to it in his love of justice. These principles are an eternal antagonism Repeal the Missouri Compromise, repeal all compromises, repeal the Declaration of Independence, repeal all past history, you still cannot repeal human nature.²⁶⁰

Taney's opinion in *Dred Scott* was wrong for one paramount reason. He did not see that the Constitution, grounded in the principles of the Declaration of Independence, reflected any standard of justice other than the positive law. He did not see that the word "person" meant any human person whatever his race, creed, or nation.

In December 1860 Lincoln wrote to his old friend Alexander Stephens—who, he hoped, was still a friend and not an enemy—that the South would be in no more danger from his administration than from that of Washington.²⁶¹ He would no more interfere with slavery in the slave states than had any President before him.²⁶² But that, he said, did not meet Southern objections: "You think slavery is right and ought to be extended, while we think it is wrong and ought to be restricted. That, I suppose, is the rub."²⁶³

That was indeed the "rub" that led to secession and civil war. It was also the "rub" in *Dred Scott*. Until Justice Rehnquist learns this lesson from Abraham Lincoln, he will not understand the original intentions of those who framed the Constitution of the United States.

260. BASLER, *supra* note 204, at 309.

261. *Id.* at 568.

262. *Id.*

263. *Id.*