

# AN APPLE OF GOLD: ABRAHAM LINCOLN AND CONSTITUTIONAL INTERPRETATION

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## Introduction

In the closing days of the Adams Administration, President John Adams appointed 42 men to fill the position of justice-of-the-peace for the District of Columbia. He and the Federalist-controlled Senate did so as part of an attempt to secure Federalist control over the judicial branch before surrendering control of the other two to Thomas Jefferson and his Democratic-Republicans. In the melee of the final hours of the Adams administration several of these judicial commissions were not delivered, one of which belonged to one William Marbury. When James Madison took office as Secretary of State under Jefferson on March 4, he discovered the commissions and refused to deliver them, despite the fact that they were approved, signed, and sealed by Madison's predecessor-turned Chief Justice, John Marshall. Marbury, along with the others whose commissions were not delivered, sued Madison under Article 13 of the Judiciary Act of 1789. They claimed the act gave the Supreme Court original jurisdiction over the matter, allowing them to rule on it directly.<sup>1</sup>

Speaking for the Supreme Court in *Marbury v. Madison* (1803), Marshall ruled that Madison could not be required to deliver the commission by that court. In doing so he established a principle that went beyond the commissioning of a justice-of-the-peace. The court declared that Article 13 of the Judiciary Act was unconstitutional and therefore null and void. They did so by asserting the doctrine of judicial review. The powers of the government are limited by the Constitution. The Constitution is "the fundamental and paramount law of the nation, and consequently...an act of the legislature repugnant to the constitution, is void."<sup>2</sup> It is "the supreme law of the land," and any act of the government must be consistent with it.<sup>3</sup> Only those acts made "in pursuance of" the Constitution also have this rank. It is higher than the government and its laws, for the Constitution created both. Were an act, contrary to the Constitution, to be accepted, the principle of constitutional government would collapse.

Literally speaking it is possible for the legislature to create an unconstitutional law. There must be a way to prevent the legislative branch from imposing an unconstitutional law on the nation. To this end the

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<sup>1</sup> Ralph A. Rossum and G. Alan Tarr, *American Constitutional Law, Volume I: The Structure of Government*. New York: Worth Publishers (1999), p. 75.

<sup>2</sup> *Marbury v. Madison*, 5 US (1 Cranch) 137 (1803), in Rossum and Tarr p. 77

<sup>3</sup> The Constitution of the United States of America, Article VI, clause 2

Marshall court introduces the doctrine of judicial review. "It is," the Chief Justice noted, "emphatically the province of the judicial department to say what the law is."<sup>4</sup> Judges, when they rule on laws, must often choose between the Constitution and a law. Since the Constitution is the supreme law of the land, they must invariably choose to enforce the Constitution and ignore the law. Doing so renders the law null and void, because all other judges must do the same. Someone must determine if a law is in pursuance of the Constitution, and judges, by their position and training are in the proper place to do so.

There are some instances where the text of the Constitution is clear and easy to understand. There is no questioning the fact that one must be 35 and a natural-born U.S. citizen to be President of the United States. The Constitution explicitly prohibits the issuance of Bills of Attainder and ex post facto laws. In these cases, the text is clear. This is not true in all cases. To what cases does freedom of speech apply? Who may suspend habeas corpus? What is the meaning of the Establishment Clause? The text leaves these questions unanswered. Chief Justice Marshall noted in *McCulloch v. Maryland* (1819) that

A Constitution, to contain an accurate detail of all the subdivisions of which its greatest powers will admit, and all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its

important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.<sup>5</sup>

It would be impossible for a constitution to cover everything with total accuracy, and still be a document that is comprehensible by the public. It would become an unintelligible jumble of legal jargon that only a few trained minds could understand. It would not be venerated the way our Constitution is. Ours is a broad Constitution that outlines the general framework, and it remains for us to use that framework to build around it. We must apply general practices to particular circumstances when the Constitution is not specific. A judge must do this when examining a law. He must ascertain if the particular statute is consistent with the broad plan of government erected by the Framers. They must be able to interpret the meaning of the Constitution and apply it to the particular circumstance in question. If they cannot, problems will arise, for one cannot always tell from the plain language of the text whether a law is consistent with it or not. It is necessary that the text be interpreted and since judges have that power they must exercise it when necessary.

Judges thus have both the ability and the need to interpret the constitutional text. This poses a new question: how should the Constitution be interpreted? Numerous methods of interpretation have been brought to bear during the past two-plus centuries. How is one to establish which of them is the proper one, and which ones are contrary to the American regime? In 1854, Congress passed the Kansas-Nebraska Act, mandating

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<sup>4</sup> *Marbury v. Madison*, 5 US (1 Cranch) 137 (1803), in Rossum and Tarr p. 77

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<sup>5</sup> *McCulloch v. Maryland*, 17 US (4 Wheat.) 316, 407 (1819), quoted in Antonin Scalia *A Matter of Interpretation: Federal Courts and the Law: An Essay*. Princeton, NJ: Princeton University Press (1997), p. 37

the principle of popular sovereignty for answering the slavery question in those territories. One unforeseen effect of the act was to excite the political interest of Abraham Lincoln. Throughout the next 11 years, from the Kansas-Nebraska Act to Dred Scott, his famous debates with Stephen Douglas, two terms as President and a Civil War, Lincoln advocated a particular method of understanding the Constitution. He saw the document as the manifestation of a set of principles that guided the Founding Fathers in their understanding of law and nation making, and ought therefore to be employed by modern jurists in understanding the fruits of their labor. Lincoln believed and demonstrated that the Constitution must be interpreted in light of the principles of the Declaration of Independence to be interpreted correctly.

## **The Jurisprudence of Oliver Wendell Holmes**

Fifty-three years after Lincoln's assassination, the Harvard Law Review published an article by a former officer of the Army of the Potomac. Its author, "more than any other individual, shaped the law of the twentieth century" in the United States.<sup>6</sup> The article is perhaps the clearest explication of the theory of interpretation that has come to dominate the modern court, conservative and liberal. The author was U.S. Supreme Court Justice Oliver Wendell Holmes. The article, "Natural Law," redefined American jurisprudence and has since influenced many justices, if not most, either directly or indirectly.

As its title suggests, "Natural Law" is an attempt to understand what natural law is, from whence its validity comes, and its

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<sup>6</sup> Albert W. Alschuler, *Law Without Values: The Life, Work and Legacy of Justice Holmes*. Chicago: University of Chicago Press (2000), p. 1

role in jurisprudence. Natural law is derived by two different types of people who have the same objective. Philosophers attempt "to prove that truth is absolute," while jurists "search for criteria of universal validity."<sup>7</sup> Both are trying to satisfy the instinct in man for absolutes: to be able to say that there is something higher, primary, and superior to all others. They want to be able to present to the world a guide, and to justify themselves in their actions by rendering them consistent with objective, transcendent truth. In doing so they become quite sure that what they have deduced is objective truth, yet no matter how much one believes something, it is not necessarily right. Men "have been cocksure of many things that were not so."<sup>8</sup> The "truth" may not be absolute.

We become attached to things that we are associated with as children. "Truth has a root in time," and since we have always preferred these things to others, we continue to do so throughout our lives. It is insane to argue with them: they are not based in logic or reason but are merely "dogmatic preferences." Each person is entitled to his preferences, but he is not entitled to enforce those preferences on anyone else. Doing so would presume that our beliefs are truth, yet "his grounds are just as good as ours." To say that there is absolute truth, a "natural law," is simply naïve. What we believe to be true is merely that which we prefer, and has no basis other than our preference for it. Something else may be equally true for another person, and for the same reasons. In a now-famous example, Holmes asserts that he prefers granite rocks and barberry bushes, not because they are

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<sup>7</sup> Oliver Wendell Holmes "Natural Law" 32 Harvard Law Review 40 (1918), in Richard A. Posner, ed. *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions and Other Writings of Oliver Wendell Holmes, Jr.* Chicago: University of Chicago Press (1992), p. 180

<sup>8</sup> *Ibid.*, p. 181

intrinsically good, but simply because he loved them as a child. The foundation all of truth "is arbitrary." No one preference is superior to any other; both are simply individual choices.<sup>9</sup>

To talk of rights as being transcendental, higher, or natural is purely absurd. A right is an idea, a preference, and by definition no such thing can ever claim to be objectively true. Those things which are our rights are "only the hypostasis of a prophecy."<sup>10</sup> When the strongest portion of a society, in our case the majority, determines that it has a similar preference, they establish that preference as law. Whatever right is included in the law becomes a right. Until then, the right is imaginary, henceforth it is real, the manifestation of an idea. A people believe that it has a right, and is willing to fight to assert and defend that right. This willingness is the basis of rights, and people in a state express its desire to have such a right through the enactment of laws. These things are rights, not those things that some philosopher or judge concocts according to a theory. One's rights are those things which a people authorizes its members to do through the law.

In war, men often sacrifice their life, which is considered the highest fundamental right. They do so not only in war, but whenever "the interest of society, that is, the predominant power in the community, is thought to demand it."<sup>11</sup> When the society determines that they must surrender their rights, their rights are surrendered, for society is the sole basis of those rights. The rights of the people in a society are determined by that society; they are purely contractual. The majority, since they furnish the force that preserves rights, must then determine what those rights are. In that determination they are left to consult their

own preferences. Whatever preference is held by the most people decides the issue. Since none is better than any other, which value triumphs is irrelevant. Natural law, then, is pointless, since it directs its adherents to believe that some things are simply true and that certain rights cannot be voided by the majority. American government is an exercise in democracy. So long as the true majority is allowed to assert itself, its decision is always right. What decision is made is irrelevant insofar as the decision has no intrinsic value. Its only value is that it is the decision of the dominant interest of the society. In that regard it is superior to anything that is not law. Laws, and thus rights, are what society says they are; all law is positive law.

## Rehnquist and the Contemporary Court

Foremost among the adherents of Justice Holmes is the current Chief Justice of the Supreme Court, William H. Rehnquist. While an associate justice, Rehnquist published an article in the *Texas Law Review* titled "The Notion of a Living Constitution." In it he takes to task those who believe that "nonelected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so."<sup>12</sup> Citing the problems of this "liberal" notion of the role of the courts, he replaces it with his method of jurisprudence. In it we see the modern manifestation of the philosophy of Oliver Wendell Holmes most clearly explicated.

Within the article one sees the Chief Justice's jurisprudence when responding to the third difficulty in the "living Consti-

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<sup>9</sup> Ibid., p. 181

<sup>10</sup> Ibid., p. 182

<sup>11</sup> Ibid., p. 182

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<sup>12</sup> William H. Rehnquist "The Notion of a Living Constitution" *54 Texas Law Review* 4 (May 1976), p. 695

tution" approach. That difficulty is "that it seems to ignore totally the nature of political value judgements in a democratic society." The decision of the majority under the Constitution is the law; to overturn it implies that the will of the people is somehow wrong. Like Holmes, the question Rehnquist raises is: On what basis was the law judged wrong? Recall that the moral judgments of individuals are merely preferences, and that "there is no conceivable way in which I can logically demonstrate to you that the judgements of my conscience are superior to the judgements of your conscience, and vice versa." Moral judgments are not logical or rational; no one is superior to the other, for none have any basis other than personal preference.<sup>13</sup>

Moral judgments do, of course, have their place in a free society, for they "afford a springboard for action in society."<sup>14</sup> People who believe in something will seek to have it enacted as law. In the process he will determine if others share in his judgment. If they do, then that judgment will be enacted as law. "The laws that emerge" from such a process "take on a form of moral goodness when they are enacted as positive law." It is the enactment of a value judgment as law that gives it moral strength; their worth is derived "neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice."<sup>15</sup> American law focuses on the protection of rights. These safeguards for individual liberty, since they are a part of the law, must be measured by the same standards as any other law. The people of the United States determined that certain rights, such as speech, press, trial by jury, etc, ought to be afforded protection. To that end they enacted laws. If they chose not to, then these things would

not be protected; indeed, there are many things not protected, for the law does not afford them protection.

As to the judge's role in interpreting the Constitution, it is strictly limited. The Constitution is the supreme law of the land, and therefore the supreme value judgment of the nation. So long as a law does not conflict with the text of the Constitution it is legitimate. The justices must set aside their own moral judgments and examine the law in light of the only moral judgment that matters, the law.

Together, Holmes and Rehnquist elaborate the legal positivist theory of jurisprudence. The law determines what rights the people have and what controls the government may exert on the people. Since there is no intrinsic right, the law cannot be wrong. The law is merely the manifestation of the individual value judgments of the dominant interest of the society. Whatever that interest determines to be right becomes law, and by becoming law becomes right. Any objection is simply another value judgment, but without the force of society to make it law. In a democratic society, the majority is the dominant interest. Self-government is the basis of the American regime, and popular rule is its primary mechanism. Legal positivism is, in short, the doctrine that the decision of the dominant power in a society is right and law.

Adherence to the Holmesian theory permeates not only those like Rehnquist, who are avowed disciples of Holmes, but those who claim to have distinctly differing views of interpretation. Even those commonly thought to be opponents of Rehnquist are unable to separate themselves from Holmes' influences. Justice Antonin Scalia, typically regarded as a conservative and an ally of Rehnquist on the Court, is one such prominent example. Scalia adopts a form of the "text and tradition" approach to constitutional interpretation, by which he attempts

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<sup>13</sup> Ibid., p. 704

<sup>14</sup> Ibid., p. 705

<sup>15</sup> Ibid., p. 704

to ascertain "the original meaning of the text." First, he examines the writings of those who were influential in framing the Constitution, such as Madison and Hamilton in *The Federalist Papers*. He does not limit himself to those people, for there were other intelligent men whose writings may also shed light on how they understood the text. Such people, Scalia says, include John Jay in the *Federalist* or Thomas Jefferson, "even though neither of them was a Framers," strictly speaking.<sup>16</sup> He seeks to understand the law as those who created it understood it. Thus, if the Framers considered something to be a right and expressed as much in relation to the Constitution, then such a right exists. If not, then the right is not protected under the Constitution. Like Holmes, "truth ha[s] a common root in time."<sup>17</sup> For Scalia, however, the truth is that of the nation, and not of an individual. The preferences of the young nation shape our nation's judgment today, just as the early associations of a man determine his adult preferences. The Framers of the Constitution expressed a desire that a right be secured, and then acted to secure it. Any other rights may be regulated or abolished by the government, so long as the rights of the Founders remain intact.

Rights may also be derived from the common law, brought from England and evolved until the present time. They are those things that have commonly been understood as rights, and were understood as rights by the Framers under the common law. They have been considered as rights for as long as men can remember laws. They were enacted by men as rights through the common law. The process may be different, but the outcome is the same. Rights are derived from their enactment in law and their acceptance over time. They are those

things which have been enacted in positive law since the Founding by the Framers, either through the Constitution or common law. Scalia differs from Holmes insofar as he requires that the original intent of the Framers be adhered to; what they believed were our rights could not be tampered with in any way. His agreement with Holmes resides in the fact that the only protected rights are those which the Founders attempted to manifest through common or positive law. There is no principle underlying these rights by which other rights can be manifested.

Such thinking about the basis of law is not confined to "conservative" jurists. Justice William J. Brennan, the primary expositor of the modern liberal, or living Constitution approach to interpretation, also shows the influence of the late Justice Holmes. He does so while rejecting Scalia's belief that "we can gauge accurately the intent of the Framers on application to specific, contemporary questions."<sup>18</sup> Brennan doubts first that any principles could have existed. They were lost in compromise and political ambiguity, in the attempt to fashion a document that disparate parties could support. Furthermore, the Framers could not possibly have conceived of modern problems: issues of technology and society which did not exist then do now, and the Constitution must be able to adapt to those things.

Our institutions must be adaptable to the changing circumstances of a changing world. The Constitution allows for this, since it "was meant as a plan of government and not as an embodiment of fundamental

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<sup>16</sup> Scalia p. 38

<sup>17</sup> Oliver Wendell Holmes "Natural Law" 32 *Harvard Law Review* 40 (1918), quoted in Posner p. 181

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<sup>18</sup> William J. Brennan "Address to the Text and Teaching Symposium," Georgetown University, October 12, 1985, Washington, D.C., in Mary P. Nichols and David K. Nichols *Readings in American Government*, Fifth Edition. Dubuque, IA: Kendall-Hunt Publishing Company (1996), p. 365

substantive values."<sup>19</sup> That plan of government guides us in the letter of the law, but as for its spirit, we must be our own guides. There is no transcendent principle, inherent in our Founding that can guide us. We must determine for ourselves "what the words of the text mean in our time."<sup>20</sup> Brennan believed the Constitution was based on the dignity of man. The law must serve to protect that dignity, yet the definition of dignity changes from generation to generation; it is not transcendent. Lawmakers may not always keep pace, so judges must. Judges, interpreting human dignity and applying it to cases at law shape the meaning of those laws. The same law that was once constitutional may cease to be so if society's notion of human dignity changes, and "the demands of human dignity will never cease to evolve."<sup>21</sup> What was right in one era may not be now, and what we consider to be right may not be at some time in the future. Any law or idea that violates human dignity is unjust and must be undone, no matter how long it is stood, or what principles it is founded upon. Principles can cease to be right, just as laws can be. Societal evolution changes what principles are right, just as it changes what principles are wrong. Though he eschews Scalia's version of original intent, Brennan is also a legal positivist insofar as he denies the existence of transcendent principles in the American regime.

Contemporary jurists may differ on how to interpret the law in specific instances, but they are similar in that they all live and work in the shadow of Oliver Wendell Holmes. His theories of legal positivism have permeated jurisprudence to the point where conservatives and liberals are arguing opposite sides of the same coin.

Conservatives assert that what the Founders believed to be rights are rights through their enshrinement in the Constitution or through the common law they adhered to. Conversely, liberals argue that the notions of a bygone era are inadequate to today's needs, and that new notions of law must be adapted to fit meet the demands of human dignity. Justice Holmes truly is the founder of modern jurisprudence.

## **The Voice of Opposition**

Holmes and his disciples, ranging across the political and philosophical landscape, seem to rule that landscape unchallenged. They have shaped the course of the law for nearly a century, and their end is nowhere in sight. This does not signal an end to the discussion, however, for they are not completely unopposed. A voice cries out from the past, imploring us to reexamine the Founding, the Framers, and the law itself. It is the voice that guided a nation through Civil War, and laid the foundation for an America that was what it claimed to be. It is a voice that even now has an invaluable lesson in American government to impart upon anyone who is willing to listen; it is the last gasp of opposition to Oliver Wendell Holmes. It is the voice of Abraham Lincoln. Though Lincoln died decades before the rise of Oliver Wendell Holmes, the challenges Lincoln faced were much the same. Lincoln, however, saw the problem of constitutional interpretation in a much more direct, obvious way: slavery. This institution, based in the legal rights granted to people in a society, denied the validity of transcendental rights. Lincoln strove for over a decade following the passage of the Kansas-Nebraska Act to undo the work of men who operated under premises similar to those of Oliver Wendell Holmes. Lincoln believed not only that transcendent principles existed,

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<sup>19</sup> Ibid., p. 365

<sup>20</sup> Ibid., p. 367

<sup>21</sup> Ibid., p. 369

but that such principles were the foundation of the American government. For Lincoln, it was impossible to understand the Constitution without understanding these principles; they constituted his "ancient faith."<sup>22</sup> These principles were to be found in the act that made America a nation: the Declaration of Independence. One had to examine the Constitution and all laws made under it in light of the principles espoused in that document. It was only these principles that protected America from becoming the type of nation Hamilton described every other nation as being: a tyranny. Lincoln proved that the Constitution had to be interpreted in light of the principles of the Declaration of Independence to be interpreted correctly; he advocated a jurisprudence of natural rights.

Throughout his speeches and writings Lincoln made these points clear, yet sometime in 1860 he encapsulated in less than one page his view of law, the Constitution, the Declaration of Independence, and the role of inherent truth in the American regime. With the Civil War about to begin, the sectional conflict had reached its crisis. This piece, known to us as "Fragment: The Constitution and the Union," was never delivered to an audience or sent as correspondence. In this fragment, however, Lincoln outlines the nature of the American Founding, the philosophy of natural rights, its incorporation and centrality in the American regime through the Declaration of Independence, the need to maintain the centrality for America to survive, and how that is accomplished through the application of those principles to the Constitution. "The Constitution and the Union" is a systematic argument for a natural rights approach to constitutional interpretation.

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<sup>22</sup> Abraham Lincoln, "The Repeal of the Missouri Compromise and the Propriety of its Restoration: Speech at Peoria, Illinois in Response to Senator Douglas (October 16, 1854)" in Roy P. Basler *Abraham Lincoln: His Speeches and Writings*. New York: DaCapo (1946), p. 303

All this is not the result of accident. It has a philosophical cause. Without the *Constitution* and the *Union*, we could not have attained the result; but even these, are not the primary cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart. That something, is the principle of "Liberty to all"—the principle that clears the *path* for all—gives *hope* to all—and, by consequence, *enterprise* and *industry* to all.

The *expression* of that principle, in our Declaration of Independence, was most happy, and fortunate. *Without* this, as well as *with* it, we could have declared our independence of Great Britain; but *without* it, we could not, I think, have secured our free government, and consequent prosperity. No oppressed people will *fight*, and *endure*, as our fathers did, without the promise of something better, than a mere change of masters.

The assertion of that *principle*, at *that time*, 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.

So let us act, that neither *picture*, or *apple*, shall ever be blurred, or broken.

That we may so act, we must study, and understand the points of danger.



## Paragraph One: The Foundation of Our Success

[1] All this is not the result of accident.<sup>23</sup>

Three centuries earlier, Niccolo Machiavelli counseled that "variations of government arise by chance among men."<sup>24</sup> All states throughout history had been the result of chance. Some ruler or ruling class came to power, either through heredity or conquest, and imposed their will on the people living in the conquered land. Circumstance often played a major role in one's rise to power: shifting alliances, favorable battle terrain, or even a strong storm could determine the fate of entire nations. Powerless to protest, the people were forced to accept whoever came to power. They were in such a state because they lacked the force necessary to overturn kings, nobles and knights, armed and trained, dedicated to preserving the rule of those in power. Whatever laws they then promulgated had to be accepted, for there was no way to dispose of either the ruler or his laws. Even Athens, the birthplace of democracy became so only through favorable circumstance and a law-giver. Still it suffered repeated usurpations as the fortunes of nations rose and fell. The only principle of government was power; whoever had the strength to enforce his decrees was sovereign.

This statement was true enough until the American Founding. Alexander Hamilton realized that American deviated from all

previous regimes, and made it a centerpiece of *The Federalist Papers*. In the first *Federalist* he told his readers that

It seems to have been reserved to the people of this country, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political institutions, on accident and force.<sup>25</sup>

There are two things to be noted from this. The first is that the United States is a kind of experiment. America is the test case for government "by reflection and choice." For the first time men would be allowed to decide for themselves what form of government suits them best, and to put that government into effect. If we fail in our efforts, however, government of this type will be doomed. It will have been attempted under circumstances ideal for its success and failed. Future rulers will be able to turn to this example and say to their people: "if government by choice failed in America it will not succeed here." Oppressed peoples will have only the example of American failure; they will be without hope for bettering their own oppressed condition.

Lincoln said as much to the Congress in December 1862. In his Second Annual Message he told that body that the currently raging Civil War was a test of the American experiment. Through our actions now, "we shall nobly save, or meanly lose, the last, best hope of earth."<sup>26</sup> If we cannot save this republic and preserve it, then free govern-

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<sup>23</sup> All blocked quotes preceded by bracketed numbers are taken from Abraham Lincoln "Fragment: The Constitution and the Union (1860?)" in Basler p. 513

<sup>24</sup> Niccolo Machiavelli, *Discourses on the First Ten Books of Titus Livy* (tr. Harvey C. Mansfield and Nathan Tarcov). Chicago: University of Chicago Press (1996), Book I, Chapter 2, paragraph 3

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<sup>25</sup> Alexander Hamilton, *The Federalist No. 1*, in Publius, *The Federalist* (tr. Jacob E. Cooke). Hanover, NH: Wesleyan University Press (1961), p. 3

<sup>26</sup> Abraham Lincoln, "Annual Message to Congress (December 1, 1862)," in Basler p. 688

ment by reflection and choice is doomed for all time. We will have proven that free government is fatally flawed and incapable of survival, that it will devour itself when faced with a serious challenge. This is not to say that union and liberty for the United States were not the primary objectives of the conflict. Lincoln, however, was able to see the implications of the war for the rest of the world, and made it a focus of his justification of the war and his actions to Congress on July 4, 1861. Among other things he noted that

This issue embraces more than the fate of the United States. It presents to the whole family of man the question, whether a constitutional republic, or democracy—a government of the people by the same people—can or cannot maintain its territorial integrity against its own domestic foes...Is there, in all republics, this inherent and fatal weakness? Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence.<sup>27</sup>

Is popular government viable? America was the proving ground for such a government.

America represents a peculiar experiment on the part of men to decide for themselves which form of government shall be best suited to them. This is an event, unprecedented in history. America, Leo Strauss observed, "may be said to be the first government in the world which was founded in explicit opposition to Machiavellian principles."<sup>28</sup> Every other nation on earth has evolved through the convulsions of war

and revolution, the designs of ambitious men, and sometimes plain dumb luck. These nations cannot even ascertain for certain when or how they began, to say nothing of why. America stands in glaring contrast to this vagueness of origin and purpose. If not by accident, then this nation must be the result of conscious choice. The Continental Congress recognized the choice they were making in 1775, stating that "we are reduced to the alternative of chusing an unconditional surrender to the tyranny of irritated ministers, or resistance by force—the latter is our choice."<sup>29</sup> Throughout the revolution and beyond they made conscious choices, and those choices shaped a nation.

Even at this most basic level we can see the rift between Lincoln and the Founders and Holmes and his progeny begin to open. The latter tell us that our beliefs are formed in early childhood and that we prefer those things we associate with at that time. By the time we are adults we are wed to those beliefs and preferences to the point that they are dogma, beyond reason and impossible to argue against. We are thus at the mercy of chance; whatever we are exposed to as children is what we prefer. Unable to choose our preferences, we merely act according to what has been determined for us by fortune. The dominant interest of society, imposing its commonly held preferences on others, establishes states and the laws that govern them. Our governments, as Machiavelli said, thus arise by "chance among men."

This is not the type of man, or the manner of nation building, envisioned by Lincoln and the Framers. Their entire system of government was founded on the principles of choice. It exists in defiance of

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<sup>27</sup> Lincoln, "Message to Congress in Special Session (July 4, 1861)," in Basler p. 5

<sup>28</sup> Leo Strauss, *Thoughts on Machiavelli*. Chicago: University of Chicago Press (1978), p. 13

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<sup>29</sup> "Declaration of the Causes and Necessities of Taking Up Arms (July 6, 1775)," in Jack P. Greene, ed. *Colonies to Nation, 1763-1789: A Documentary History of the American Revolution*. New York: W. W. Norton and Co. (1975) p. 258

the notion that men have no control over themselves or their destiny. Rational people, having formed views rationally, make rational decisions regarding themselves and the future of the nation. They founded a nation whose very founding stood in direct opposition to the idea of chance or fortune. The American regime was the result of "reflection and choice."

[2] It has a philosophical cause.

This completes the elegant direct proof Lincoln begins with. He presents us with two choices, eliminates one, and thus claims the other to be true. By definition, all events must be either accidental or intentional. Often they bear shades of both, but they are never neither. The American Founding and the American regime were not accidental but intentional. Lincoln then turns to the question that logically follows: If these things were intentional, what was the intent? Our Founding Fathers were acting with a purpose; they had an objective: to make the American state into something. Something caused all of this to happen. That something, simply put, is a philosophy. America is the first nation which came to be and took shape as the result of a philosophy. Their philosophy convinced them that something was logically true, and through that belief created a regime meant to fulfill that truth. America is based in an idea, an idea which guided the Framers, an idea that has brought the nation to where it now stands. It was the choice the nation made to guide it. This is a transitional statement for Lincoln. He uses it to banish the notion that we are the result of accident. We are meant to cast it aside, for we must accept that consciously chosen philosophical foundations are the basis of the nation, that we may understand what those foundations are. He prepares his reader for future discussion.

[3] Without the *Constitution* and the *Union*, we could not have attained the result;

Throughout his presidency, Lincoln places great importance on the Constitution as the instrument of our success. He always strives to insure that all his actions as president are within the bounds specified for the president and the federal government by the Constitution. In his Fourth of July Message to Congress in 1861, he painstakingly justifies himself in suspending *habeas corpus* by noting that such power is given in case of "invasion or rebellion." Even though the power is given in Article I, the article dealing with the legislative branch, he reasons that since it may be used in time of invasion or rebellion, it was not intended that it should lay idle, waiting for Congress, while the invasion or rebellion succeeds. If it were, there would be no reason to have the power, for it would be useless. He uses his power as commander-in-chief to legitimize his raising of 75,000 troops to quell the insurrection. His oath of office becomes his justification for his attempts to suppress the rebellion on more than one occasion. He tells the nation in his First Inaugural Address that he "shall have the most solemn (oath, registered in Heaven), to preserve, protect and defend" the Constitution.<sup>30</sup> The Emancipation Proclamation is based purely in the powers given to the President as commander-in-chief, hence its limited nature. Finally, he realized the importance of the constitutional forms. If the election of 1864 had been postponed, it could have been taken as a sign that the President has unlimited powers in times of crisis, and that ours is a government that cannot function normally in such times. The Constitution limits execu-

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<sup>30</sup> Lincoln, "First Inaugural Address (March 4, 1861)," in Basler p. 588

tive power; to claim unlimited power in any situation is unconstitutional. This is a line Lincoln refused to cross. Lincoln endeavored to preserve the Constitution for he recognized its paramount importance.

We attempted once to work with neither Constitution nor Union, and the result was unmitigated failure. This was the government of the Articles of Confederation. It was a confederation that could neither defend nor sustain itself, where member states teetered on the brink of war with each other. It was unable to fulfill its intent, to create a central government for the newly independent states. The risk, as chronicled in the earliest number of *The Federalist*, was that America would simply become a carbon copy of the failed republics of the ancient world. Hamilton noted that

It is impossible to read the history of the petty Republics of Greece and Italy, without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolution, by which they were kept in a state of perpetual vibration, between the extremes of tyranny and anarchy. If they exhibit occasional calms, these only serve as short-lived contrasts to the furious storms that are to succeed.<sup>31</sup>

The convulsions of the ancient republics, similar in form to the government of the Articles of Confederation, led to their ultimate destruction. They could not sustain themselves, and there was thus no reason to suspect that our confederation could either.

It was for this reason that they supported the creation of the Constitution; it would be the salvation of the Union. Hamilton observed that "nothing can be more evident, to those who are able to take

an enlarged view of the subject, than the alternative of an adoption of a new Constitution, or a dismemberment of the Union."<sup>32</sup> It was designed to overcome the shortfalls of previous republican governments, to create a lasting regime that would retain its original republican form. It would be able to maintain the Union in a way that the Articles of Confederation were unable to by virtue of the manner in which the Articles enfeebled the federal power relative to the states. The states were able to pursue their own interests at the expense of a Union that could not prevent it, and other states which would be able to take up arms to do so.

The Founders recognized the paramount importance of the Union to the success of the Revolution. In the second *Federalist* John Jay warned that "whenever the dissolution of the Union arrives, America will have reason to exclaim, in the words of the Poet, "Farewell, a long farewell, to all my greatness."<sup>33</sup> To prevent this, the Framers realized the need for a government that differed from all previous republics and confederations, a government which was capable of preserving what it had created, for without the Union, America would not become the power it did. It would become Europe, full of feuding states, either oppressors or oppressed. This would have signified the failure of the Revolution. The experiment based on reflection and choice would have collapsed.

Lincoln also noted the significance of the Union. He was willing to go to any length, including the fighting of a Civil War, to prevent its dissolution. He noted to Horace Greeley in August 1862 that "my paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing *any* slaves I would do it, and if I could save it by freeing *all* the slaves, I

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<sup>31</sup> Hamilton, *The Federalist No. 9*, in Cooke p. 50

<sup>32</sup> Hamilton, *The Federalist No. 1*, in Cooke p. 7

<sup>33</sup> John Jay, *The Federalist No. 2*, in Cooke p. 13

would do it; and if I could save it by freeing some and leaving others alone I would also do that."<sup>34</sup> Even for the most radical abolitionists, for whom the war was about slavery, the war was also about the Union. Without the Union, there would be no abolition. A separate Southern Confederacy would never end slavery. Indeed, it was the foundation of that new government, as Alexander Stephens asserted in the Cornerstone speech: "our new government is founded...upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition."<sup>35</sup> Even for the abolition of slavery the Union was critical. Despite his belief in the power of the philosophical cause behind America, he recognized that both of these elements were necessary for success. The Constitution and the Union are crucial to bringing the aforementioned philosophy to fruition. This does not, however, prove that these things are by themselves conclusive.

[4] ...but even these, are not the primary cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart.

The Union and the Constitution are not in and of themselves sufficient causes, either by themselves or taken together. The Constitution is a republican document, designed to provide the practices that govern such a nation. As such, it embraces the idea of self-government, including such mechanisms as elected legislatures and guarantees of republican government for states. It also includes provisions that explicitly enunciate

and protect certain rights from invasion by the government. Analyzing the intentions of the Framers, Douglas concludes that "our fathers of the Revolution were contending, not for Independence in the first instance, but for the inestimable right of Local Self-Government," which they felt was being denied to them by the British King and Parliament.<sup>36</sup> For Douglas, the Constitution, with its foundation in self-government, was an end in itself. This view formed the basis of popular sovereignty. The Constitution enumerated the powers of the federal government, and left the rest to the discretion of the states. Popular sovereignty was the crux of Douglas' position during the sectional conflict. Though he is dealing with slavery as a specific example, his theory in the abstract applies to all powers not given to the federal government through the Constitution. He declared that his "object was to secure the right of the people of each State and of each Territory, North or South, to decide the question for themselves, to have slavery or not, just as they chose.... Whenever you put a limitation upon the right of any people to decide what laws they want, you have destroyed the fundamental principle of self-government."<sup>37</sup> Self-government is the fundamental principle of the American regime; the people of a particular state or territory must be allowed to reach their own conclusion. The process of self-government is an end in itself; it is what the Constitution is designed to protect.

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<sup>34</sup> Lincoln, "Letter to Horace Greeley (August 22, 1862)," in Basler p. 652

<sup>35</sup> Alexander Stephens "Cornerstone Speech (March 21, 1861)"

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<sup>36</sup> Stephen Douglas "The Dividing Line Between Federal and Local Authority." *Harper's Magazine*, XIV (September 1859), pp. 519-537, in Harry V. Jaffa and Robert W. Johannsen, eds. *In the Name of the People: Speeches and Writings of Lincoln and Douglas in the Ohio Campaign of 1859*. Columbus, OH: Ohio State University Press (1959), p. 67

<sup>37</sup> Douglas "Homecoming Address at Chicago (July 9, 1858)"

Douglas's position is similar to that of Justice Holmes. For Holmes, like Douglas, there is no spirit except self-government. The law tells us that states have the power to decide on internal questions for themselves. This is what the dominant interest of the society demands. Lincoln's opinion on the matter is merely his opinion, being as it is not enacted in any constitutional or statutory law. The dominant interest of some states has decided to enslave Negroes, and in others it has accorded them varying degrees of the liberties guaranteed to white people. The people of a locality have spoken, and their decision is law.

The example is carried further by the decision of Chief Justice Roger Taney in *Dred Scott v. Sandford* (1857). In it Taney observes that the Fifth Amendment guarantees a right of property. The government cannot take this right away. The Constitution makes reference to slaves as property three times. Taney thus concludes that slaves are property. Since men cannot be deprived of their property by the Fifth Amendment, then men have a right of property in slaves. The people have spoken; the Constitution is the supreme law of the land, and it recognizes the right of one man to hold another man as a chattel slave. The right to slaves, then, "is distinctly and expressly affirmed in the Constitution."<sup>38</sup>

Douglas agrees with that decision, saying that "all other opinions must yield to the majesty of that authoritative adjudication." If we do not yield, "what security have you for your property, your reputation, and for your personal rights, if the courts are not upheld, and their decisions respected when once fairly rendered by the highest

tribunal known to the Constitution." To ignore the ruling would be to jeopardize all of our rights; only someone bent on the destruction of the Constitution and its great principle of popular sovereignty would do this. For Douglas that someone was Abraham Lincoln, who would replace this great principle with the principle "that there must be uniformity in the local laws and domestic institutions of each and all the States of the Union."<sup>39</sup> These intrusions must thus be resisted for the sake of self-government. The people, by way of the Constitution and the Fifth Amendment, have spoken. The laws they created to that effect have been upheld by the Supreme Court.

To Lincoln this view is an incomplete view of the Revolution, the Founding, the Constitution and the laws. There is something more fundamental than the Constitution and the Union. It supports the Constitution and the Union; without it the law is perverted by those who do not believe in it, such as we have seen above. It gives the law, and us, strength, for it is something that we believe in, higher than the positive laws of man. It is eternal, stretching back far beyond the tiny space of time that the Constitution and the Union have occupied. It is prior to them, and if they should ever fall, it will live. It is something which we can attach ourselves to and have faith in. One falls in love with the game of baseball, but the record of the 1954 Indians is hardly the object of our affection (111-43). It is difficult for the Constitution and the Union to have these distinctive properties. The Constitution and the Union are creations of man, and can therefore be destroyed by man. They are thus not eternal in the way that Lincoln considers this "primary cause of our great prosperity." The Constitution and the Union are instrumental, yet it is possible that there could be created

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<sup>38</sup> *Dred Scott v. Sandford*, 60 US (19 How.) 393 (1857), in David M. O'Brien *Constitutional Law and Politics, Volume Two: Civil Rights and Civil Liberties* (Fourth Edition). New York: W. W. Norton and Co. (2000), p. 1311

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<sup>39</sup> Douglas "Homecoming Address at Chicago (July 9, 1858)"

another Constitution, and another Union, equally capable of fulfilling the same ends. For this "something," however, such is not the case. There is nothing like it. Without it we would not be where we are now. This something is the one unexpendable facet of the American regime.

[5] That something, is the principle of "Liberty to all"—the principle that clears the path for all—gives hope to all—and, by consequence, *enterprise* and *industry* to all.

This is what Lincoln has been moving toward in the first paragraph. Thus far he has denied America is the result of accident, and asserted the existence of a philosophical cause. We have seen that the Constitution and the Union are not that cause, and are not of themselves capable of fulfilling that cause. Now, in one sentence, Lincoln reveals to us both the cause and the effect.

The cause, "the principle of 'Liberty to all,'" is a statement in two parts. The first, Liberty, encompasses the human freedoms that all men ought to enjoy. Lincoln summarized this basic freedom in 1858, when he said that "I believe each individual is naturally entitled to do as he pleases with himself and the fruit of his labor, so far as it in no wise interferes with any other man's rights."<sup>40</sup> Each person is his own master, and may do anything he wants; he ought not be constrained by any other person. Whatever he earns, he keeps, no matter how little he earns, because all men are entitled to what they earn with their own hands. If another could take what he earns away, they would own him, for they would have power to extract from him whatever they chose. Protections of liberty against such intrusions

are based in nature. It is not based in the laws of man; it is part of that thing which is higher. The laws of man cannot take it away without violating nature; since nature is higher than the law, no man or state may of right do so. To do so would terminate the liberty Lincoln described above. Thus the supposition that one man may enslave another is false.

This seems to create a problem in Lincoln's logic. Even Lincoln's opponents: Douglas, Taney, and by extension Holmes and Rehnquist, believe in liberty. People have rights guaranteed to them under the Constitution, such as free speech and press, jury trial, and protection against ex post facto laws and bills of attainder. The people have said what their liberties are, and who is entitled to them. They manifested them in positive laws. Strictly speaking, under the letter of the Constitution, people had a right to slaves, for the law allowed it to them. The collective value judgment of the community has affirmed that right, and thus it has legal status. Lincoln is confronted with the problem that others, also believing in liberty, are able to justify slavery and whatever else the community decides upon.

The solution lies in the complete clause, which specifies not just liberty, but "liberty to all." The principle of equality gives the liberty that Lincoln speaks of to all men. It makes no distinction between the races. He places no qualifications whatsoever on the amount of liberty that each person is allowed to enjoy. Douglas tells us that we may do exactly that; the white race may determine how much liberty the black race is entitled to enjoy. This is a violation of the Negro's rights from nature, which are not descended from positive law but are higher than that law and thus not negotiable under it. It also deprives him of that self-government which Douglas himself claims is the fundamental principle of the Constitution. Then there is the problem of making

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<sup>40</sup> Lincoln, "Speech in Reply to Douglas at Chicago, Illinois (July 10, 1858)," in Basler p. 394

exception to a principle that is meant to apply to all people. He confronts this in the summer of 1858. Telling his audience that if we begin with the idea "that all men are equal upon principle, and mak[e] exceptions to it, where will it stop? If one man says it does not mean a Negro, why may not another say it does not mean some other man."<sup>41</sup> A principle is something that is true all the time, not just when the majority wants it to be true, no matter how large that majority is. Once you admit that such a principle may be amended by the majority or any other group, there is no way to prevent it. It ceases to be a principle. As Lincoln notes in an 1854 fragment on slavery, no matter how one defines the basis of slavery, it may always be twisted to make the oppressor into the oppressed.<sup>42</sup> Opening the principle of equality to exception negates the principle, and makes possible that all could be as equal in their oppression as nature dictates they ought to be in their liberty.

Contrary to Douglas, the principle of equality does not mean to assert that all men are equal in all respects. Such is not the case; we are not all "equal in color, size, intellect, moral developments, or social capacity." Concerning the black woman Douglas asserted Lincoln wanted to marry because he would not hold her as a slave, "in some respects she certainly not my equal; but in her natural right to eat the bread she earns with her own hands without asking leave of anyone else, she is my equal, and the equal of all others."<sup>43</sup> This principle tempers the positive law right of property in the Constitution. The right still exists, but only insofar as it is consistent with the principle of "Liberty to all." Since slavery

both deprives one of liberty and legally places two men on unequal terms with one another it is unjust.

The effect of the manifestation of this paragraph, Lincoln says, is electric. America is prosperous in a way that no other people in history has ever been. America provides the opportunity by placing all men on equal terms in the eyes of the law. It gives them the means by providing the freedom to achieve prosperity. America clears the path for all. That opportunity, however, yields much. People have hope because they have a chance to do well. America gives hope to all. Men are willing to do for themselves because they have the right to keep what they have done and to dispose of their accomplishments as they please. When people and their property are the property of others, no one will want to achieve, for it will only be taken away by others. People will stop being industrious, and without the chance to do well will lose hope. The path will be closed to some. Note the emphasis on the phrase "to all." This is meant to counteract that eventuality. We must keep the path open to all for America to continue to thrive as it has. The principle of "Liberty to all" is the cause of our great prosperity and is superior to positive law; it takes precedence over it. As he closes the first paragraph, he leaves open the question: where does this principle come from, and why are we bound to it?

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<sup>41</sup> Ibid., p. 402-03

<sup>42</sup> Lincoln, "Fragment: On Slavery (July 1, 1854?)," in Basler p. 278

<sup>43</sup> Lincoln, "The Dred Scott Decision: Speech at Springfield, Illinois (June 26, 1857)," in Basler p. 360-61



## Paragraph Two: The Necessity of Principles

[6] The *expression* of that principle, in our Declaration of Independence, was most happy, and fortunate.

Lincoln almost anticipates the question: why should we think about the Constitution in terms of the principle of "Liberty to all?" Lincoln puts added emphasis on the word "*expression*" to stress the fact that the principle is not implied. It need not be inferred or deduced but is plainly available. The Declaration of Independence pointedly asserts the principle of "Liberty to all." The people came forward in that document and asserted that principle. The principles were the philosophical justification for a revolution, for the violent overthrow of one government and its replacement with another. Lincoln places great faith in the Declaration and the principles it contained.

The second paragraph of the Declaration begins by proclaiming that "we hold these Truths to be self-evident." What follows is so obvious it should not need to be said, yet they will be said for the record. The laws of man are not the foundation of government, "self-evident truths" are. They are so obvious that they can be understood by anyone; they are available to all. Once we understand these truths, it is then possible to reach conclusions about government, justice and rights based on them. All that is necessary is that someone does so. Foremost among these truths is "that all Men are created equal." Even before there were laws, men were equal. It is in the act of creation that men were made equal. Governments were formed long after that creation, and were thus not a party to it. The law can neither grant nor revoke equality; it is inherent in each person by virtue of his

being human. Law does not have the power to revoke what it has not granted, and it cannot grant what was granted before it even existed. From here Lincoln derives the notion of "...to all." The equality of men is higher than the law for it is antecedent to it.

Lincoln has already demonstrated that it is not in all respects that men are equal, such as size, intellect, capacities, etc. Yet each is equal in his natural right to "to do as he pleases with himself and the fruit of his labor, so far as it in no wise interferes with any other man's rights." The Declaration describes this to mean "that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."<sup>44</sup> These rights are a gift from the "Creator." They are not the product of any code of laws or any man, no matter how powerful. Since they do not originate in anything human, they cannot be taken away by anything human. Furthermore, since we are all equal and all endowed with rights, then we are equal in those rights. No man is entitled to his rights any more or less than any other man.

At the time of the Founding and the ratification of the Constitution, Lincoln asserts that slavery was considered to be an evil. Jefferson's first draft of the Declaration went so far as to contain a public denunciation of slavery, and blamed the English monarchy for its introduction and perpetuation. "The unmistakable spirit" of the Founding era and generation, "was hostility to the principle, and toleration only by necessity."<sup>45</sup> The necessity was the fact that it existed, and an attempt to outlaw it would destroy the fragile new Union, whose importance has already been spoken of. The

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<sup>44</sup> Declaration of Independence, paragraph 2

<sup>45</sup> Lincoln, "The Repeal of the Missouri Compromise and the Propriety of its Restoration: Speech at Peoria, Illinois in Response to Senator Douglas (October 16, 1854)," in Basler p. 314

Founders were secure in this arrangement because "where the founders of this government originally placed" slavery, was "in the course of ultimate extinction."<sup>46</sup>

History, however, proved that such was not the case. "In those days, Lincoln reflected,

Our Declaration of Independence was held sacred by all, and thought to include all; but now, to make the bondage of the negro universal and eternal, it is assailed, and sneered at, and construed, and hawked at, and torn, till if its framers could rise from their graves, they would not at all recognize it.<sup>47</sup>

By the time of Kansas-Nebraska the prevailing sentiment had changed. The Kansas-Nebraska Act and its supporters had turned from the Declaration to a new principle, "that if any one man, choose to enslave another, no third man shall be allowed to object."<sup>48</sup> It is the principle of popular sovereignty that gives to each local political institution the unbridled authority to regulate its own domestic institutions. If Kansas, or any other state or territory should choose to have slavery, no one may prevent it. Men have a right to their property, and they have a right to self-government. Black people "have no rights a white man is bound to respect."<sup>49</sup> If a state or territory chooses to extend it to them that is their choice, yet

they are not entitled to them. The choice of the people here and in all cases is supreme.

Popular sovereignty is based on exactly that, that the people are sovereign and entitled to self-government. The brand of self-government introduced by Douglas, however, is not self-government at all. By Douglas and Taney's admission the entire black race is deprived of the right to participate in their own government. The only self-government that can ever be worthy of the name is one that "allow[s] all the governed to have an equal voice in government."<sup>50</sup> According to the "ancient faith" all men are created equal, and are thus entitled to an equal share in their own affairs. For those who would perpetuate slavery, there remains only one alternative: to repudiate the ancient faith.

It was this that made the pronouncement of the principle of "Liberty to all" in the Declaration so happy and fortunate. Lincoln recalled that

Henry Clay once said that a class of men who would repress all tendencies to liberty and ultimate emancipation, that they must, if they wish to do this, go back to the era of our Independence, and muzzle the cannon which thunders its annual joyous return; they must blow out the moral lights around us; they must penetrate the human soul, and eradicate the love of liberty; and then, and not till then, could they perpetuate slavery in this country.<sup>51</sup>

This was exactly what they were doing, through the promulgation of popular

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<sup>46</sup> Lincoln, "Speech in Reply to Douglas at Chicago, Illinois (July 10, 1858)," in Basler p. 394

<sup>47</sup> Lincoln, "The Dred Scott Decision: Speech at Springfield, Illinois (June 26, 1857)," in Basler p. 359

<sup>48</sup> Lincoln, "A House Divided: Speech Delivered at Springfield, Illinois, at the Close of the Republican State Convention (June 16, 1858)," in Basler p. 373

<sup>49</sup> *Dred Scott v. Sandford* 60 US (19 How.) 393 (1857), in David M. O'Brien *Constitutional Law and Politics, Volume Two: Civil Rights and Civil Liberties* (Fourth Edition). New York: W. W. Norton and Co. (2000), p. 1308

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<sup>50</sup> Lincoln, "The Repeal of the Missouri Compromise and the Propriety of its Restoration: Speech at Peoria, Illinois in Response to Senator Douglas (October 16, 1854)," in Basler p. 304

<sup>51</sup> Lincoln, "First Debate with Stephen Douglas, at Ottawa, Illinois (August 21, 1858)," in Basler p. 460

sovereignty and the Kansas-Nebraska Act. "The spirit of seventy-six and the spirit of Nebraska," Lincoln observed, "were utter antagonisms; and the former is being rapidly displaced with the latter."<sup>52</sup> This was a concerted effort, and at the time a seemingly successful one to replace the principles of the Declaration of Independence with the principle of legal positivism. A nation would have to change from one that loved liberty to one that recognized only the supremacy of the will of the people. If they were successful, the men of Nebraska could then institute slavery.

The Declaration was the stumbling block that led to their ultimate undoing. *Dred Scott*, Kansas-Nebraska, popular sovereignty, Taney, Douglas and their ilk all worked on that same object, the repudiation of the principles of the Declaration. It was the Declaration that gave opponents of slavery and popular sovereignty a banner around which to rally. Even the most fervent abolitionists, such as William Lloyd Garrison, who denounced the Constitution as "a covenant with the devil," could rally around the idea that the Creator had granted to all men equality and natural rights. From Kansas-Nebraska through his assassination, Lincoln continually employed the Declaration as the roadblock to slavery. With it he prevented slavery from uniting the nation instead of liberty. Either was possible under the Constitution and the Union, but those two, taken with the Declaration, could never allow such an event. Lincoln paid fitting tribute to the man who established that principle as the foundation of our regime:

All honor to Jefferson—to the man who, in the concrete pressure of a

struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men at all times, and so to embalm it there, that to-day, and in all coming days, it shall be a rebuke and a stumbling-block to the very harbingers of reappearing tyranny and oppression.<sup>53</sup>

The principles of the Declaration of Independence are plainly expressed, and when applied to the American regime, are what protects it from becoming simply another tyranny.

[7] Without this, as well as with it, we could have declared our independence of Great Britain; but without it, I think, we could not have secured our free government, and consequent prosperity.

Revolutions, rebellions and uprisings against established governments have occurred for as long as governments have been established. Some have even succeeded in their immediate goal: the overthrow of the government and the creation of a new regime. From there, however, the records of even those which managed not to be destroyed from outside is a sad sight. A particular example is the history of those regimes which were established from the fires of revolution with the promise of liberating some oppressed group inside the state. These include the French, Russian, and Iranian Revolutions. All began with high hopes of justice, fairness and equity. All were based in abstract principles; principles that were used as a model and

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<sup>52</sup> Lincoln, "The Repeal of the Missouri Compromise and the Propriety of its Restoration: Speech at Peoria, Illinois in Response to Senator Douglas (October 16, 1854)," in Basler p. 315

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<sup>53</sup> Lincoln, "Letter to H.L. Pierce and Others (April 6, 1859)," in Basler p. 489

guide for the actions of the revolutionaries. Upon application, however, these principles led their advocates to repudiate the original reason for revolting: to free the oppressed. They ceased to be the liberators and instead became the tyrants. In most cases they proved to be worse tyrants than those they had replaced, since they were driven by their faith in an ideology. This ideology led them to oppress their people in the hope that through oppression, liberation would emerge. Instead they were rewarded for their efforts with varying degrees of anarchy and tyranny, such as Hamilton described in Federalist 9.

The Declaration prevented the American Revolution from devouring itself as the others had done. True, it was a set of abstract principles, but it differed from the others in one crucial aspect: the principles of the Declaration required that "Liberty to all" be achieved by working toward liberty, not be further oppressing the people. It does not allow for someone to be oppressed for liberation in the future. The rights are both above the control of man and inalienable. A person cannot forfeit his rights to any one for any reason, nor can he have them taken away, for no man has the power to take them from anyone else. This forced those who formed the regime to always work within the framework of protecting other people's rights. The Declaration of Independence provided them with a path to follow as they formed a government and designed its laws. The path it created is the path of "Liberty to all." It has led us thus far to the prosperity and success described above. It is true that this particular principle is not necessary for the establishment of a government. History has shown that any principle, or no principle at all, will suffice. The history of other republics, and the brief one of the United States has shown, however, what the annulment, repudiation or modification of that principle will do. It eliminates the last

prevention of the tyranny of whoever can impose its will on the rest; it allows for the growth and moral and legal justification of slavery, and other deprivations of the rights of some by others. We did not need the Declaration to create a new nation, yet it and its principles are the reason we have become what we are today. Without it our free government would not be secure, and our prosperity would be in jeopardy.

[8] No oppressed people will fight, and endure, as our fathers did, without the promise of something better, than a mere change of masters.

Lincoln now appeals to his readers to remember the Revolution. He wants us to recall the hardships and privations suffered by the people, the constant danger the leaders faced every day, and the total magnitude of the revolutionary situation. Did it not have a purpose? Even when a revolution eventually destroyed itself, the people had a reason for revolting: they thought that through the revolt they were going to improve their lot, and the lot of their posterity. This higher purpose justified the death, starvation, pain, and upheaval inherent in revolution. America's Founding Fathers were similar to them in this regard. They had a purpose for a new nation, a purpose that the people could unite behind, something worth fighting and dying for. They stated it in the Declaration of Independence so that all Americans could know exactly what they were fighting for.

Without a purpose the entire foundation of the United States would collapse. Ours would not be a government based on reflection and choice, as Hamilton said. It would just be an event without purpose. Whatever emerged from the chaos of the revolution would entirely be the result of accident and force, entirely devoid of

those things that made the American experiment unique. Whoever was able to prevail over the others would be able to impose his will on the others. Ours would be a government based on Machiavellian principles, like every other government on earth. People would be subject to whomever held power. Without principle there would be no way to tell right from wrong, so that whoever was in power would be able to claim right, and no one would have any legitimate foundation for opposing them.

In Lincoln's lifetime the attempt to legitimize slavery and popular sovereignty by marginalizing the Declaration of Independence and the principles of natural rights was an effort in exactly that direction. He noted that since the Founding the prevailing trend of thought had not been promising. In 1855 he told George Robertson that

On the question of liberty, as a principle, we are not what we have been.... When we were the political slaves of King George III, and wanted to be free, we called the maxim that "all men are created equal" a self-evident truth; but now when we have grown fat, and have lost all dread of being slaves ourselves, we have become so greedy to be masters that we call the same maxim "a self-evident lie."<sup>54</sup>

We have descended from the moral heights we had hitherto occupied. When we were victims of slavery, we wanted nothing to do with it. We wanted something different; to that end we promulgated principles and fought a revolution. Now, however, those who remembered why we fought are gone. The principles have made us prosperous, but we have lost sight of them. The

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<sup>54</sup> Lincoln, "Letter to George Robertson (August 15, 1855)," in Basler p. 331

only thing we see is that prosperity. We are so far removed from the past that we no longer fear being returned to our former servitude. We are willing to do anything to preserve our prosperity, even going so far as renounce the principles that have thus far delivered that prosperity to us.

As a nation we wasted no time in beginning our downward spiral. "Our progress in degeneracy," Lincoln noted,

Appears to me to be pretty rapid. As a nation, we began by declaring that "*all men are created equal.*" We now practically read it "all men are created equal, *except Negroes.* When the Know-Nothings get control, it will read "all men are created equal, *except negroes, and foreigners, and Catholics....*"<sup>55</sup>

America has begun the long slope from a nation of principle to a nation of legal positivism and the rule of the stronger. We have taken our principle and amended it to fit the will of the dominant interest of the community. This process, once begun, can never end. Lincoln poses this in the form of a rhetorical question: "if taking this old Declaration of Independence, which declares that all men are equal upon principle, and making exceptions to it, where will it stop?"<sup>56</sup> He knew it would not, and knew his audience would draw the same conclusion. The next time the majority of those left in power decided they wanted to condemn another group, no one would be able to stop them. Those who would have protested had already forfeited that power when they allowed the Declaration to be amended to allow for chattel slavery for blacks. When-

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<sup>55</sup> Lincoln, "Letter to Joshua F. Speed (August 24, 1855)," in Basler p. 335-36

<sup>56</sup> Lincoln, "Speech in Reply to Douglas at Chicago, Illinois (July 10, 1858)," in Basler p. 402-03

ever the people turned on another group, such as foreigners or Catholics, there was no way to make a principled defense, for the principle was gone. In its place is the principle of legal positivism, and under it, whatever the people say is right, for there is no objective standard to measure it against.

If the Declaration were refuted in principle, then Douglas would be vindicated. In Douglas' opinion, Lincoln observed, "it merely 'was adopted for the purpose of justifying the colonists in the eyes of the civilized world in withdrawing their allegiance from the British crown, and dissolving their connection with the mother country.'"<sup>57</sup> The Declaration was simply the instrument by which the American people justified their seizure of power. The people of the colonies were finally strong enough to take power away from Britain. They used that power to create a new government. Since the basis of the government is power, whoever has that power can use it in any way he chooses. There is no appeal to higher principles; power is the principle. If it wants to enslave black people, then they are enslaved. If the power wants to give varying degrees of civil liberty to them, then those liberties are theirs, so long as the power wishes it to be so. Lincoln said in his Dred Scott Speech that he

had thought the Declaration had promised something better than the condition of British subjects; but no, it only meant that we should be equal to them in their own oppressed and *unequal* condition. According to [Douglas], it gave no promise that having kicked off the King and Lords of Great Britain, we should not at once be saddled with a King and Lords of our own.<sup>58</sup>

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<sup>57</sup> Lincoln, "The Dred Scott Decision: Speech at Springfield, Illinois (June 26, 1857)," in Basler p. 362

<sup>58</sup> *Ibid.*

The promise of the Declaration for Douglas was only that we would no longer be subjects of Great Britain. If we decided to anoint other masters, the whites, and other slaves, the blacks, that was perfectly acceptable. We were no different than Great Britain: some were the oppressors and some were the oppressed. Eventually, anyone could be the slave and anyone the master, so long as the master had the force of the dominant interest of the community to support him." One group of Lords replaced by another. The cycle can continue indefinitely, yet one thing is constant: there will always be rulers, and there will always be the ruled.

Those who suffered for independence did exactly what Lincoln said they would never do: "fight and endure" for "a mere change of masters. From the hall where liberty was proclaimed, President-elect Lincoln told the people of Philadelphia that "it was not the mere matter of the separation of the Colonies from the motherland; but that sentiment in the Declaration of Independence which gave liberty, not alone to the people of this country, but, I hope, to the world, for all future time."<sup>59</sup> This is what oppressed people fought and died for. They suffered, not for independence, but for independence and liberty. They were the torchbearers of an idea that would serve as "an abstract truth, applicable to all men at all times."<sup>60</sup> Anyone, anywhere, who craved independence, would be able to look to the principles of America as a guide. The promise of the Declaration was the promise of "Liberty to all." That was something worth fighting for.

The second paragraph elaborated the foundation of the principle of "Liberty to all" and its enshrinement in the Declaration

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<sup>59</sup> Lincoln, "Address in Independence Hall, Philadelphia (February 22, 1861)," in Basler p. 577

<sup>60</sup> Lincoln, "Letter to H.L. Pierce and Others (April 6, 1859)," in Basler p. 489

of Independence. That instrument, while not necessary to actually declaring independence, was essential for the establishment of the freedom and prosperity we now enjoy. It is the bulwark that protects us from the reestablishment of tyranny. It provides us with objective truth; to deny that truth would be to make America no better than any other repressive government ever created. Americans fought and died to prevent exactly that. They fought for the Declaration of Independence and the hope that the principle of "Liberty to all" held for all men.

### **Paragraph Three: Principles and Practices**

[9] The assertion of that *principle*, at *that time*, was *the* word, "*fitly spoken*," which has proved an "apple of gold" to us.

In this third paragraph we see the culmination of what Lincoln has been moving toward. He does so through the use of what may be his most famous Biblical allusion. The verse reads "A word fitly spoken is like apples of gold in pictures of silver."<sup>61</sup> It is from this allusion that he will unify the themes of government according to a philosophy, equality and natural rights, and the true nature and extent of legitimate government. It is illustrative of what he is attempting to demonstrate.

Note that he equates the principle to gold, a mineral of extreme value. He does so to emphasize the importance of the idea stressed in the words of the principle. What matters here is not so much the technical language used, but the value of the idea those words convey. Lincoln draws to us an analogy from Euclid: Euclid began *The*

*Elements* with a set of 23 definitions and 5 axioms. These were intended as ideas so simple that anyone could understand them, yet so fundamental that they had to be agreed upon if any progress were to ensue. For example, one could not prove the first proposition of *The Elements* if he refused to accept the first axiom. Constructing an equilateral triangle requires one to draw lines connecting points, and if one does not accept that this is possible, the proposition collapses. More fundamentally, what if one denied Euclidean definitions of points and lines? Anything that followed would not only be impossible but unintelligible. Even a child could master Euclid if only he accepted the definitions and axioms, yet without them the system collapses.

The same is true of the American government. Lincoln asserted that "the principles of Jefferson are the definitions and axioms of a free society."<sup>62</sup> Without them it is impossible to maintain a free government. The Constitution, the Bill of Rights, subsequent Amendments and all statutory law are the propositions of this free society, yet they all come crashing down if one ignores or denies the principles of Jefferson. (These principles, we learn later in the letter, are those espoused in the Declaration of Independence.) The practical, tangible goods of these documents, such as federalism and the separation of powers are as easily rejected as accepted without them. Without the principle there would be no freedom, for one could construe the laws, even the Constitution, any way he pleased; Taney proved this point in *Dred Scott*, Douglas with the policy of "don't care." These principles are as essential to a free society as the definitions and axioms of Euclid are to *The Elements*. By simply denying Euclid's Fifth Axiom, one can construct hyperbolic

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<sup>61</sup> *Holy Bible* (King James Version), Proverbs 25:11

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<sup>62</sup> Lincoln, "Letter to H.L. Pierce and Others (April 6, 1859)," in Basler p. 489

geometry, an alien specimen in the eyes of Euclid. By rejecting the principle of equality, we have slavery, equally alien in a society that claims to be free. Without these principles, a free society is at the mercy of whatever political winds prevail on a given day. We must, therefore, understand and accept the principles of the Declaration, for without them we cannot understand the American regime.

Lincoln demonstrated why the principle has proved an apple of gold: it has secured our freedom and prosperity, it gives hope to all, it prevents America from lapsing into the tyranny it fought so desperately to escape. The Declaration establishes the principles of free government, and it gives liberty and equality. It prevents the encroachment of legal positivism, for it recognizes strength and justification to those who rely on it for their protection. In the remainder of "The Constitution and the Union," Lincoln will recall those themes he has thus far explored, and apply them to form a complete understanding of the principles and practices of the American regime.

[10] The *Union*, and the *Constitution*, are the picture of *silver*, subsequently framed around it.

The Declaration is first. The Union and the Constitution were built by those who first proclaimed the principle of "Liberty to all" and then fought a revolution to fulfill that promise. It is first in the hearts of those who created the nation. Lincoln ascribes to those two things the qualities of silver. Silver is undeniably valuable, yet its worth cannot hold a candle to that of gold. The Declaration is much more valuable than the Constitution. It is so, as we have seen, because anyone can establish a government, yet to establish a free government that is as prosperous as ours requires that special

commodity contained in the Declaration of Independence, the principle of "Liberty to all." If one desires free government and prosperous people, it is important to have the Union and the Constitution; thus they are a valuable commodity. To that same end it is absolutely essential to have the Declaration and its principles, and they are therefore the even more expensive. Silver is much more plentiful than gold. One frequently sees governments that are technically well founded. They have practices and laws that make a well-governed nation. Less often, however, does one see a government founded on sound principles that protect its members from oppression. This is evidenced by the failures of other revolutions to fulfill their promise of liberating their people from oppression. They formed good technical governments, but on bad philosophical principles.

The Constitution and the Union were made for the Declaration of Independence, not vice versa, as we have seen. The Declaration is the central element of the American regime; it is the basis of everything that came after it. The purpose of both is the Declaration and the fulfillment of its principles. It is superior and antecedent to both the Constitution and the Union. Responding to a letter from Thomas Jefferson asking for guidance on the subject, James Madison states that "the 'first' of the 'best guides' to the Constitution...[is] 'the Declaration of Independence, as the fundamental act of Union between the states.'"<sup>63</sup> The Founders, including the man who drafted both the Constitution and the Bill of Rights recognized the primacy of the Declaration of Independence to the American regime. The Declaration was meant to

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<sup>63</sup> Harry V. Jaffa "Original Intent and Chief Justice Rehnquist," in J. Jackson Barlow, Dennis J. Mahoney and John G. West, eds. *The New Federalist Papers*. Lanham: University Press of America (1988), p. 227



be the basis for the new regime, for it was in signing that document that the new nation was created.

The Constitution itself takes an active role in recognizing this fact. The last clause of that document declared the Constitution to be approved by the convention "in the Year of our Lord one thousand seven hundred Eighty-seven and of the Independence of the United States of America the *twelfth*," referring to 1776, the year of the signing of the Declaration (italics mine).<sup>64</sup> The Constitution, like Madison, realizes that what binds the nation together is not the letter of the Constitution, but the spirit of the Declaration, as "the fundamental act of Union."

The Declaration instructs its readers on how to form a government consistent with the principle of "Liberty to all." The Declaration asserts that all men are created equal and have inherent natural rights that cannot be taken from any man by any other man. The Founders continue in the second paragraph "that to secure these Rights, Governments are instituted among Men."<sup>65</sup> The purpose of government is to protect rights; it is the reason for which governments are formed. Since all have rights, and they are all equal in those rights in a manner that is beyond the power of man to alter, then it must protect the rights of all. By implication, any power not used for the protection of rights is unjust. Men consent to be governed to protect their rights. They consent to this, so as to ensure that they will have the free exercise of their rights in all respects. To this end the governed grant such powers to the government as they believe necessary for the protection of their rights, and nothing more. If the government is not using its power to protect individual

rights, then it is not acting justly. It has usurped a power that cannot be granted to it. The purpose of legitimate government is to protect rights.

When a government is operating against people's rights, the Declaration gives the people the right to terminate that government, "and to institute new Government, laying its Foundations on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."<sup>66</sup> In creating a new government, the Founders tried to do these things. The laws of the new government are promulgated by the people in a manner they think will be effective. Since the purpose of government is to protect rights, then an effective government would be one which accomplished this task well. The Founders endeavored to construct a government that would not prevent but aid in the exercise of individual rights, and built a Constitution with that in mind. It matters not how the powers are organized, so long as they protect the rights of man, and are based in the consent of all those under the government. Such a foundation prevents some systems of government and lends itself to others. The need for consent and equality eliminates the possibility of an absolute monarch, however, benevolent. The need to protect rights means that a Hobbesian sovereign is also illegitimate, for there is no way to prevent him from encroaching on those rights. The particulars retain a certain flexibility, so long as the principles are adhered to. We see again the importance of the principle over the practical result, and how the Constitution and the Union were thus built to suit the principles of the Declaration.

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<sup>64</sup> Constitution of the United States of America, Article VII

<sup>65</sup> Declaration of Independence, paragraph 2

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<sup>66</sup> Ibid.

[11] The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it.

The challenge for the Founders was to construct a government consistent with these principles, and to make it capable of withstanding assault. We are an experiment in government based on a principle; the first government based on reflection and choice, the first government with a purpose and a principle. There was no model for our Framers to base themselves upon. Past republics could hardly be considered the basis for anything, considering Hamilton's admission that all previous republics collapsed. The task was to create a system of government that would not collapse, and would be able to fulfill the principles of legitimate government on which it is based.

In Lincoln's time, men were attempting to refute the principles while adhering to the practices. The Declaration was referred to alternately as "a self-evident lie" and as being intended for descendents British citizens then living in the colonies.<sup>67</sup> Taney in *Dred Scott* and Douglas with his principle of popular sovereignty attempted to assert that the positive right of property was supreme to any abstract theory of rights. Their assertions deny the existence of any moral truth that determined what the law ought to be. To concede the existence of such truth would be fatal for them, for it is higher than man and thus superior to positive law. The law states that we shall have a right of property. It states further that African slaves are as much property as any material possession. They conclude that man has a right to keep another man in chains, declaring that the right to own slaves is

"distinctly and expressly affirmed in the Constitution."

The same logic is evident in the thought of the modern court, from Oliver Wendell Holmes to William Rehnquist. There is no moral judgment behind the law; it gives rights to some and withholds them from others. The Thirteenth Amendment now prohibits slavery, and so slavery is prohibited. Were it not for that Amendment, there would be no barrier to the reestablishment of some form of slavery in the United States. The Thirteenth Amendment is the only protection, for it is the only legal barrier. They also do not believe in the value of the principle of "Liberty to all" and the role it has to play in American government. It is not the law, and therefore it carries no force. The Constitution is used by legal positivists of all ages to annul and marginalize the principles of the Declaration of Independence.

Lincoln was acutely aware that this meant the degeneration of the American republic; in Taney, Douglas and their supporters he witnessed it in his own time. He saw the steady progress toward an American government without principle, like every other government. He noted this degeneration in the 1855 letters to Joshua Speed and George Robertson discussed above. He also saw the results of this degeneration. In the House Divided Speech he said that Douglas has endeavored for the past four years to deny the Declaration of Independence, and "has done all in his power to reduce the whole slave question to one of a mere right of property."<sup>68</sup> The laws prohibiting the importation of slaves remain on the books, having taken effect on the first day authorized by the Constitution. The slave trade and those associated with it are loathed, even by slaveholders themselves.

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<sup>67</sup> Lincoln, "The Repeal of the Missouri Compromise and the Propriety of its Restoration: Speech at Peoria, Illinois in Response to Senator Douglas (October 16, 1854)," in Basler p. 314

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<sup>68</sup> Lincoln, "A House Divided: Speech Delivered at Springfield, Illinois, at the Close of the Republican State Convention (June 16, 1858)," in Basler p. 380

"You despise him utterly," for he is neither "a friend, or even an honest man" but rather "a sneaking individual."<sup>69</sup> No one wants to be associated with him or his dealings, and one does so only out of necessity. Lincoln said this in 1854, yet only four years later he says that "a leading Douglas Democratic newspaper thinks Douglas' superior talent will be needed to resist the revival of the African slave trade."<sup>70</sup> Why is that so important? Why do we so desperately need Douglas to save us from the revival of the African slave trade? We know we want to, for there is in all of us a sense of human sympathy and justice, telling us that "the poor negro has some natural right to himself."<sup>71</sup> Why then, is a man of Douglas' stature, talent and eminence needed to arrest the return of the African slave trade? It is because human sympathy and justice has no place in the law; the idea that the poor negro has some natural right to himself is merely a personal opinion. It holds no place in the law, because it has not been created as law. Without the principle of "Liberty to all" espoused in the Declaration, no one has any refuge against assault except the law; when the law fails him, he is finished. Without the Declaration there is no legal principle to prevent the reestablishment of the trade, provided the dominant interest of the community wants it.

Such is the result of American government without the principle of "Liberty to all" in Lincoln's time. In our time, the fruits of legal positivism are similar in character,

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<sup>69</sup> Lincoln, "The Repeal of the Missouri Compromise and the Propriety of its Restoration: Speech at Peoria, Illinois in Response to Senator Douglas (October 16, 1854)," in Basler p. 302

<sup>70</sup> Lincoln, "A House Divided: Speech Delivered at Springfield, Illinois, at the Close of the Republican State Convention (June 16, 1858)," in Basler p. 379

<sup>71</sup> Lincoln, "The Repeal of the Missouri Compromise and the Propriety of its Restoration: Speech at Peoria, Illinois in Response to Senator Douglas (October 16, 1854)," in Basler p. 302

taste, and effect to that of its forebears. Modern justices, beginning with Holmes, follow in the footsteps of Douglas: they deny the validity and truth of the principles of the Declaration and their central place in the regime. The Constitution, Lincoln says, is not a weapon against the Declaration. It is not the tool by which one obfuscates the founding principles. Its purpose is not to diminish the Declaration. It was intended to protect the Declaration from exactly the kinds of attacks it faces now. It was envisioned as the protection and realization of those principles. The Constitution enhances the Declaration by giving it force, it makes the principles seem even greater by making them real. The Declaration is the great statement of beliefs, consciously chosen as the basis of an experiment in government by choice. Without a Constitution, however, the principles are just that, principles. The Constitution gives them force.

[12] The *picture* was made *for* the apple—*not* the apple for the picture.

The Union and the Constitution are compared to a picture frame. That frame is meant to enclose something; in this case the apple of gold. The picture was built to fit that which it was meant to surround. One does not purchase a frame, and then cut his Rembrandt to fit; on the contrary, he takes the measure of his Rembrandt, and then buys the frame that fits it. The Rembrandt is obviously of greater value and rarity, and thus takes precedence. To butcher the painting for the sake of the frame would ruin the former and deprive it of its value. Such is the relationship between the Declaration and the Constitution and the Union. The principles were divined, and then a government was created to suit those principles. The principles were too valuable to be trimmed; they had to be worked around. If

we were to truncate the principles when it was expedient, the principles would be without value. They would not be principles, just suggestions, to be ignored or revised as the mood struck.

The Constitution, as his analogy proves, was not made from nothing. It was built around the principles of the Declaration. It protects and enhances them; that is its purpose. The two coexist, yet the Declaration is fundamental. Other Constitutions and other Unions could be built, but the Declaration is truth. Any principle that differs cannot be. To construct a state based on other principles or no principles at all is to construct one on false principles. The history of other revolutions has shown the dangers of such an act. The laws can change, but the principle must be the same, and must stand as the foundation on top of which regimes are built. The picture of the regime must protect the apple of principles. The Union and the Constitution, then, are secondary to the Declaration.

### **Endgame: Advice for the Nation**

[13] So let us act, that neither picture, or apple, shall ever be blurred, or broken.

Having made the case for the Declaration, Lincoln concludes with a declaration of his own: the need for both the picture and apple. To lose either would be disastrous for the nation, and for all peoples who endeavor to establish free government. To ignore one will inevitably bring about the destruction of both. To neglect the Constitution will cause secession and anarchy, as we have seen in Lincoln's own time. To reject the Declaration engenders the destruction of free government in another way. It removes the principle that animated those who created the regime and on which that

regime is based. Rejecting the Constitution created anarchy, rejecting the Declaration will create tyranny. Whatever law is passed, no matter how unjust, will be acceptable, because there will be no objective way of claiming it is wrong. This is Lincoln's message to his contemporary opponents: secessionists and Douglas Democrats who would use the Constitution as a weapon against the Declaration, asserting that man made, positive law protections can claim to be higher than inherent natural rights. This is contrary to the philosophical founding of the American regime. One cannot be used against the other, and Lincoln operated under that premise. He understood that to preserve the principle of "Liberty to all" he had to preserve the Union and the Constitution. This meant fighting. Throughout the conflict, however, he was careful to ground all his actions within the limits given to federal and executive power by the Constitution. Liberty could not be saved otherwise, for without the Constitution and the Union, we could not have attained the result. Similarly, to preserve the Union and the Constitution that the Founders had created, he had to preserve the principles of the Declaration. The former were inspired by and dedicated to the latter.

This is also Lincoln's message to the people of today and for all time. Moral skepticism and legal positivism are outgrowths of the same doctrines that attempted to replace the Declaration with slavery, popular sovereignty and the idea that governments are merely the dominant interest imposing its will on the state. The government begins and ends with the people, but the principles that animate that government transcend all human legal creations. The Union and the Constitution are the instruments, consciously chosen by those who recognized these transcendent principles, to manifest them in a government of men. We cannot choose one over the

other; we cannot use the Constitution to destroy the Declaration. We must preserve them both, for only together do they truly encompass the American regime.

[14] That we may so act, we must study, and understand the points of danger.

Almost as an afterthought, Lincoln adds this warning to the end of the piece. If we are to preserve the Declaration and the Constitution and the Union, we must be continually vigilant, ever mindful that a Civil War could purge slavery from the nation, but it could not permanently subdue the theories behind its perpetuation, the theories underlying the words of Douglas and Taney. He knew that to prevent what nearly happened in his time from happening in any time we must understand the foundations of our own philosophies and the basis of the challenge of legal positivism, that we may meet that challenge with all the might of philosophic truth. "Let us have faith," Lincoln admonished, "that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it."<sup>72</sup> The principles of the Declaration were and are truth. They are the basis of the regime, and to defend them is right. Their rightness makes them, and us, strong, and able to weather the assaults of those like Holmes and Rehnquist, men who would invert the right and the might. We must, therefore, never cease in our efforts to defeat them and preserve our principles. That is our duty, to preserve inviolate the principles and practices established by the Founders.

## Conclusion

Legal positivism is contrary to the principles of the American regime. Objective truth exists; it can be understood by men and is manifested in the Declaration of Independence. Those who would reject the principle of "Liberty to all" contained therein would undo the American regime. They would transform it from a government based on reflection and choice to one based, like all others, on accident and force. It would make whatever becomes law right, no matter how unjust. The Declaration prevents this; it guarantees certain inherent natural rights, and that all men are equal in those rights. It guarantees them by making them higher than positive law and therefore unalterable by it. It requires that any legitimate government be based in these rights, and formed by the consent of all, not just the dominant interest. To that end we chose the Constitution, but the Constitution could be twisted to whatever the majority interest desires if not for the objective truth contained in the Declaration. The Declaration and the Constitution are an inseparable whole that together, and only together, form a regime based in objective truth that protects the inherent rights of man against all assaults in a way that the Constitution alone does not and cannot. The Constitution must be interpreted in light of the principles of the Declaration of Independence.

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<sup>72</sup> Lincoln, "Address at Cooper Institute, New York (February 27, 1860)," in Basler p. 535

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