

A New Birth of Freedom: Fulfillment or Derailment?

by
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In the Constitutional Convention of 1787 James Madison was the first to introduce the question of slavery, apparently gratuitously.¹ We say gratuitously at first because the delegates to the Convention clearly were mindful of how sensitive a question it was and how destructive it could be in the context of the major task before them. Upon closer review, however, we discover that Madison's use of the issue of slavery was in fact far from gratuitous; he recurred to it in what seemed to him an emergency: the necessity to dislodge the "small state - large state" voting formations if the Convention were to progress at all.²

Thus, the power of the issue of slavery in American politics was revealed in the context of the Convention; it went to the heart of the question of the kind of people the Americans conceived themselves to be.

In the pages which follow I shall review the constitutional questions from the eras of the Founding and the Civil War as a means to pose anew the question of where the United States Constitution stands today on the question of race, in the aftermath of the seminal Supreme Court case, *Brown v. Board of Education* (1954). I shall argue that contemporary confusions about the status of the Constitution in those earlier eras, above all the mistaken notion that the Constitution was compatible, and the Founders content, with the existence of slavery.

The argument for the idea that the Constitution depended on slavery is by now a familiar one. It begins with concluding from a negative, that because the constitution did not abolish slavery, slavery was therefore *preserved* under the Constitution. Then it calculates from the positive provisions of the Constitution touching upon slavery, that the Constitution *encouraged* slavery. On the strength of that *prima facie* demonstration, then, the various acts and deeds of individual Founders are interpreted as if they were in the main consciously entertained with an eye to the putative result. What follows from this generally is a fairly disingenuous debate about the extent of culpability of the various founders.³

Alternatively, one might take the Constitution at face value and then inquire how far it sustains or discourages any of a vast range of social and political practices both at the time of the Founding and since.

Against the view that the Framers regarded slavery as "compatible" with the "progressive" regime they created, as William Wiecek asserts elsewhere in this volume, we have Madison's direct testimony. Madison is far the *best* example, because in some respects he is the *worst* case.⁴ To avoid the danger of false imputation, I quote at length:

In proportion as slavery prevails in a State, the Government, however democratic in name, must be aristocratic in fact. The power lies in the hands of property, not of numbers. All the ancient popular governments, were for this reason aristocracies. The majorities were slaves. Of the residue a part were in the Country and did

not attend the assemblies, a part were poor and tho in the City, could not spare the time to attend. The power was exercised for the most part by the rich and easy. Aristotle (*de rep. lib. e. cap. I & 4*) defines a Citizen or member of the Sovereignty to be one who is sufficiently free from all private cares, to devote himself exclusively to the service of his country See also Anacharsis, vol. 5. p. 280/1. *The Southern States of America, are on the same principle aristocracies.* In Virginia the aristocratic character is increased by the rule of suffrage, which requiring a freehold in land excludes nearly half the free inhabitants, and must exclude a greater proportion, as the population increases. At present the slaves and non-freeholders amount to nearly $\frac{3}{4}$ of the State. The Power is therefore in about $\frac{1}{4}$.⁵ Were the slaves freed and the right of suffrage extended to all, the operation of the Government might be very different. The slavery of the Southern States, throws the power much more into the hands of property than in the northern States. Hence the people of property in the former are much more contented with their establishd. Governments, than the people of property in the latter.⁶

This subtle, political analysis conveys far more evidence of a more sensitive understanding than is often assumed by scholars. It suggests the specific way in which the Constitution had a liberalizing tendency, apart from constitutional provisions. To be precise, to the extent Virginia ceased to be an independent nation and came to be integrated in a national republic, a republic verging dramatically less toward aristocracy than Virginia, Virginia itself would come to participate more in republicanism without effecting so much as a single change in its domestic institutions. The dynamics of democracy, more than any direct provisions of the Constitution, were the source of the antislavery implications of the Founding. In that way, the political accomplishment of the Constitution of 1787 was to deepen the influence and authority of the Declaration of Independence.

On the score of the Declaration also we may assess the special relation in which the Founders stood regarding slavery. That slavery was considered a “necessary evil” neither derives from the era of the Missouri Compromise nor is alien to the Constitutional Convention. But over and beyond those familiar examples, we find extensive discussion of this theme throughout revolutionary America, from Georgia to New Hampshire. The pieties of revolutionary fever ought not to be taken as decisive, however. What counts far more are the official representations of the state governments to the Continental Congress, of which that from New Jersey in June, 1778 is the most instructive. In it we behold in a single view the moral ambition and practical limitations of the American scene regarding slavery.

The Legislative Council and General Assembly of New Jersey had several reservations about the Articles of Confederation. None were voiced more stridently, however, than their concern over a provision in the ninth article. That article “provides, that the Requisitions for Land-Forces to base furnished by the Several States, shall be proportioned to the Number of white inhabitants in each.”⁷ New Jersey found an objection to this provision in the Declaration’s affirmation that “we hold these truths to be self-evident, that all Men are created equal.” A necessary deduction, they held, is that “the Inhabitants of every Society, be the Colour of their Complexion what may, are bound to promote the Interest thereof, according to their respective Abilities.” Accordingly, blacks and whites alike should be accounted for in assessing obligations of

self-defense. To the New Jersey legislators, any problems created by this principle were “special local” problems. Thus, if due proportionality would send virtually all white southern males to the field of battle, leaving slaves in the fields and homes, the southern states would need to reconsider their institutions. For,

admitting Necessity or Expediency to justify the Refusal of Liberty, in certain Circumstances, to persons of a particular Colour; we think it unequal to reckon Nothing upon such in this Case.⁸

The New Jersey patriots did not affect to impose abolition of slavery on the south. They did, however, recognize and declare that a due regard for liberty and equality might impose abolition on the south. For on any other account, free white northerners would have to subsidize southern liberty at the cost of their own blood. Slavery in a free republic not only created inequalities between blacks and whites; it also created inequalities with respect to the obligations of citizenship between slave-holding and non-slave-holding whites—inequalities on both scales held to be incompatible with the Declaration of Independence.⁹

Three events reveal clearly as may be the nature of the slavery option under the Constitution of 1787. The first, to which I alluded above, was Madison’s resort to slavery at the Philadelphia Convention, in order to dislodge the logjam over representation occasioned by the small state - large state division. Yates of New York tells us that Madison did this on June 29. His purpose was unmistakable:

The great danger to our general government *is the great southern and northern interests of the continent. being opposed to each other. Look to the votes in congress, and most of them stand divided by the geography of the country, not according to size.*¹⁰

The emphasis which Yates gave to this passage reflects very well the shock which must have been occasioned by the conscious attempt to make slavery an issue in the Convention, which had been sitting for over a month without ever once broaching the issue as such (although routinely invoking the Confederation Congress’s “three-fifths’s clause” at least ten times theretofore). Madison apparently repeated his argument the following day, by which point the small state-large state controversy had reached such an extreme as to call forth from Gunning Bedford (Delaware) a threat to take a “foreign power by the hand.” Not long after, however, the Convention turned; the controversy over size came to be supplanted by the controversy over slavery, especially as signified in the representation question. The previously uncontroversial three-fifths provision became sufficiently controversial as to require ultimately a compromise in its own right. I submit, in other words, that James Madison resorted to the inherent division over slavery as a device to overcome the division on the score of representation; placing a strain on the coalition which had previously sustained the dispute. The implication of this move may be stated in a word, namely, that slavery was a threat to the consensus needed to build the Union.

The second event of the founding era which indicates the nature of the slavery option occurred after adoption of the Constitution, in the first Congress. The first major debate over constitutional interpretation within the Congress took place in the House of Representatives on May

13, 1789. The subject was slavery, and it carried with it all of the ambiguous assumptions which freighted the several compromise provisions on the subject in the Constitution. It is to be remembered that the slave trade clause (Art. I, sec. 9), by which slavery could not be prohibited by Congress until the year 1808, but by which the Congress could impose an import tax on slaves, produced contrary interpretations even at the time, ranging from the more familiar southern claims that “we got all that we could” on behalf of slavery, to the less well known but extraordinary claim by James Wilson, that

I will tell you what was done, and it gives me high pleasure, that so much was done. . . [B]y this article after the year 1808, the congress will have the power to prohibit such importation, notwithstanding the disposition of any state to the contrary. I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind of gradual change which was pursued in Pennsylvania.¹¹

The debate that occurred within the House of Representatives shows how far the hopeful interpretation prevailed over the shameful interpretation. On the surface it seems that the shameful interpretation prevailed, for the House voted by a large majority not to impose the constitutionally permitted impost on slaves. Further investigation reveals, however, that the vote was carried primarily by the northern and eastern antislavery votes, cast by those who acted in this case on the principle enunciated by men such as Fisher Ames and Roger Sherman, that “no one appeared to be prepared for the discussion.”

Josiah Parker of Virginia had introduced and pushed the measure, even to the point of eliciting a momentary attempt at a positive good argument for slavery from Jackson of Georgia. It was James Madison, however, who was most prepared to discuss the matter and most reluctant to yield to counsels of caution on a matter which others feared could abort the Union. His comments in this debate illuminate his resort to slavery in order to move the Convention toward a Constitution almost two years earlier, for in this case it is the existence of the Union which weighs heavily in his reflections and promises the opportunity to act upon the question.

I cannot concur with gentlemen who think the present an improper time or place to enter into a discussion of the proposed motion . . . There may be some inconsistency in combining the ideas which gentlemen have expressed, that is, considering the human race as a species of property; but the evil does not arise from adopting the clause now proposed; it is from the importation to which it relates. Our object in enumerating persons on paper with merchandise, is to prevent the practice of treating them as such . . .

The dictates of humanity, the principles of the people, the national safety and happiness, and prudent policy, require it of us . . . I conceive the Constitution, in this particular, was formed in order that the Government, whilst it was restrained from laying a total prohibition, might be able to give some testimony of the sense of America with respect to the African trade. . .

It is to be hoped, that by expressing a national disapprobation of this trade, we may destroy it, and save ourselves from reproaches, and our posterity the imbecility ever attendant on a country filled with slaves . . . [I]f there is any one

point in which it is clearly the policy of this nation, so far as we constitutionally can, to vary the practice obtaining under some of the state governments, it is this.

To Madison, it appears, the slavery option was such that it could, and should, be subject to calculated disincentives. An analysis of the vote on this measure, in a House of 59 representatives, ten of whom were present in the Constitutional Convention, reveals a preponderant disposition to treat slavery as an option to be discouraged but nevertheless a sufficiently sensitive matter as to make that difficult.

The third event of the Founding era, which contributes understanding of the slavery option, is the manner in which, when the constitutional prohibition had expired, the international slave trade was prohibited. The President and his Secretary of State initiated the process in 1807 with some apparent pleasure. They encountered a difficulty, however, which no one had anticipated. It centered on the question of what to do with any contraband (that is, ships and slave cargo) that may be apprehended. Jefferson's original proposal envisioned a traditional disposal in the interest of the government. But other parties, especially Quakers, pointed to the grand paradox that would involve the United States in selling Africans as a means of denying that privilege to American citizens in the name of the rights of humanity. Madison's speech of 1789—we treat persons as property in law in order to be able to prevent their being treated as property in practice—resonated loudly. It quickly became clear that Jefferson's proposal involved a mere oversight. Yet, it was immensely difficult to discern what else might be done.

The counterproposal, that the Africans be freed rather than sold, was the immediate cause which touched off a heated debate, but that debate, above all in the House of Representatives, produced the first compromise on slavery admitting the existence of irreconcilable differences between north and south. Here, for the first time, there was an explicit threat of civil war over the institution of slavery, and an accommodation which recognized that "Easterners" must not be asked to turn their backs on the Founding and principles of humanity, while "Southerners" must not be asked to participate in a condemnation of their way of life. Therefore, the northern proposal, effectively to free the cargo within the United States and even within the slave states, was amended, first, to freeing them only in the north (i.e., indenturing them for a term of years at a stipulated wage), and ultimately, to remanding them such provisions as the states might make, with the tacit understanding that they were not to be dealt with as property.

It is interesting to speculate about what might have eventuated had Jefferson and Madison reflected initially on the impropriety of proposing legislation to handle the Africans as contraband.¹² They may well have discovered the key whereby to unlock the door to the interstate commerce power as a device for regulating slavery. Not only did they not envision such a debate in 1807, however, but more importantly no one else did. Not even the Quakers, whose sharp-sightedness prevented a moral catastrophe, applied their principles in this way. It seemed in 1807 that no one at all, whether defender of slavery or abolitionist, looked at the "migration" language of Article I, section 9 as a probable means to resolve this difficulty.

This lends powerful credence to Madison's 1819 claim, that the language of the migration portion of the slave trade clause did not apply to slaves, though it may have regarded free blacks.¹³ His further remark, to the effect that any attempt so to construe it would have caused a

brouhaha, helps explain the absence of recourse to it in 1807. As noted, the mild debate which did eventuate in 1807 produced threats of secession and war. Accordingly, Madison simply maintained that public opinion would not have abided such a turn, pointing the one theme he consistently enunciated throughout his career, namely, the necessity of consent, not only to institute the government but to institute the fundamental change envisioned. This Madison explained repeatedly, as he did to Robert Evans in 1819.¹⁴ For Madison, the key to this progressive regime was consent, the index of which was public opinion. Whatever was to be accomplished had to be accomplished by that medium. So fervently did he believe this that he not only subordinated abolition to it, but, as he expressly recounted, all his labors to form the Democratic-Republican Party were predicated on that premise.

While public opinion in 1807 countenanced the prohibition of the slave trade, it did not countenance federal abolition of slavery. In the end, for Madison, the theory of republicanism is not a theory about institutional relations; it is a theory about the dependence of power on opinion. The “changes” in his views all take place at the surface, because, like planets, ideas about constitutionality wander about a fixed sun.¹⁵

In these three events, therefore, we may see a mosaic, which captures all of the dimensions of the role of slavery and race in American politics. The question regarding that role must be considered against the backdrop of the principles of the regime, because actions touching upon slavery and race bear heavy implications for those principles, and vice versa. This does not result from any cultural or traditional pattern so much as from the conscious choices with which Americans wrestled at every turn in our nation’s history, up to and including the decisions of the present generation.

It is especially obvious in the 1807 struggle over the prohibition of the slave trade: From the moment that slavery was in any degree limited, there arose to replace it the problem of how to handle the question of race. The answer to that question rests, in turn, not only on the fact that the consciously chosen principles of the regime entail equality and liberty for all humans but, far more importantly, on the question whether they require an open, heterogeneous society. The decisions that were made on this question in the aftermath of the War of American Union, in the form of the post-war amendments and civil rights legislation, indicate a positive response to the latter. But how far was that also true at the time of the Founding itself?

While it is inaccurate to assert that no one prior to the last half of the nineteenth century imagined an interracial society founded on the principles of the Declaration of Independence, that question is of minimal concern here. First, it is of minimal concern because it is subordinate to the question of whether the Declaration was understood to include all human beings without regard to the practical social implications of that principle. Second, it is of minimal concern because the status of slavery and race under the Constitution or regime—and how to legislate in regard to it—is and has been a single question. Madison’s concern to avoid the “imbecility” of a country filled with slaves does not require the corollary of turning slaves into free citizens in the republic. As the 1807 slave trade debate reveals, however, that is the very question which arises the moment the freedom of the African is conceded. Hence, the debate was in fact a debate about whether and how to integrate Africans within the United States. The fact that Americans posed

the same kind of question then and now points the way to an understanding of the dilemma we now face.

We have available, to guide us in addressing the social question involving racial equality, both a practical account, from the official posture of the Founding itself, and a theoretical account, at the center of *The Federalist*, number 43.

First, let us consider the practical account. All have heard it said that the Declaration excludes women, because it reads, “all men are created equal.” It excludes blacks because, it is said, when they wrote “men” they meant “white Anglo-Saxon protestant males.” It excludes Indians, etc. The list of reasons goes on and on. But what is the truth, apart from this story we hear? And how should we uncover it?

I suggest that we return to the language that Thomas Jefferson used originally when drafting the Declaration of Independence. Allow him alone to speak for himself, in which he would point out that he used the term “men” three times in the document. “All men are created equal” was only the first; thereafter he wrote that “governments are instituted among men” and founded in the consent of the governed. To the question whether he regarded women as ungoverned, he might respond with an air of incredulity. Surely women too were to be governed. Besides, when Jefferson liberalized the criminal code of Virginia, he included a provision specifically to deal with loose or ungoverned women. Women were surely to be governed, and thus included in the language that “governments are instituted among men.”

The third time Jefferson used the term “men” he reproved the King of England for obstructing the elimination of the slave trade in the colonies. There he wrote,

He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty. . . Determined to keep open a market where MEN should be bought and sold. . .

This was the only time he emphasized the word, printing it in bold capitals. Ask him whether, when he did this, emphasizing MEN, he meant “white Anglo Saxon protestant males.” Would he not return with the question, “Are you ignorant who the slaves were among us?” or, “Do you think me so dense as not to know?” Surely he knew intimately that they were not only black but male and female. Thus, Mr. Jefferson would finally declare that the language of the Declaration is plain; it speaks to all humankind. None are excluded. When the Declaration affirms the proposition that “all men are created equal,” meaning that no human being is by nature the ruler of any other, it means all human beings.

A pedantic objection to this discussion would remind us that the delegates did not accept Jefferson’s language about the slave trade. From that truth they would erroneously conclude that the sense of the language was entirely deleted from the Declaration. We have seen that this was not so in the example of New Jersey above and there is a final, definitive example to follow, for the Declaration was taken following its adoption precisely in the sense in which it was originally formulated.

The last example covers the most frequently circulated charge and has most wanted a review. Simply put, for a long time almost everyone in America has misunderstood that language in the Constitution which is referred to as the three-fifths clause.

The general account is that the Framers regarded black people as only three-fifths of human beings. That, in turn, shows them as bigots and their opinion of black people as low indeed. Again, the palpable surface of the documents reveals the truth. Consider what they did in fact mean, then judge how well the Framers confronted their moral dilemmas.

In April, 1783 (not 1787) in the Confederation Congress the three-fifths compromise emerged after six weeks of debate. An eighth article was proposed for the Articles, apportioning expenses for the Confederation on the basis of land values as surveyed. There the discussion opened, only to reveal how difficult it was to assess land values and, in the rude conditions of those times, to produce accurate surveys. Thus, they resorted to numbers instead, speaking of population as a rough approximation of wealth. Taking the numbers of people in the respective states, they hit upon the following language:

expenses shall be supplied by the several states in proportion to the whole number of *white and other free inhabitants, of every age, sex, and condition*, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes in each state.

What, then, does three-fifths apply to? Slaves, carefully and legally defined. But re-read the opening clause, delimiting “the whole number of white and other free inhabitants.” To whom does that apply? Surely not whites only, nor only males, since “every age, sex, and condition” is further appended. Clearly, they aimed at every free human being, white and non-white. As is generally known, the only significant number of free non-whites in the United States in 1783 were American blacks (another 10,000 of whom were emancipated between 1776 and 1787). There were not in America of 1783, for example, any Asians. Thus, these legislators included American blacks among the free inhabitants; the three-fifths clause following applied not to blacks generically but rather to those in the peculiar legal relation of slavery. Three-fifths of the number of slaves were counted, not in terms of their humanity but with respect to their legal status in the respective states.

The Confederation Congress fully affirmed the humanity of American blacks through the language of “white and other free inhabitants.” When this same language was taken up again in 1787 in the Constitutional Convention, was that recognition of humanity withdrawn? Here is the provision:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to the respective numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

The distance of four years has brought changes. But what are they? On the surface the changes are primarily editorial, introducing economy and exactness of language. As any composition teacher would point out, the first thing to notice is the elimination of redundancy. Why should it be necessary to say the “whole number of white and other free inhabitants, of every age, sex, and condition,” when the “whole number of free persons” says the same thing? Further, “adding three fifths of all other persons” is less awkward than the inclusion clause of 1783. Finally, the substitution of “Service” for “servitude” continues the liberal impulse of 1776. Thus, 1787’s language includes women and blacks; it does not exclude them.

The theoretical account from *Federalist* forty-three requires a more involved explanation. There, Madison spelled out how the principles of the Declaration of Independence might work in an imperfect world. The discussion concerns a defense of the Constitution’s guarantee to all the states of “a republican form of government” and, further, the federal government’s commitment to defend the states against domestic violence. The “superintending government” must have authority to purify a “confederacy founded on republican principles” of serious “aristocratic or monarchical” pretensions, and that rests on the ability to preserve the specific form of the republican regime:

The more intimate the nature of such a union may be (the less distinct its confederal elements), the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained.¹⁶

It *could* arise that a majority have not the right to alter the government to the extent that a particular people with a genuine public good may be said to exist or intended to exist. The *illegitimate* majority may tyrannize a minority and may derogate from the public good non-tyrannically.¹⁷

What this might mean Madison makes clear by introducing a distinction between a “majority of citizens” and a “majority of persons.”¹⁸ A minority of *citizens* bringing some other *persons*—slaves, perhaps?—to their side could actually constitute a majority of persons while nothing would have changed in the republican nature of the regime itself! Insofar as any particular regime leaves any human beings outside the status of citizen, there exists the possibility at once theoretical and practical of a minority of *citizens* uniting with other *persons* to bring greater force to bear on the regime.

Nothing can show more clearly than this that the Founders did include *all men* when they recognized that “all men are created equal.” In those terms—and according to Publius it is the Declaration we are expounding—a majority of *men* are at any time within their rights to form a regime. They may not be able to claim the right from any *given* regime. That is precisely because every given regime ideally originated in a like appeal to natural right. The difficulty which is created is not the confusion of rights. That can be resolved. It is rather the possibility that recognition of this *natural majority* undermines the entire significance of citizenship.¹⁹

Madison rescued the fair damsels of republican state, county, and district governments, not by means of justice but by means of the superior and disinterested force of a federal govern-

ment able to intervene and suppress insurrection. “It may be doubtful on which side justice lies,” but the federal government can quench the flame of violence.

Happy would it be if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind.

Short of such “universal peace”—the logical result of modern natural rights—every solution is provisional. Madison could not avoid following his prayer with the natural question, earlier left unanswered:

Should it be asked what is to be the redress for an insurrection pervading all the States, and comprising a superiority of the entire force, though not a constitutional right? The answer must be that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability...

Is this answer sufficient? It must be seen as radically insufficient save on one of two grounds. Either the slaves were such as indeed to make it beyond the “compass of human probability” for a *natural majority*, including them, to arise within the United States, or by some process the potential for such a *natural majority* would be diminished by encompassing all persons within the meaning of citizenship, *at the same time* as exercising a sufficiently salutary influence upon the opinions of the citizens as to assure a preponderant allegiance to the Constitution.

This dilemma made slavery the kind of option that had to be discouraged, and it was understood as such fully as much by slavery’s defenders as by its enemies. The elder Charles Pinckney reflected this understanding in the South Carolina ratifying convention when, challenged to account for the absence of a “bill of rights” in the Constitution, he responded that, inasmuch as such documents characteristically begin with a clause to the effect that “all men are created equal,” it seemed to the delegates of the south that they would make such a declaration with decidedly ill grace. As fate would have it, however, that doctrine was already so far wrought in the soul of the regime that by the time of the Constitution it had become impossible to hide it.

This review of the constitutional questions from the era of the Founding enables us to pose anew the question of where the United States Constitution stands today, in the aftermath of *Brown v. Board of Education*. We should have to stretch our imaginations beyond their limits, however, to jump entirely beyond the development of these issues as they arose in the War of American Union. To understand the meaning of equality as it has developed in the course of American politics, we may consider the drama acted out in the fifth joint Lincoln-Douglas debate. That debate was one—and an important one—in a series which effectively secured for Abraham Lincoln the Republican nomination and the Presidency in 1860. It thereby secured to us that very Constitution we now consider and, further, it preserved to our memories the influence of those great Virginians, Washington, Madison, Marshall, and Jefferson. Without them we would not have our Constitution; without the Union their memories would have gone to secessionist Virginia.

WHEN SLAVERY ENDED. . .

The fifth joint debate between Stephen A. Douglas and Abraham Lincoln on October 7, 1858, at Freeport, Illinois, may have seemed at the time only a way station in the journey to Alton, where the seventh and final debate in the series was held, but clearly it was more than that; this most important of the debates demonstrated precisely how principles of just constitutionalism come to inform popular deliberation in American politics, without which there would be no defense possible for that politics. The issue at stake was, of course, the status of slavery in America, but the form that the issue assumed is what concerns us. For it is clear that the abstract principle of the injustice of slavery was of far less importance than whether the constitution were friendly or hostile to it.

The debate over the founding intention was fairly and fully carried out in the era immediately prior to the War of American Union. Lincoln and Douglas, above all, resorted to the Constitution “as our fathers made it.” They produced evidences, comprehensive if not complete, on the one side and the other. Accordingly, every new argument along those lines bears the obligation to respond to the arguments they formulated. The fact that this obligation is seldom honored makes a strong *prima facie* case that no one has succeeded to marshal a stronger case on behalf of either the one or the other. In that context we are justified to ask ourselves the new, simpler questions, what rights and limitations did slavery have under the Constitution, and how far were they beneficial or harmful to slavery?

The question I now propose is the genuine issue which was in dispute between Lincoln and Douglas, though their exchange tended sometimes to obscure it. A brief review of their exchange reveals the point at which we find in the Founding the strongest grounds for answering our question. Such a review should begin with the Freeport debate, in which Lincoln propounded to Douglas the famous “third interrogatory:”

If the Supreme Court of the United States shall decide that the states cannot exclude slavery from their limits, are you in favor of acquiescing in, adhering to and following such a decision, as a rule of political action?

Lincoln recognized how extraordinary this proposition was, how far-reaching its threat to the rule of law. To his mind, though, “this slavery question . . . endangered our republican institutions.” Accordingly, he appealed to the necessary foundations of our constitutional polity, forcing Douglas to join him in extensive and painstaking constitutional analyses before the tribunal of the people. We have in these two able counselors the presentation of briefs unexcelled by any yet produced before the bar of the Supreme Court.

The implications of this process are borne out best in Douglas’s 1859 *Harper’s Magazine* article, in which, finally he met Lincoln’s challenge. It was Douglas’s most comprehensive response to the third interrogatory and its correlative, “Are you in favor of acquiring additional territory in disregard of how it may affect us upon the slavery question?” What characterizes the *Harper’s* essay above all is that it is a lengthy, laborious search for historical precedent to sustain the constitutional interpretation that local self-government entailed the right to regulate all do-

mestic practices up to and including the ownership of slaves. Douglas plumbed the records of revolutionary history to sustain his point, although noticeably omitting (as Lincoln later pointed out) any mention of the antislavery provision contained in the Northwest Ordinance of 1787 originally passed by the final Confederation Congress and readopted by Congress in 1789 under the new Constitution.

Douglas's argument was ingenious. He sought the principles of the United States Constitution outside of and prior to the Declaration of Independence, locating them instead in what he called the colonists' defense of the "unalienable right of local self-government." Unlike Taney's oxymoronic attempt in the *Dred Scott* case to interpret the idea that "all men are created equal" as if "men" meant "Anglo-Saxon immigrants" (which Lincoln easily embarrassed by reminding continental emigrants that their liberties were endangered thereby), Douglas's attempt had the clear virtue of selecting a principle which demonstrably included the recognition of slavery among the domestic practices subject in principle to local regulation. Further, because the colonists sought for a long time to win from the mother country the absolute right to control the introduction of slaves into the colonies, as well as to regulate the practice of slavery, Douglas could then maintain that this was one of the privileges for which they had "shed their blood." Hence, they would not have surrendered it to a new national government without express language to that effect. Avoiding the contentions that *blacks* were not "men"—an argument with which he otherwise agreed—he simply concluded that *slavery* lay within the ordinary powers of the governments established through the Revolution. The constitutional status of slavery, moreover, was that unless it were expressly prohibited, it had to be permitted.

Douglas argued that there never was a direct, constitutional decision on the merits of slavery. If there were not a direct decision originally, if slavery existed as it were from time immemorial, there would be a precedent to avoid a direct decision now. Had there been a direct decision before, even in *favor* of slavery, that would give color for a direct decision now, a constitutional decision *against* slavery. In some ways Douglas understood the south's necessities better than the southerners. He wished slavery to have a constitutional status somewhat akin to that of the family. The family has no express constitutional recognition, yet who would deny that it had constitutional protection? Further, local regulation of marriages and other family matters exists even in the absence of express constitutional recognition of the family. Unfortunately for Douglas, the analogy breaks down when we begin to discuss the "inalienable rights of local self-government" to permit or prohibit practices of immemorial usage; an option is precisely not a matter of universal custom. The family could never be an option, as slavery had been an option.

This is the point at which Lincoln hammered: slavery had been an option, and then only in the sense of an exception to principles otherwise established. Lincoln rooted the concept of self-government in the meaning of that "abstract truth," "all men are created equal." The fact that this irreducible principle was not given its *full* scope alone preserved the option of slavery; to that extent it represented a qualification of the Founders' achievement. However what they did not achieve in practice the Founders dedicated themselves to in principle. On the basis of this interpretation, Lincoln challenged Douglas for a seat in government and demanded insistently that the Declaration of Independence and the Missouri Compromise be considered together the statement of national policy toward slavery. For Lincoln, the slaves were men of a given legal

status. Hence, it was necessary to affirm the existence of slave law as an exception to America's primary conception of the relationship between men and law. Slavery, although an *option*, had to be publicly acknowledged as an *exception*, not only to equality, but to the consent of the governed. The failure to do so was seen as a threat to fundamental law and hence a threat to free men. Stated slightly differently, *Lincoln insisted that free men be understood as free in relation to their rights as men and not by virtue of their accidental juxtaposition with slaves.* Lincoln and Douglas agreed, therefore, that slavery had been an option at the Founding. They disagreed as to the nature of the option.

THE QUESTION OF RACE ARISES . . .

The ambiguities which surrounded the question as to the kind of option slavery was were swiftly transmitted to the question of race once the war had ended and slavery was gone. The process was dramatic and dynamic. The issue over which the War of American Union started, whether there was a right to expand slavery into the territories, ceased to be the central issue from the moment war began. Thereafter the issue became slavery itself, above all the problem of the character of the regime. And then there was race, achieving its most ambiguous form by 1896 in the famous *Plessy v. Ferguson* decision.²⁰ From that vantage point we may stand mid-stream, reaching back to the Founding itself and also forward to our own time, to trace an evolution of the status of slavery under the Constitution to our present-day concerns with race and the meaning of equality.

The American people resolved the dilemma, which Tocqueville took as the ultimate source of their destruction, and then in the most unlikely way. By doing so, however, they raised Tocqueville's question of the "Three Races in America" to the level of a regime question, rather than leave it a mere question of cultural differences. Transformed into the question of the two races in America, it became the decisive vehicle for the interpretation and development of the principles of the regime into the twentieth century. The test of whether a nation "so conceived could long endure" has frequently been approached but never actually resolved. Just as the nation existed for nearly 100 years before coming to terms with the paradox of slavery in a regime founded on the basis of the Declaration of Independence, so today the nation has continued over a hundred years without coming finally to terms with the question of race.

Brown v. Board of Education (1954) offered the Supreme Court occasion for such a resolution, but they failed to achieve it.²¹ The reasons for that failure reveal that the question of race slavery retains today the same power for good and evil that was revealed in Madison's parliamentary exploitation of the issue in the Constitutional Convention. The Court in *Brown* explicitly spoke of overturning the decision in *Plessy*. Just as emphatically ever since, many scholars and commentators have insisted that in *Brown* they did no such thing. The difference turns on the fact that *Brown* did not specifically adopt the opinion of Justice Harlan's dissent in *Plessy*, that famous dissent which gave us the expression, "Our Constitution is colorblind, and neither knows nor tolerates classes among citizens." Accordingly, "today the *Brown* decision is considered the progenitor of a host of color-conscious and group-specific policies."²²

The decision in *Brown v. Board of Education* was handed down in 1954. At that time, I had turned ten years of age and was completing my fourth grade year at Peck Elementary

School, in Fernandina Beach, Florida. Peck was a black segregated school, with elementary and secondary schools housed in a single facility; it was segregated from grade one through grade twelve. About that time my parents were conferring with my teacher, Mr. Simpson. At length they all concurred that I should not be skipped ahead, of my class, in spite of working significantly beyond grade level. The principle of their decision was that intellectual growth was one thing, maturation was another, and the latter had its own laws. They deliberated seriously and for a good long time before reaching their decision. Of these two decisions, that rendered in *Brown* and that rendered by my custodians, the last had by far the more profound influence on my own development and the life I now live. We must consider *Brown*, of which so much was expected, to learn why this was so.

This purely abstract, quasi-biographical approach serves only to provide a frame in which to consider the implications of *Brown*. The debate whether *Brown* succeeded or failed is misplaced and tendentious. Turning as it does on results generalizable over classes, the debate obscures if not everts all consideration of the choices faced and made by individuals. By raising the question of my own success or failure as a question which might trace its answer to lines independent of *Brown*, I mean to suggest that there are other grounds, principled grounds—constitutional, historical, and ethical grounds—on which to consider the case and the conditions of its implementation. Here I follow the spirit of Mary Beard, whom I will cite.

For the consideration of the nation as community there is required both a looking backward and a looking all around at the present. Americans have not been accustomed to thinking of their United States in its entirety as an expression of civilization and culture. Instead they have been inclined for the most part to live from day to day, taking advantage of the extraordinary opportunities for personal advancement as they have lavishly presented themselves, or waging a lone fight against disadvantages.²³

I am interested in *Brown v. Board of Education* at this point not as a model of jurisprudence. The jury is in on that; it was not. I am interested in it from the simple perspective of its important position in a line of events contributing to the continuing elaboration of the principles of American life, above all that all men are created equal.

It is characteristic of American life that we regularly repose for ourselves the question of the meaning of that principle (knowingly or not). We do so as scholars. We do so as citizens. Thoughtful people, like Lincoln, have amply demonstrated that certain political junctures impose upon us the necessity to reconsider our fundamental principles. At such moments the cast of our situation is such that we risk losing them altogether and can preserve them only at the cost of self-conscious exertion. Is there inherent in the very principles by which we live a necessity to risk losing them by virtue of the endeavors they impose on us? Cannot our guiding principles acquire and preserve an enduring authority over our souls and our children's souls through the traditional reliance on example and ritual? I believe the answer to these questions is yes, and the explanation entails a brief inquiry into the life lived in accord with equality and consent.

Legitimate governments derive their just powers solely from the consent of the governed. That is the world of the Declaration. In most, and almost all antecedents to this theory, men con-

sent rather to the fact of government than to its forms and powers. What we confront in the Declaration is the identical question that animated Machiavelli's dialogue with the ancients: who has just title to rule? The answer in the Declaration is that the least shall rule (insofar as the many means the least). That is, there were no longer any reservations recognizing the priority of the best. I say this more simply than it is in fact. The Declaration is not an anathema against the best. But the principle of equality in the Declaration was a direct response to the earlier recognition of distinctions in men respecting titles to rule. From such principles it emerged clearly that the form or structure of government was the secondary element of republicanism. With the vision of a polity in which no adventitious titles would determine the question of ruling, republicanism had emerged as more than a device to prosecute peace between warring classes. It was a way of life in which those distinctions would lose fundamental political significance.

Considering the consent which equality entails, and inquiring how that consent may be exercised, we are forced to investigate the character of the consenting individual. Not only is it of primary importance to preserve the right of consent to men in general, but men in general must actually exercise it in order to vindicate the principles. Yet, is it not manifest that only men in a certain condition and of a certain character (namely, being free agents and subject to rational and moral persuasion) can in fact exercise the power of consent? All concur that neither those in the condition of slaves (whether to men or passions) nor those of a slavish character can in fact exercise the power of consent. At the heart of the ethical question, then, lies the question of character.²⁴

The character of the free, consenting citizen must generally reflect the disposition to weigh social and political actions in the light of those principles which guide us. Certainly, at least, it must be the aim of law to encourage such habits of soul. Let us not fail to notice, however, that such law may also encourage, however mildly, a species of skepticism about the principles by which we govern ourselves. Individuals who must judge, not only whether laws accord with equality and consent, but also whether equality and consent provide for what is good, will sometimes judge false. While they have the powerful influence of tradition and prior demonstration to guide them, those forces are insufficient in themselves to determine individual judgment in every case. Accordingly, there is present in our laws an openness to good-willed abandonment of the principles which guide us. We should candidly confront the prospect that men, fully intending to reaffirm the sufficiency of equality and consent, may actually wander beyond the reach of these limits of safety.

In that light, let us ask about *Brown v. Board of Education*, does it measure up to the task outlined by Lincoln? In political terms I believe the answer is yes. The political task in *Brown*, capping a long series of halting steps in this direction, was to reaffirm the commitment of this nation and its citizens to the principle of equality. That is precisely the task which the Court accepted and which it carried out to the extent of its powers. Indeed, I consider it fair to say that the Court bears great responsibility and deserves praise for the eventual passage of the 1964 Civil Rights Act, which culminated this process. One may even say that the colloquial judgment of the Court's work adequately states the case on behalf of the Court. It has become fashionable to fasten upon the ambiguous phrase, "with all deliberate speed," in order to diminish the Court's achievement through the suggestion that it was too willing to allow recalcitrant states to go slow

in dismantling segregated school systems. However, while it is true that by the time schools were integrated in Fernandina Beach I had already left to attend a private college in the west, by 1968 I could return to teach in the single high school attended by all pupils.

Politically, then, the change we have all witnessed is no illusion, whether sufficient or no. And for the fact that it is a return to fundamental principle, we have the retroactive testimony of James Wilson to confirm:

With regard to an individual, everyone knows how much his fortunes and his character, his infelicity or his happiness depend on his education. What education is to the individual, the laws are to the community. ‘Good laws,’ says my lord Bacon, whose sentences are discourses, ‘make a whole nation to be as a well ordered college.’ With what earnestness should every nation—with what peculiar earnestness should that nation, which boasts of liberty as the principle of her Constitution—with what peculiar earnestness should she endeavor, that her laws . . . should be improved to a degree of perfection as high as human policy and human virtue can carry them!²⁵

In one area only do I conceive it possible to raise a political objection to the *Brown* decision. The problem stems from the Court’s shrinking from the declaration that the Constitution is “color-blind.” The Court did so, I am convinced, because it had accepted the perspective of the *Carolene* footnote, in 1938, that “... prejudice against discrete and insular minorities may be a special condition, which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and may call for a correspondingly more searching judicial inquiry.”²⁶ The *Carolene* Court strongly implied that enhanced judicial scrutiny not only remedied but supplanted the defect of recourse to ordinary political processes. The *Brown* Court, accordingly, undertook its political mission voluntarily hobbled, already inclined to forgo reliance upon ordinary political processes to achieve the objective.

What were those ordinary political processes? In general this must be regarded as a reference to the ordinary processes of elections, lobbying, and general participation in the formation of public opinion. In this context, however, the proper expression would be rule by the majority. The Court saw itself as the protector of minority rights against majority intransigence, in a case in which it did not conceive it possible that the minority could be incorporated directly into the political process and in which it did not conceive of any other possible protection for minorities.

This is the famous problem set forth in James Madison’s tenth *Federalist* paper, in which he held that, “if a faction consists of less than a majority, relief is supplied by the republican principle,” namely majority rule. When a faction is a majority, however, Madison acknowledged a peculiar difficulty, in that the republican form worked against an easy solution. He affirmed, however, that the end, “the great object in view,” has to be both to “secure the public good and private rights” and “at the same time to preserve the spirit and the form of popular government.” Too often Madison is read as offering nothing more than “interest group liberalism” as the solution to this great difficulty. Not only is that an inadequate reading of the limited remedy offered in *Federalist* 10; it also neglects the fully developed response which Madison offered in *Federalist* 51. That is where we find the authoritative account of the relation between the ordinary politi-

cal processes under the Constitution and the preservation of minority rights. We can see there that the Court failed utterly, both in 1938 and 1954, to comprehend how far it was obligated to rely upon ordinary political processes in order properly to achieve its political mission.

Madison argued that the most important test of American freedom would always be the ability of the American system to guarantee the freedom of minorities *without* special provisions for their protection. On that basis the optimal condition of freedom would be that degree of freedom which would allow the majority to govern without permitting it to abuse the rights of others. Every special protection for minorities, then, would be a further barrier to majority rule. Unfortunately, however, it would amount to establishing a “will independent of the society” to enforce it. Madison ruled that out as incompatible with republicanism and as the re-establishment of the aristocratic principle. He defended the specific constitutional design, the process, as accomplishing all that was necessary and all that was desirable in order to achieve the end. For a process to bear that much weight calls for conscious attachment on the part of the people. And that is what was provided: to avoid the evil of majority faction, while relying on majority rule, through the citizens’ conscious attachment to republican principles and processes.

The Founders relied upon this conclusion as the active principle of the regime: the people’s determination to work through certain well designed and established processes would not only provide safety for liberty but the pursuit of “justice and the general good.” This is the purpose of the defense of the separation of powers and representation; not so much wisdom and the adaptability of the representatives (which *were* important), but the stability and decency of democratic opinion would be ensured thereby. The constitutional debate over separation of powers and checks and balances, at its best, would be a debate about how far the people’s continuing justice and happiness might be impaired in departures from the design

I am aware that there is an objection to this interpretation of the ordinary political processes from which the Court had departed in adjudicating questions of civil rights. As it is usually stated, any proposal to allow fundamental civil rights guarantees to be enforced by the majority (not intending to eliminate private litigation) would merely be a return to rule by whites in the interest of whites, or males in the interest of males, or heterosexuals in the interest of heterosexuals, *ad infinitum*.²⁷ But the belief that minorities are “protected” by laws rather than by the opinions of the people is based on a fundamental misunderstanding. The assumption is that every special protection of a minority exists in opposition to the preponderant sentiment of the community. If that were strictly true, however, such laws and programs would not remain in force for even a day.

I conclude, therefore, that the *Brown* Court failed to restore confidence in ordinary political processes. That failure stemmed from an error in judgment, founded in ignorance of the connection between the principle by which we govern ourselves and our ordinary political processes, between equality and consent. Thus, the Court achieved its objective to reaffirm our commitment to equality, without recognizing that a commitment to consent required fully as much to be reaffirmed. Ironically, then, it preserved the *Plessy* principle: “When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized. . .” In that principle the government usurps the role of the governing citizens, who govern through consent.

By leaving intact those *Plessy* powers (assumed to inhere in state legislatures, but actually opposed to consent), at the same time as it failed to rely on ordinary political processes, *Brown* succeeded in renewing our commitment to our guiding principle while depriving us of the correct means to implement it.

“Self-government” refers not, only to the processes of popular government but also, and even more so, to the fact that every self needs governing. That is the light in which the dependence of consent upon character becomes interesting. Here we confront different kinds of challenges, having far more to do with the actual post-*Brown* environment. It is here that the debate over the success or failure of *Brown* becomes most important. And it is here that the question of the ethics of its implementation becomes central: just what options are available to establish the priority of the principle that all men are created equal? Lest we set sail with too little provision, permit me again to recur to Mary Beard for moral support:

To appreciate what it signifies to have no history, let us try to imagine what it would be like to know nothing even of men’s past! In the case of labor leaders, every incorrigible enthusiast would be justified in thinking of himself as a messiah; or, utter stagnation might overtake the labor movement through its allegiance to outworn programs.²⁸

Even as our case is new, Beard seems to say, our adeptness in recognizing it may well depend upon our skill in remembering whence we came. To look forward, we must look backward. Surely, nowhere in American political life is the backward gaze more characteristic than in court decisions.

We have already noted that *Brown* spoke of, without accomplishing, the overturning of *Plessy v. Ferguson* with the result that, “today the *Brown* decision is considered the progenitor of a host of color-conscious and group-specific policies.” The problem centers on the Court’s refusal to adopt the Harlan dissent. Why is the Harlan opinion significant? We are inclined to imagine that its importance has been inflated by the tendency of partisans to appeal to it, in spite of the fact that it is a lone dissent, and as Justice Blackmun argued in *Bakke*, was never accepted as law by the Court.²⁹ Perhaps, though, there is a principle beyond the decisions of the Supreme Court. As Lincoln pointed out, respecting the fear that a subsequent *Dred Scott* case would legalize slavery, “In my judgment there is no avoiding that result, save that the American people shall see that Constitutions are better construed than our Constitution is construed in that decision. They must take care that it is more faithfully and truly carried out than it is there expounded.”³⁰

The idea that there exists a higher or last resort beyond the Court is also reflected in the history of Harlan’s opinion. The fact that it has been so frequently recurred to suggests that it speaks to an understanding of the rule by which we govern ourselves at once deeper and more difficult to eradicate than passing Court opinions might conceive. Even in court records themselves, in fact, we find this phenomenon borne out. Harlan’s dissent is perhaps the most frequently and widely cited dissenting opinion in the history of constitutional adjudication before American courts. From 1947 to 1978 (prior to the *Bakke* decision), we count 64 Harlan dissent citations, 27 of which are in school cases. This phenomenon suggests that Harlan’s opinion

speaks more directly to our expectations of the rule of equality than any of the long line of majority opinions touching upon the question of race in America.

In effect, the constant recurrence to the Harlan dissent demonstrates that Lincoln succeeded in preventing Douglas from blowing out the moral lights around us,” from “penetrating the human soul, and eradicating the light of reason and love.” But Lincoln’s defense of popular deliberation as a higher constitutional authority than the Supreme Court has failed to make an impression on the Court itself. For it has yet to accept Lincoln’s faith in the sufficiency of the consent of the governed. The reason, perhaps, is that the Court has not understood the connection between equality and consent in such a way as to lead it to prefer only those measures of implementation which reinforce the consent of the governed. While it cannot be doubted that every justice would prefer a situation in which the ethical authority of our guiding principle governed individual souls, it is fair to say that few justices have ever had confidence that that was possible. Thus, in spite of *Brown*, we struggle still with the question about the just means to implement standards of equality and fairness in American life.

Over the years we have searched so diligently for “discrete and insular minorities,” that what began as a supposedly necessary suspension of the operation of ordinary political processes has itself turned into the ordinary, nay, traditional procedure for our generation. The needs of “discrete and insular minorities” have turned into the demands of special interests, and our lawmakers seem to have lost all capacity to legislate in the common interest. Looking at the university, George Anastaplo has aptly characterized the problem:

One proper concern of the law, as of the community whose instrument the law is, must continue to be the education of the public. But no system of education can mean much if it is not guided by men who have some rough idea of what is good—of what would be an improvement, of what would be deterioration. This means, for example, that the delusive character of certain programs (such as most of those devoted to so-called black studies and those that make much of “black English”) should be recognized . . .³¹

Inasmuch as the task suggested by Anastaplo could only be undertaken by persons who took seriously the work we described above—to entrust to free, consenting citizens the goal of weighing social and political actions in the light of the principles which guide us—it follows that the explanation for the difficulties we have encountered in implementing the principle so well established in *Brown* stems in large measure from that decision’s neglect of the means which ought to have accompanied its goal.

While there exists a sufficient scholarly history of the development of those interpretations which have occasioned our difficulties³², the case can be adequately documented from the contemporary judicial record. Accordingly, I will rest here with a single example, again making Harlan’s dissent the mediating focus of our concern.

Thirty years ago, then presenting the plaintiff’s cause in *Brown*, the present Justice Thurgood Marshall said, “I think so far as our argument on the constitutional debate is concerned . . . the state is deprived of any power to make any racial classification in any governmental field.”³³

His exchange with the justices at the bench placed a definitive gloss on the statement in the NAACP brief, concerning the idea that “our Constitution is color-blind”: “It is the dissenting opinion of Justice Harlan, rather than the majority opinion in *Plessy v. Ferguson* that is in keeping with the scope and meaning of the Fourteenth Amendment. . .” How changed, then, some would say, of the Justice’s opinion in *Bakke*, 24 years later. No, I would say, there is no inconsistency between Mr. Marshall of counsel and Mr. Justice Marshall. But unlike those who labor to interpret away the manifest contradictions in his language, urging divergent contexts and other exculpations, I insist that Marshall is consistent even with the presence of contradictions in his language (not unlike Madison of the previous century).

Here is what he wrote in *Bakke*:

We must remember, however, that the principle that the ‘Constitution is color-blind’ appeared only in the opinion of the lone dissenter. . . It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give considerations to race in making decisions about who will hold the positions of influence, affluence and prestige in America.

Note very well that, in addition to justifying race-conscious legislation, Marshall incidentally also justifies the right of government—not the people—to decide “who gets what,” “who will hold positions of influence, affluence and prestige.” That is to say that Marshall adopted the *Plessy* principle of the plenitude of state power. This violation of the people’s right of self-government is the real injury that inheres in the opinion. Once the right of self-government is surrendered, it matters little whether the masters who emerge base their judgments on race or on the positions of the stars. Liberty is lost, and with it every occasion for ethical conduct.

I find Marshall’s consistency in his good intention to bring about a constitutional result, namely, “meaningful equality,” respecting which he has not deviated one whit. But this is precisely where the problem surfaces. For not all the good intentions and high sounding language one may muster can supply the *soundness* upon which ethical judgment rests. The contradictions in Marshall’s language do not indict him a hypocrite; they prove he failed, first and last, to comprehend the precise means required to relieve our nation’s distress. And in that he was less seriously in error than the *Brown* majority, for he at least mouthed the correct argument. In reviewing *Brown*, and the decisions leading up to it, he himself concluded in 1978, “those decisions . . . did not . . . move Negroes from a position of legal inferiority to one of equality.” He perceived, in other words, that something had gone wrong in the implementation of *Brown*. There we agree, though I cannot subscribe to his pessimistic account. As I have tried to show, what went wrong was already present in the *Brown* decision’s unanimous neglect of the need to rely upon ordinary political processes in order to produce results in accord with the rule by which we govern ourselves.

The necessity I speak of here lies in the fact that we must maintain in ourselves the character befitting a people who owe to govern themselves through the principle of consent. The demonstration that we *can* govern ourselves cannot be the result of governmental regulations. The question of race obscures this truth; nevertheless, *Brown* has kept alive for us in this era the importance of reflecting upon the requirements of equality and consent. Because of that we are

able to raise anew the claims of virtue within our polity. Further, it is no small achievement that we have already erected a powerful consensus in favor of equality. We would all be justified in taking the optimistic posture that a full understanding of equality and consent remains a distinct possibility. We have matured beyond the illusion that political integration is the prior condition of peace within our society. We can now see that social integration is the necessary support of political integration, as Aristotle argued more than two thousand years ago. We can also see that the necessary means to nurture and sustain that social integration are intimately connected with our appreciation of the principles and promises of the American Constitution. With a proper regard for the ethical imperatives of equality and consent, we can assure that the victories we have already gained will eventuate in the fulfillment of that new birth of freedom to which, in 1863, Lincoln gave witness of his people's resolve.

At the era of the Founding confusion about the requirements of the Constitution could be attributed to the inherent tensions of an imperfect world, even as the salutary influence of the Declaration and Constitution worked to produce an improvement in human political life. Given the achievements of past eras, confusion about the requirements of the Constitution in our own time is less readily explicable. For the first time, the practical conditions for the rule of the regime's guiding principle are wholly consistent with private and public efforts to justify the experiment in self-government.

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¹ Earlier in the Constitutional Convention, May 30, Madison steered the delegates away from a discussion of slavery, stating: "that the words 'or to the number of free inhabitants' [in the article on representation in the Virginia Plan] might occasion debates which would divert the Committee [of the Whole] from the general question whether the principle of representation should be changed." On his motion the words were struck.

² Gordon Lloyd described the politics of the Convention thus: "[Madison] reminded the delegates that the real division to be faced in America lay between north and south and not between large and small states... [He] deliberately chose to push the issue of slavery to the forefront in order to make sure that North Carolina, South Carolina, and Georgia joined the three large states in voting down the five small states from the north. The 3/5ths

clause was a genuine offer, to the small southern states, so that they would think large.” Lloyd’s comments appear in a paper delivered at the American Political Science Association Annual Meeting of 1985, commenting on the paper of John Alvis, “The Slavery Provisions of the U. S. Constitution: Means for Emancipation.” The analysis below differs somewhat from Lloyd’s, but the essential remains: Madison’s awareness of the status of slavery at the foundation may be distinguished from his principles, in themselves abolitionist.

³ Wiecek’s “The Blessings of Liberty: Slavery in the American Constitutional Order,” herein, follows that path in setting out with “five principles” which include the claim that “slavery was wholly compatible with the American constitutional order; indeed it was an essential component of it.” In this conclusion he seems to confuse an “essential” element (intrinsic to the meaning or purpose of a whole) with a “necessary” element (that part or condition of a whole without which the whole itself cannot be realized). I will show below the degree to which this view does not state the views of the Founders in general and, therefore, does not sustain Wiecek’s conclusion that “the Constitution of 1787 contained no implicit assumptions that slavery was incompatible with the progressive governmental order that document created.”

⁴ Cf., Walter Berns’ definitive analysis of the constitutional provision touching upon slavery, in “The Constitution and the Migration of Slaves,” *Yale Law Journal* LXXVIII (1968). Madison seemed to stray through his career from the position of abolitionist-in-principle-if-not-in-practice to the position of a defender of slave-holding interests (p. 209). The problem, according to Berns, arose from Madison’s shrinking from employing the interstate commerce power under the Constitution in relation to Article I, Section 9, which affirmed a congressional authority, after 1807, not only over the “importation” but also over the “migration” of slaves within the United States. Such a power could well have been employed to force the practical abolition of slavery. What follows in this essays presents what I take to be the only credible response to Berns’ well-defended argument.

⁵ Cf., *Federalist* forty-three, Madison’s discussion of the “natural majority” and the discussion of that principle below.

⁶ “Notes for the *National Gazette* Essays,” *The Papers of James Madison*, ed. by Robert A. Rutland, et. al. (Charlottesville: University of Virginia Press, 1983), vol. 14, pp. 160-161. Madison’s outline is incorrectly taken, I believe, as “notes for his *National Gazette* essays.” It appears rather to be a tentative approach to a comprehensive treatise on political principles. In that light, it also confutes the thesis of Gordon Wood, to the effect that the Framers adopted a “democratic” language to defend their “aristocratic” institutions. Cf. , *The Creation of the American Republic 1776-1787*, especially pp. 492-498 (New York: W. W. Norton & Co., 1972).

⁷ Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution*. Vol. I “Constitutional Documents and Records, 1776-1787,” (Madison: State Historical Society of Wisconsin, 1976). p. 116.

⁸ Ibid.

⁹ As General Pinckney recognized in the South Carolina ratification debate. See below.

¹⁰ Max Farrand, *The Records of the Federal Convention of 1787*, vol. 1. (New Haven: Yale University Press, 1966 [1911]), p. 476. Underscoring in the original.

¹¹ Pennsylvania State Ratifying Convention, December 3, 1787.

¹² See the *Annals of Congress*, 9th Congress.

¹³ Letter to Robert Walsh,, November 27, 1819, printed in Max Farrand, *Records*. op. cit., vol. III, p. 436.

¹⁴ Letter to Robert Evans,, June 15, 1819,, in *The Writings of James Madison*, ed. by Gaillard Hunt (New York: G. P. Putnam I s Sons, 1908), vol. VIII, pp. 439-441.

¹⁵ See especially Madison's account of his "different" opinions on the constitutionality of a national bank, in the letter to President Monroe, December 27, 1817. *Works*, vol. III, pp. 55-56.

¹⁶ Alexander Hamilton, James Madison, and John Jay, *Federalist*, ed. by Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), pp. 288-298.

¹⁷ On February 19, 1787 Madison urged Congress not to renounce its intention to support Massachusetts in quelling Shays' Rebellion, in spite of legitimate doubts about the authority of the Confederation. This clear case of exercising a power "not expressly delegated" conflicted with the Articles and, worse, brought the Confederation into conflict "with the principles of Republican gov'ts. which as they rest on the sense of the majority, necessarily suppose power and right always to be on the same side." [*Journals of the Continental Congress*, xxxiii, p. 721.] Madison nevertheless found reason to support federal opposition to a possible Shays' majority in Massachusetts. A sense of the federal good seems to prevail over manifest power and right in the Republic of Massachusetts. Madison went to the Constitutional Convention three months later having already affirmed the priority of democratic nationalism to majority rule in any one of the states. *Federalist* fifty-one should be re-read in this light.

¹⁸ Note that the term "persons" is not only used of slaves in the Constitution, but is also the term Madison used to refer to slaves throughout his May 13, 1789 speech.

¹⁹ Compare with the opinion of Chief Justice Taney in *Dred Scott v. Sandford*, 19 How. 393, 404 (1857).

²⁰ 163 U.S. 537; 16 S.Ct. 1138; 41 L.Ed. 256. Contrast the language of Mr. Justice Brown (announcing the majority's doctrine of "separate but equal") with that of Mr. Justice Harlan (insisting that the "Constitution is color-blind.") The terms with which Brown and Harlan referred to American blacks convey a sense of their own personal attitudes. Three terms appear: black, Negro, and colored. Mr. Justice-Brown did not once resort to "black," used "Negro" but twice, and employed "colored" some thirty times. Harlan, by contrast, did not use "Negro," used the prevalent (of that era) "colored" fifteen times, and used "black" twenty-one times.

²¹ 347 U.S. 483; 74 S. Ct. 686; 98 L.Ed. 873.

²² Diane Ravitch, "The Ambiguous Legacy of Brown v. Board of Education," *New Perspectives*, 16:1, p. 6.

²³ Mary Ritter Beard, "A Changing Political Economy as it Affects Women," American Association of University Women, Washington, D. C., 1934, p. 55.

²⁴ We may define character to be the patterned representation of the content of the soul. A good judge is not called such by virtue of a single good judgment but by virtue of repeated and consistent good judgment. One who indifferently judged well or ill would not be called a good judge. So too, a generous man; to be known for such his actions must be generous in general and not sometimes generous, sometimes miserly. Accordingly, the character for which one is known is produced by the dispositions or habits of soul, which determine one's actions in a consistent manner over time. The character itself is a sign of the soul's content.

²⁵ A Charge Delivered to the Grand Jury in the Circuit Court of the United States, for the District of Virginia, May 1791.

²⁶ 304 U.S. 144, 152, n.4.

²⁷ Of course, the foregoing sections of this paper already demonstrated how far this view is a mischaracterization of the American past anyway.

²⁸ *op. cit.*, p. 6.

²⁹ *Regents of the University of California v. Allan Bakke*, 438 U.S. 265; 98 S.Ct. 2733; 57 L.Ed.2d 750 (1978).

³⁰ Speech at Columbus, Ohio, Sept. 16, 1859.

³¹ George Anastaplo, "Race, Law, and Civilization," ch. xv in *Human Being and Citizen: Essays on Virtue, Freedom, and the Common Good* (Chicago: Swallow Press/Ohio University Press, 1975).

³² I discuss the historical question in detail in my essay, "In Search of Freedom: Slavery and the Principles of the American Founding," *The American Journal of Jurisprudence*, Vol. 18:1983,249-271.

³³ The best treatment of the development of Marshall's views, and the decision in *Brown* and its repercussions, is Raymond Wolters' *The Burden of Brown* (Knoxville: University of Tennessee Press, 1984). Marshall's briefs and oral comments at trial are preserved in the record of the case, and his written dissent in *Bakke* is published with the case, op. cit.