

# ESSAY

## “Who Killed Cock Robin?” A Retrospective on the Bork Nomination and A Reply to “Jaffa Divides the House” by Robert L. Stone\*

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I am indebted to Dr. Robert L. Stone for his eloquent testimonial to my efforts, over more than forty years, to “address the central question in American constitutional law today, which is the same question over which the Civil War was fought.” At the same time, I find myself puzzled at his charging me with “dividing the house.” The argument to which he takes exception is, in principle, the same made by Abraham Lincoln in his immortal speech of June 16, 1858.

In an utterance that may have changed the history of the United States, and of the world, Lincoln argued that the grounds upon which one opposed the extension of slavery into the territories was inseparable from opposition to slavery itself. Similarly, I maintain that the ground upon which one argues for a constitutional jurisprudence of “original intent” is inseparable from such a jurisprudence. No one has ever formulated the doctrine of “original intent” jurisprudence with greater perspicacity or eloquence than did Chief Justice Taney in his opinion in *Dred Scott*. Furthermore, his judgment that a property interest in slaves in the Territories was guaranteed by the “original intent” of the Constitution is reasonable if one takes the text and history of the Constitution, apart from its moral

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grounding in the principles of the Declaration of Independence, as the guide to that intent. Although the words "slave" and "slavery" do not occur in the text of the Constitution of 1787, it was clear that the protection of property in slaves was the purport of a number of its clauses. One could not tell from the text, however, whether such protection was extended to something regarded as a necessary evil, something regarded as a positive good, or something that, like driving on the right side of the road, was neither good nor evil until enacted into positive law.

In the Congress of 1857-1858, the Southern Democrats, led by President Buchanan attempted to give slavery a permanent foothold in Kansas by admitting Kansas as a state under the Lecompton Constitution. However, Lecompton was defeated in the House of Representatives by a political coalition of Republicans and free-soil Democrats led by Senator Stephen A. Douglas. In the spring of 1858, many in the Republican Party, in particular in its eastern wing, were now willing to accept Douglas as an authentic free-soil leader. It was against this acceptance of Douglas by Republicans that Lincoln's House Divided speech was primarily addressed. This is the precedent that, I believe, I rightfully follow today in opposing certain views of my fellow conservative Republicans.

My brethren, represented in particular by Chief Justice Rehnquist, hold that constitutional "safeguards to individual liberty" have "no intrinsic worth," are not grounded in any "idea of natural justice," and derive whatever "moral goodness" they are alleged to have "simply because they have been incorporated into a constitution by a people." This assertion is nearly identical to Douglas's belief that the people may either vote for slavery or vote against slavery, and that whether slavery is lawful or not depends exclusively upon their will.

The Lecompton Constitution would have guaranteed security and permanency to any property in slaves already in Kansas in 1858, whether or not other slaves might later be brought in from other slave states. However, Douglas had opposed the Lecompton Constitution, not because of any concessions it made to slavery, but because it was adopted in a rump election marred by fraud; therefore, he maintained, it was not a valid expression of the will of the people of Kansas. However, opposed to voting fraud as much as Douglas, Lincoln opposed Lecompton primarily because of the concessions it

made to slavery. Lincoln did not think the people of the Territory of Kansas should vote on the question of whether to admit slavery among their domestic institutions. Keeping slavery out of the Territories should, he thought, be a matter of national policy enacted by Congress. The wrongfulness of slavery, he asserted, was grounded in "an abstract truth, applicable to all men and all times." Like Judge Douglas and his followers, the very idea of such truth, instructing us as to what is right and what is wrong, is rejected today by Chief Justice Rehnquist. The Chief Justice writes that there is "no conceivable way that I can demonstrate to you that the judgments of my [e.g., anti-slavery or anti-Nazi] conscience are superior to the judgments of your [e.g., pro-slavery or pro-Nazi] conscience."

Lincoln has asserted what is in fact the truth of the matter. It is that free political institutions presuppose an agreement on certain principles in regard to right and wrong. These principles are set forth in the second paragraph of the Declaration of Independence, where it is said, "We hold these truths to be self-evident . . . ." Voting does not legitimize these principles; the principles are what legitimize the voting. As Lincoln said in the course of the joint debates, "[Judge Douglas] contends that whatever community wants slaves has a right to have them. So they have, if it is not a wrong. But if it is a wrong, he cannot say that people have a right to do wrong."

In 1858, those of Dr. Stone's mind did not want Lincoln to oppose Douglas for re-election to the Senate. They felt that he was "dividing the house" of the free-soil coalition. They thought Douglas had proven his practical effectiveness as an anti-slavery leader in the fight against Lecompton. Like Dr. Stone, they deprecated theoretical objections to what appeared to them to be Douglas's practical effectiveness. Horace Greeley, among others, did not see what difference it made whether slavery was defeated under the aegis of popular sovereignty, by a vote of the people of Kansas, or excluded, as Lincoln wished, by Congress.

Lincoln continued to insist upon the re-enactment of the Missouri Compromise restriction upon slavery, which provided that the remaining Louisiana Territory north of the southern border of Missouri, not already incorporated into a state, should prohibit slavery forever. This restriction had been repealed by the Kansas-Nebraska Act of 1854, of which Senator Douglas was the author and chief sponsor. Douglas

replaced the Congressional prohibition of slavery in the 1820 law with a policy of congressional "non-intervention" into slavery matters in the States and Territories. Henceforth, according to the language Douglas incorporated in the Kansas-Nebraska Act, the people of each Territory and each State would be "perfectly free to form and regulate their domestic institutions in their own way." This meant that the people of a Territory would decide by their votes whether to include slavery among their domestic institutions. The spirit of the Kansas-Nebraska Act is indicated by the following passage from Douglas's speech in the Alton joint debate with Lincoln: "[w]e in Illinois . . . tried slavery, kept it up for twelve years, and finding that it was not profitable we abolished it for that reason . . ." (emphasis added). For Lincoln, the Kansas-Nebraska Act had, from the outset, represented an "open war with the very fundamental principles of civil liberty, criticising the Declaration of Independence, and insisting that there is no right principle of action but *self-interest*" (emphasis in original).

For Lincoln, treating slavery as immoral, and making that immorality the basis of all policy dealing with it, was as important as the Missouri Compromise or any other limitation upon the spread of slavery. For Lincoln, as for Madison and Jefferson, the moral bankruptcy of slavery and the rightness of constitutional government were but two sides of the same coin. The requirement that "the just powers of government" be derived from "the consent of the governed" is grounded upon the prior recognition that all men are created equal. It is *human beings* whose consent is required, not horses or dogs or oxen or asses. This is not, as Chief Justice Rehnquist supposes, a "political value judgment." "Value judgments" *qua* "value judgments" are subjective. However, the difference between man and beast is not subjective, but objective. Hence, the moral judgments consequent upon the recognition of this difference are not subjective, but objective. Because men are not beasts, they ought not be ruled as men may rule beasts. Nor ought they to have toil imposed upon them by the uncontrolled discretion of another as such toil is imposed upon a horse or an ox or a mule. Nor is it a "value judgment" to refuse to equate the stockyards where cattle are slaughtered with the extermination pens of Buchenwald and Auschwitz.

"Thou shalt not kill" has never been understood to refer to beef cattle or to hogs or to sheep. "Thou shalt not steal" has

never referred to the goods produced by the labor of horses or of oxen. It is because it is an objective and self-evident truth, and not a "value judgment," that no man is by nature a beast, that none may arbitrarily be excluded from the class of those whose consent is necessary for the powers of government to be just. It is not a "value judgment" to say that the nature of a man is different from the nature of a beast. Every human being has, in Lincoln's words, "a natural right to put into his mouth the bread that his own hand has earned." It is this antecedent natural right to the product of one's labor that is the foundation of the constitutional right that the product of that labor may only be taxed with our consent.

If it is true, as a general rule, that no human beings are to be regarded as so far inferior as to deserve to be treated as beasts, it is also true that no human beings are to be regarded as so far superior as to be deferred to as gods. Hence, the just powers of government are not only derived from the consent of the governed, but are defined and circumscribed by that same consent. Each one of those living under the law has the same right to participate in the political process whereby the laws he lives under are made. Each and every one of those making the laws has an identical obligation to live under the laws he has made. It is not simply the will of the people that is to be paramount under the Constitution, but the rational and moral will, formed in accordance with "the laws of nature and of nature's God." This is the argument of the Declaration of Independence, the American Revolution, and the American Founding, of an essential, original, intrinsic, natural right. It is a right that is moral and rational, no less than constitutional, that informs the jurisprudence of a free people. As such, it embodies, *a fortiori*, the "original intent" of the jurisprudence of the Framers and Ratifiers of the American Constitution.

For Dr. Stone to say that I am "dividing the house" by insisting upon this ground for a jurisprudence of original intent is to stultify the very idea of such a jurisprudence. Chief Justice Rehnquist's jurisprudence, accepted either implicitly or explicitly by others whose doctrines Dr. Stone finds "wholesome and necessary for the public good," is that of legal positivism built upon moral relativism. But without the authentic and genuine morality of the true doctrine of "original intent," there is no principled ground upon which to resist liberal judicial activism, and there can be no house to divide.

After the defense of Judge Bork contained in Dr. Stone's article, Judge Bork was nominated to the Supreme Court by President Reagan. His nomination was rejected by the United States Senate. The lengthy and bitter struggle over the Bork nomination involved the Supreme Court in the political process more profoundly than any event since President Roosevelt's "court packing" plan of 1937.

What I believe to be the truth, although not the whole truth, about that struggle was well expressed by Suzanne Garment in *The War Against Robert H. Bork*, in the January 1988 issue of *Commentary*. I regarded Judge Bork's enemies to be the enemies of my understanding of the Constitution no less than of his. While Judge Bork defended the conception of "original intent" in interpreting the Constitution, his opponents believed the Constitution, or at least all those clauses of the Constitution that are open to interpretation, had virtually no fixed meaning. Anything they regarded as wrong was a wrong to be righted by the judicial process no less than by legislative process. The question of whether to use the courts or the legislatures to gain a particular end was only a question of expediency, a question of which avenue offered the greater chance of success. The Constitution was deemed to be a vehicle for justice, and whatever was said to be justly claimed was said to be claimed constitutionally.

Courts are not legislative bodies, and they may not and ought not levy taxes. In addition, except in the case of lawfully imposed fines, the courts have no constitutional authority to transfer wealth. These maxims, however, did not seem to restrain the demand for judicial activism on the part of Judge Bork's enemies. The liberal judicial activist's "justice agenda" redefined what had hitherto been understood to be the rule of law. A dramatic, current example of how this agenda operates has been furnished by the order of a federal court to the city of Yonkers, New York, requiring it to build low cost housing as a remedy for what the court found to be a pattern of discrimination. The city would have had to impose very substantial taxes upon itself to carry out the order, taxes vehemently opposed by a large majority of its citizens. The court thereupon imposed fines both on the city and its officials, fines that would in a relatively short time bankrupt both. City officials were also subject to imprisonment for contempt of court. The order, now on appeal, dramatically illustrates the usurpation of legis-

lative authority, in this case the taxing power, by the judiciary. Judge Bork and I are both opposed to such usurpation. It also illustrates the importance of having justices on the Supreme Court who, like Judge Bork, would vote to overrule such judicial tyranny. A constitutional jurisprudence of "original intent" has been viewed as a reactionary obstacle to justice by those anxious to carry out "reform," as in Yonkers, through the judiciary. In opposition to the dead hand of "original intent," they call for a "living Constitution."

I publicly supported Judge Bork's nomination, and even contributed money to his cause. As a matter of practical politics, I no more "divided the house" by opposing Judge Bork's views on original intent than Lincoln "divided the house" by opposing the cooperation of Republicans and Douglas Democrats in the struggle to defeat Lecompton. Judge Bork's nomination failed precisely because his conception of "original intent" was flawed. He was never able to command the moral high ground that belonged to the genuine doctrine as held by Jefferson and Madison. His opponents looked upon "original intent" in the light, not of Lincoln's, but of Chief Justice Taney's espousal of it. They saw "original intent" as having once sanctioned slavery, and even later as having sanctioned racial discrimination of the most odious kind. Judge Bork did nothing to contradict this opinion. In fact, in the course of the hearings, Senator Metzenbaum read to Judge Bork the identical passages on "original intent" I had cited from Chief Justice Taney's opinion in *Dred Scott*.

Judge Bork's response was only to say that "the Devil can quote Scripture," thereby conceding the accuracy of Chief Justice Taney's characterization of "original intent." He then went on to repeat what Chief Justice Rehnquist and Mr. Meese had said about *Dred Scott*: that the Court's great error was to usurp the power of Congress by declaring unconstitutional the limitation upon the extension of slavery in the Missouri Law of 1820. I have pointed out, however, that a hopelessly divided Congress, in the Compromise of 1850, left the question of the constitutional status of slavery in the Utah and New Mexico Territories to the Supreme Court. As I noted, it had "laid the baby on the doorstep of the Supreme Court, rang the bell, and then disappeared." Three years before *Dred Scott*, in the Kansas-Nebraska Act of 1854, Congress had repealed the Missouri law's restriction upon the extension of slavery. This action was

open to the interpretation, espoused by, among others, Senator Stephen A. Douglas, that Congress had come to regard the Missouri law's restriction as a wrongful policy. It certainly did not preclude the view that the Supreme Court, in *Dred Scott*, was merely following Congress, and not usurping its powers. The attempt by Judge Bork, no less than Chief Justice Rehnquist or Mr. Meese, to treat *Dred Scott* as primarily a matter of judicial usurpation shows as profound an ignorance of constitutional history as Taney himself displayed in his opinion for the Court in that case.

During the Bork hearings, I had occasion in a public discussion to confront someone who was a prominent member of the Meese Justice Department, and who was a zealous advocate of Bork's views on "original intent" and the limits of judicial power. In a discussion of *Dred Scott*, he too insisted that the abiding sin of the Court was in declaring unconstitutional an act of Congress. I put the following hypothetical question to him. Let us contemplate, I suggested, the case of *Dred Scott* in reverse. Let us suppose that John C. Breckenridge had been elected President in 1860, and that he had been elected on the platform of the Southern Democratic Party, calling for a federal slave code for all the Territories. Let us further suppose that Congress, acting upon this platform, passed just such a law. Now let us suppose that Lincoln, not Taney, was Chief Justice of the Supreme Court, and that a majority on the Court held Lincoln's opinion concerning the constitutionality of slavery in the Territories. Finally, let us suppose that Dred Scott sued for his freedom on the ground that the law Congress had passed enforcing slavery in the Territories was unconstitutional. How did Judge Bork's adherent think that "Chief Justice" Lincoln, writing for the majority, would decide the case?

Our Borkian had no doubt that Lincoln, like Taney, would have upheld the constitutionality of an act of Congress guaranteeing slavery in the Territories. He did not think that Lincoln, or any sound constitutionalist, would interfere with the legislative discretion of Congress "to dispose of and make all needful rules and regulations respecting the Territory . . . belonging to the United States," under article IV, section 3 of the Constitution. He saw no reason why Dred Scott, in these circumstances, should not have remained a slave. But this is preposterous. "Chief Justice" Lincoln would have said that Congress had no lawful power under the fifth amendment to



deprive any person, white or black, of his liberty, if that person had not been lawfully convicted of a crime.

By way of contrast, Chief Justice Taney had used the fifth amendment to say that Congress had no lawful power to deprive any owner of his slave property in a Territory. To reach this conclusion, he had first to decide that a Negro was not a person within the meaning of the fifth amendment. This he did by asserting that Negroes, whether free or slave, were "beings of an inferior order . . . and so far inferior that they had no rights which the white man was bound to respect." Because Lincoln asserted that the Negro was a human being, and, according to the Declaration of Independence, possessed the same natural rights as all other human beings, "Chief Justice" Lincoln would have held that a Negro was a person within the meaning of the fifth amendment. Lincoln would have had no hesitation in pronouncing unconstitutional any law passed by Congress which was based upon the premise that the Negro was a chattel and not a human person. Our Borkian, however, could not see that. Such blindness certainly had much to do with Judge Bork's defeat.

It cannot be repeated too often that the central question in *Dred Scott* was whether the Negro was, under "the laws of nature and of nature's God," a human person entitled to that personal liberty guaranteed to all persons in the fifth amendment. The Borkians today are as unable as Chief Justice Taney was in 1857 to say that *anyone* white or black has natural rights. Hence they are unable to see any foundation for civil rights outside of positive law. That they may themselves be in favor of civil rights without discrimination on the basis of race is simply a matter of personal preference, a political value judgment, which, as such, has no constitutional standing. Judge Bork's inability to see the centrality of man's humanity and natural rights as the *constitutional* issue in *Dred Scott* is the reason he was unable to endow his version of "original intent" with any moral authority. For Robert Stone to say that Bork's jurisprudence is "wholesome and necessary for the public good," in the light of such a defect, is inconsistent with any respect whatever for the constitutionalism of Jefferson, Madison, or Lincoln.

Because of the resemblance of Judge Bork's version of "original intent" to that of Chief Justice Taney, Judge Bork's critics could insist, with some plausibility, that the authority of

the Constitution had to be derived not from the reactionary past, but from the liberal future. The principles of the Constitution, they hold, are to be found in an "evolving" sense of justice. Just as Darwinian evolution displayed higher biological forms of life emerging out of lower forms, conceptions of morality and justice have evolved so as to distinguish the concept of "original intent" in 1787 from that of 1987. A judge, according to this view, should not be bound by "original intent" because such intent is irrelevant to and inconsistent with what the American people, the source of all constitutional authority, rightly expect from our contemporary Constitution. In arguing against "original intent," Judge Bork's opponents also maintained that, whether desirable or not, it was a useless concept because one could never know what that intent was, or how it could be applied to problems the framers and ratifiers never imagined. The following is characteristic of the language used:

The text of the Constitution, as anyone experienced in words might expect, is least precise where it is most important. . . . History can be of considerable help, but it tells us much too little about the specific intentions of the men who framed, adopted and ratified the great clauses. The record is incomplete, the men involved often had vague or even conflicting intentions, and no one foresaw, or could have foreseen the disputes that changing social conditions and outlooks would bring before the Court. . . . One begins to understand why so many judges, lawyers, and legal scholars have despaired of the very possibility of neutral principles of constitutional law and have succumbed to the temptations of the interest-voting philosophy. What else is there?

The author of the foregoing was, however, not Justice Brennan in 1987, but Judge Bork in 1968. I mention, in passing, that "interest voting" and an "evolving" standard of justice are, in today's political vocabulary, only two names for the same thing. One simply identifies one's own interests, or one's own passionately held opinions, with the higher standard. An example is the ease with which so many in the civil rights movement have passed from a movement against racial discrimination, based upon the "neutral principle" of equal rights for all human beings, into a movement for racial discrimination, based upon preferential treatment for "discrete and insular minorities." This they have done without any apparent

consciousness of, much less admission of, any change of principles.

In 1968, however, Judge Bork saw "two alternative philosophies" to that of judicial "interest voting." One led to "a relatively restrained Court, the other to a relatively activist Court." The restrained Court would simply leave to the political branches the definition of the Constitution. However, a restrained Court should not be merely passive, but should do much to "improve the quality and performance of the American political process," without itself attempting to achieve substantive ends of government. An example is the ordering of re-districting when the electoral process cannot reform itself. In 1968, however, Judge Bork was equivocal in his support for this non-activist approach to the work of the Supreme Court:

A desire for some legitimate form of judicial activism is inherent in a tradition that runs strong and deep in our culture, a tradition that can be called "Madisonian." We continue to believe there are some things no majority should be allowed to do to us, no matter how democratically it may decide to do them. A Madisonian system assumes that in wide areas of life a legislative majority is entitled to rule for no better reason than that it is a majority. But it also assumes there are some aspects of life a majority should not control, that coercion in such matters is tyranny, a violation of the individual's natural rights. Clearly, the definition of natural rights cannot be left to either the majority or the minority. In the popular understanding upon which the power of the Supreme Court rests, it is precisely the function of the Court to resolve this dilemma by giving content to the concept of natural rights in case by case interpretations of the Constitution.

I propose to show that there is much that is flawed in this understanding of a jurisprudence of natural rights. Let us however concede that, had Judge Bork propounded this understanding during the hearings on his nomination to the Supreme Court, he would almost certainly have been confirmed. Much of the controversy during the hearings surrounded his objections to the discovery by the Supreme Court of a "right to privacy" in *Griswold v. Connecticut*.

Senators on the Judiciary Committee could not understand Judge Bork's objection to a decision holding unconstitutional a Connecticut statute forbidding the prescription by a physician of contraceptives to a married couple. It was in this

case that Mr. Justice Douglas, speaking for the Court, discovered a "right of privacy" among the "penumbras formed by emanations" from the first, third, fourth, fifth, and ninth amendments. Douglas conceded that no such right was explicit in the Constitution, but observed that "the notions of privacy surrounding the marriage relationship" were so "sacred" as to deserve constitutional protection. At his 1987 confirmation hearings, Judge Bork conceded that the Connecticut law was "preposterous, ridiculous, absurd, and loony," but he would not concede that these were reasons for regarding it unconstitutional. Besides, he asked, might not a right of privacy extend constitutional protection to otherwise illegal acts such as drug use, wife abuse, and child abuse? In 1968, however, Judge Bork took a very different view of the *Griswold* case.

At that time, he believed in the plausibility of a "legitimate form of judicial activism." As a result, he found "a warrant for the Court to move beyond the limited range of substantive rights that can be derived from traditional sources of constitutional law." Such a warrant, he found, "persuasively argued" in Mr. Justice Goldberg's concurring opinion in *Griswold*, an opinion based upon the ninth amendment, which states that "[t]he enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Goldberg had written that "the ninth amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments . . . and an intent that the list of rights included there not be deemed exhaustive." In 1968, Judge Bork patronized this version of "original intent" jurisprudence and was willing to concede that there was a natural and constitutional "right of privacy in marriage." He then correctly assumed that it was an innocent right, one that might not give protection to vicious or immoral acts when done in private. Like Justice Goldberg, he did not see the right as an "emanation" from any of the first eight amendments, but as one of the unenumerated rights protected by the ninth amendment. However, he did not see the doctrine of unenumerated rights as flowing from the social contract theory of the American Revolution. He did not understand that civil society was understood by the framers and ratifiers of the Constitution as the result of contract and that only those rights necessary for

the carrying out of the purpose of that contract were surrendered to civil society. All other rights were reserved.

This is the very basis of the idea of limited government and the rule of law which underlies the Constitution. As the Massachusetts Bill of Rights of 1780 put it:

The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good.

The premise upon which the right of contract, or compact, rests, is that all men are born free and equal. It is this freedom and equality which vests, in every human being, the natural right to make contracts, including the basic contract that creates civil society. But the resulting power of government extends only so far as the original contract authorizes. It is this understanding of the ground of constitutionalism that is embodied in the ninth amendment. All this escaped Judge Bork in 1968, and he has not caught up with it yet. In 1968, however, he did see that the protection of marital privacy conformed with the "popular understanding" of what was the Court's function. In the hearings on his nomination, however, he no longer regarded this as a constitutional consideration. This was a fatal flaw in the eyes of Senators who thought, as Judge Bork once thought, that the popular understanding deserved high consideration.

What Judge Bork called the "Madisonian" alternative in 1968 was in fact no more characteristic of Madison than of his contemporaries. Madison himself would never have dreamed of calling the "concept of natural rights" Madisonian. Nor would these natural rights, as the ground of the Constitution, have been regarded by Madison, or any of his contemporaries, as an optional alternative, any more than they would have regarded human nature as an option for human beings. Being natural, these rights constituted the only possible ground of a genuine jurisprudence of "original intent." In this respect, the correspondence between Madison and Jefferson and the law faculty of the University of Virginia is illuminating.

In it, Madison and Jefferson commended to the faculty that the first of the "best guides" to the principles of the governments, of both Virginia and of the United States, was "the Declaration of Independence as the fundamental act of union

of these states." Neither Madison nor Jefferson thought, however, that these principles implied any *a priori* knowledge, as with Kant's categorical imperative, of what particular judgments these principles entailed. The morality of natural rights, as the Declaration of Independence itself makes clear, is a morality of prudence. These principles are the necessary, but not the sufficient, ground of wise judgment. The Constitution is a bundle of compromises, representing what was believed to be the greatest good, and the least evil, attainable in the actual circumstances of the United States in 1787. These principles, while telling us that slavery is an evil, also tell us that, as Lincoln would say, the concessions to slavery in the Constitution were intended to be in the service of human freedom. Without the concessions, and without the prudence that dictated the concessions, there would have been no stronger, more perfect Union. Without these prudent concessions, there would have been no union strong enough to accomplish what this union accomplished within fourscore and seven years, by placing slavery "in course of ultimate extinction."

Nothing in human affairs, observed Jefferson, "is unchangeable *but the inherent and unalienable rights of man*" (emphasis added). It is irrelevant that we do not know how the framers and ratifiers of the Constitution and its amendments would have applied any of its provisions under present circumstances. "Original intent" means they intended us to understand their handiwork in the light of its enduring principles, not in the light of either their or our own transient circumstances. When Judge Bork writes, as he did in 1968, of a jurisprudence "of natural rights," arrived at "in case by case interpretation of the Constitution," he is, without knowing it, referring to a jurisprudence of "original intent." However, Judge Bork, in 1968, qualified his call for such a jurisprudence by asserting:

This requires the Court to have, and to demonstrate the validity of, a theory of natural rights. A Court without such a theory should candidly admit its lack, eschew policy questions, and practice restraint. Otherwise it will inevitably deny the majority some of its legitimate power to rule, thus abetting a tyranny of minorities.

But must the Court "demonstrate the validity" of "a theory" which already constitutes the "original intent" of the framers and ratifiers? If it is true, as Madison and Jefferson believed it

to be, that the Declaration of Independence is "the fundamental act of union of these states," then its principles are *a fortiori* those of the Constitution. Furthermore, why would Judge Bork think that any court of law should be considered either legally or philosophically competent to make such a demonstration? This goes beyond even Justice Brennan's "evolutionary" conscience. There never has been any need for the Court to engage in a philosophical justification of what the Constitution itself assumes to be true. That assumption is "original intent." John Marshall, in his dissenting opinion in *Ogden v. Saunders*, in considering the "obligation of contracts" clause of the Constitution, wrote the following:

When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligations and contracts. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our Constitution took the same view and the language they have used confirms this opinion.

In 1825, Madison and Jefferson, in laying down required texts for the law faculty of the University of Virginia, had also declared that

as to the general principles of liberty and the rights of man, in nature and society, the doctrines of Locke, in his "Essay concerning the true original extent and end of civil government," and of Sidney in his "Discourses on government," may be considered as those generally approved by our fellow citizens of this, and of the United States.

Marshall did not name the "wise and learned men." However, it is certain that, on the subject of "an original, intrinsic obligation derived from the acts of free agents and not given by government," that is to say, of natural rights as the ground of constitutional rights, he and Jefferson and Madison expressed doctrines first propounded in Locke and Sidney. It deserves special attention that Marshall supposed that these doctrines had "guided public opinion" while Madison and Jefferson understood that the same doctrines were those "generally

approved" of by their fellow-citizens. Hence what we may, with propriety, call Lockean natural rights and Lockean contractualism were deemed to be elements equally of the framing and of the ratification processes.

Some two decades after his 1965 article, however, Judge Bork abandoned any thought that the Supreme Court could "demonstrate the validity of a theory of natural rights." In his celebrated 1984 lecture, "Tradition and Morality in Constitutional Law," he said that "constitutional law has very little theory of its own and hence is almost pathologically lacking in immune defenses." This reflects Judge Bork's own abandonment of the "original intent" of the "Madisonian system" based upon a "theory of natural rights." The pathology in question lies, however, in his own jurisprudence, not in the Constitution. In the same lecture he also declared that "judges have no mandate to govern in the name of contractarian or utilitarian or what have you philosophy rather than according to the historical Constitution." But the "Madisonian system" does embrace a "contractarian" philosophy. One wonders whether Judge Bork has ever read an opinion of John Marshall, not to mention any of the relevant writings of James Madison.

Absent the demonstration of the theory of natural rights, Judge Bork has turned to the only alternative he knows: "the interest voting philosophy." He has turned, that is, to recommending that the Court "eschew policy questions, and practice restraint." By an amazing mutation of terminology, Judge Bork now calls "original intent" the very doctrine that he had proposed in 1968 as a substitute to the system he had called "Madisonian."

In fact, however, Judge Bork never understood what was meant by a "Madisonian system." In 1968, he commended it, not because it was true but because it reflected "a tradition which runs strong and deep in our culture." But the tradition of equal natural rights does not run more strongly in our culture than very different traditions run in other cultures: the tradition of stratified classes with untouchables at the bottom, or the tradition of suttee in Hindu culture. There is hardly any absurdity, polygamy, slavery, human sacrifice, self-mutilation, public prostitution, which is not "sacred" or "strong and deep" in the tradition of some culture. Judge Bork does not seem to recognize any objective basis for evaluating cultures and their different traditions. It was, however, the essence of the Ameri-



can form of government, as understood by its founders, that it began a new order of the ages, *novus ordo seclorum*, which rejected all traditions inconsistent with what it regarded as reason and nature. One cannot repeat too often Washington's pronouncement that the foundations of our governments were "not laid in the gloomy ages of ignorance and superstition; but at an epoch when the rights of mankind were better understood and more clearly defined than at any other period."

For the Founding Fathers, the natural rights of mankind were inherently different from the principles of any tradition, however powerful, that reflected "ignorance and superstition." In fact, the natural rights tradition of the Founding was largely abandoned in the South in the generation before the Civil War. The South Carolina doctrines, formulated during the struggle over Nullification from 1828-1833, came to dominate the antebellum South. The states which formed the Confederacy came under the influence of the political thought of John C. Calhoun.

In Calhoun's thinking, the reasoning which connected political sovereignty, including state sovereignty, with the equal natural rights of individual humans was entirely abandoned. In Calhoun's thinking, the rights of the "Madisonian system," which were the rights of individuals, became the rights of groups. But Calhoun's rights of groups are indistinguishable from the interests of those same groups. This is clearest in the fact that the collective right of slaveholders to preserve and protect slavery is in no way gainsaid by any individual rights to freedom of the slaves. The interest of the slaveholders in slavery constituted their moral right in slavery. Although Calhoun himself would not have used the term, any claim of right on behalf of the slaves would have been what Justice Rehnquist calls "a political value judgment." According to Calhoun, an effective veto by the slaveholding interest upon any action of the federal government tending to put slavery "in course of ultimate extinction" was equally a moral and a constitutional right. Judge Bork's jurisprudence in 1968, although on the surface Madisonian, in fact is Calhounian, notwithstanding the loathing that the historical Madison had for the historical Calhoun.

We have heard Judge Bork declare that, in certain areas, a majority has a right to rule "for no better reason than that it is a majority." Without knowing it, Judge Bork has again

broached an opinion that is the very negation of Madisonian thought. By it, Bork shows that he is unaware of the logical relationship connecting majority rule with minority rights. For that logic we turn to Madison himself, writing in the light of that same wisdom and learning that John Marshall had praised. The following is an essay on "Sovereignty," written near the end of Madison's life:

To go to the bottom of the subject let us consult the Theory [sic] which contemplates a certain number of individuals as meeting and agreeing to form one political society, in order that the rights the safety and the interest of each may be under the safeguard of the whole.

The first supposition is, that each individual being previously independent of the others, the compact which is to make them one society must result from the free consent of *every* individual.

But as the objects in view could not be attained, if every measure conducive to them required the consent of every member of society, the theory further supposes, either that it was part of the original compact that the will of the majority was to be deemed the will of the whole, or that it was a law of nature, resulting from the nature of political society itself, the offspring of the natural wants of man.

Whatever be the hypothesis of the origin of the *lex majoris partis*, it is evident that it operates as a plenary substitute of the will of the majority of the society for the will of the whole society; and that the sovereignty of the society as vested in and exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals, of conscience for example, in becoming parties to the original compact being beyond the legitimate reach of sovereignty, wherever vested or however viewed.

We see again that the right, and limits of the right, of the majority to rule must be understood first and foremost in the light of that "original compact" by which political society is formed. The ground of that compact is the equal natural right of every individual, by his own consent, to become a member of the body politic. This is but another expression of the thought embodied in the great proposition "that all men are created equal." Political authority in society, thus formed, devolves upon the "majority." This majority is the "plenary substitute" for the will of the whole society. It is, however,

such a "plenary substitute" *only* for those purposes to which unanimous consent has already been given.

The unanimous consent which gives rise to government would be self-defeating if government could act only by unanimous consent. The majority is that substitute for unanimity which makes effective government possible and which does not derogate from the equality of the original contracting or consenting parties. However, the very fact that the authority of the majority derives only from those purposes to which all have unanimously consented, specifies both the purposes and the limits of that authority. The majority *never* rules, as Judge Bork mistakenly supposes, merely because it is a majority. It is also the case that, in instituting government by unanimous consent "to secure these rights," civil society authorized the majority, primarily through the legislative power, to specify the means by which the rights are to be secured. In short, the "Madisonian system" of natural rights is a system for authorizing legislation, and only derivatively does it provide a role for the judiciary. The will of the people, in the exercise of their natural rights, is to be sovereign. The judiciary, as the 78th *Federalist* declares, is to exercise judgment rather than will. In short, the theory of natural rights, while providing a strong argument for the protection by the courts of the reserved rights of individuals, nonetheless provides a much stronger and more principled argument *against* proto-legislative judicial activism than do any of the latter day "originalists."

Madison says that the majority acts as the substitute for the entire society. But he goes beyond this when he declares that the majority "may do anything that could be *rightfully* done by . . . unanimous concurrence" (emphasis added). We see that the reserved rights of individuals control the scope of authority of the majority, and direct the majority to those objects which represent a common interest of all the citizens. That is why every elected official is deemed to represent those who voted against him no less than those who voted for him. However, not even unanimous consent will authorize the exercise of powers over subjects which are understood by the original contract to remain among the reserved rights of individuals.

As an example, Madison mentions the right of conscience. The right to act upon unanimous consent, no less than the right of the majority, is confined to ends which are rational

and moral. Madison himself placed the emphasis upon *rightfully*. To understand the full and inner meaning of a jurisprudence of "original intent," we are reminded that independence was declared in 1776, not merely by a people, but by a "good people," who had confidently and conscientiously affirmed the "rectitude of their intentions" to the "supreme judge of the world."

Jefferson, writing to Spencer Roane in 1819, said that the ultimate authority for the meaning of the Constitution must rest in the people as a whole, not in the judiciary, or in any other branch of government, observing that "independence can be trusted nowhere but with the people en mass. They are inherently independent of all but moral law." We see here that the exception is the very ground of the rule. Without the moral law, the people is not a people. No less than for any classical, or Christian, or Jewish writer, for Jefferson and Madison, a people is distinguished from a band of robbers. Civil society is not collective selfishness. It is the moral code of civilized society as such, which must be understood to underlie the jurisprudence of a free people. Positive law, and especially constitutional law, must be seen in its relationship to the natural moral law.

Dr. Stone found that I had also "divided the house" with respect to the allegedly wholesome doctrines of Jeane Kirkpatrick, Irving Kristol, and Martin Diamond. I believe that my differences with these worthies are essentially the same as those I have elaborated with respect to Judge Bork, and it would be merely weaving Penelope's web to repeat them.

For those of unsated appetite, however, I would recommend *Jeane Kirkpatrick: Not Quite Right*, by Charles Kesler, in the October 29, 1982 *National Review*. I would here add only that nothing in my critique or Professor Kesler's article in any way diminishes our admiration for Ambassador Kirkpatrick as a peerless spokesman for American interests in the international arena.